

## RECENT REGULATION

FEDERAL ELECTIONS — CAMPAIGN FINANCE — FEC UPDATES ONLINE AD DISCLAIMER RULES. — Internet Communication Disclaimers and Definition of “Public Communication,” 87 Fed. Reg. 77,467 (Dec. 19, 2022) (codified at 11 C.F.R. pts. 100, 110).

In 2022 alone, political campaigns and their backers spent an estimated \$8.9 billion on advertising.<sup>1</sup> Many of those ads had to state who funded them.<sup>2</sup> But a gap in the rules of the Federal Election Commission meant that many online ads lacked these “disclaimers.”<sup>3</sup> On December 1, 2022, the FEC addressed that gap, passing a regulation to apply new disclaimer rules to most online ads.<sup>4</sup> This regulation is an important step, bringing the values of disclosure to where so much of American politics happens: the internet.<sup>5</sup> Yet it’s also too small a step — it exempts certain ads,<sup>6</sup> is at risk of underenforcement, and is limited by law. To more fully bring disclaimers online, Congress will need to act.

Since 1975, the FEC has enforced Congress’s campaign finance disclosure<sup>7</sup> regime — one designed to inform voters, deter corruption, and police statutory violations.<sup>8</sup> That regime, built for the world of TV and radio, has long applied uncertainly to the internet. Early signs indicated disclosure would translate easily to cyberspace, as the FEC in 1995 applied the disclaimer policies of the Federal Election Campaign Act of 1971<sup>9</sup> (FECA) to many online ads.<sup>10</sup> But in 2002, the FEC backtracked, exempting nearly all internet-based ads from the beefed-up disclaimer

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<sup>1</sup> ADIMPACT, ADIMPACT’S 2022 POLITICAL CYCLE-IN-REVIEW 15 (2022).

<sup>2</sup> *Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers> [<https://perma.cc/BH54-LQJN>].

<sup>3</sup> Internet Communication Disclaimers and Definition of “Public Communication,” 87 Fed. Reg. 77,467, 77,468 (Dec. 19, 2022) (codified at 11 C.F.R. pts. 100, 110) [hereinafter Final Rule] (noting that FEC rule implementing Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 36 and 52 U.S.C.), exempted “communications over the internet” from disclosure requirements).

<sup>4</sup> *See id.* at 77,467.

<sup>5</sup> *See Online Political Ad Spending*, OPENSECRETS (Apr. 22, 2022), <https://www.opensecrets.org/online-ads> [<https://perma.cc/5GHA-Q9NX>].

<sup>6</sup> *See Taylor Giorno, Federal Election Commission Passes New Digital Ad Disclosure Rule*, OPENSECRETS (Dec. 1, 2022, 3:36 PM), <https://www.opensecrets.org/news/2022/12/federal-election-commission-passes-new-digital-ad-disclosure-rule> [<https://perma.cc/R44Y-BN26>].

<sup>7</sup> “Disclaimers” are one category of “disclosures.” Disclosure refers generally to the laws that track and publicize where campaign money comes from and how it is spent. Disclaimers refer specifically to rules that say who paid for an ad. *See* R. SAM GARRETT, CONG. RSCH. SERV., IF10758, ONLINE POLITICAL ADVERTISING: DISCLAIMERS AND POLICY ISSUES 1 (2019).

<sup>8</sup> *See 40th Anniversary Timeline*, FEC (2015), [https://transition.fec.gov/pages/40th\\_anniversary/40th\\_anniversary.shtml](https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml) [<https://perma.cc/6E4D-6DSA>]; *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (per curiam) (describing state’s interests in disclosure).

<sup>9</sup> Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. §§ 30,101–30,126, 30,141–30,145).

<sup>10</sup> Final Rule, *supra* note 3, at 77,468.

requirements of the Bipartisan Campaign Reform Act of 2002<sup>11</sup> (BCRA).<sup>12</sup> The federal judiciary soon joined the fray, forcing the FEC to include internet ads Congress intended to cover,<sup>13</sup> so the FEC mandated disclaimers for paid ads on websites.<sup>14</sup> Amid this back-and-forth, advertisers sought clarity on when the rule applied, but the FEC couldn't provide it, often deadlocking or issuing imprecise opinions.<sup>15</sup>

This regulatory uncertainty was unsustainable. So, in 2011, the FEC began a rulemaking aimed at bolstering online disclaimers.<sup>16</sup> Five years passed without a new rule, and by then, technology had transformed, leaving an advertising regime designed for “websites” increasingly obsolete in a world of wearables, smart devices, and apps.<sup>17</sup> To match the modern internet, the FEC twice sought new comments.<sup>18</sup> Then, right before expanding disclaimers to “internet-enabled device[s] or application[s],”<sup>19</sup> the Commission deadlocked before the 2018 midterms.<sup>20</sup>

Four more years elapsed before the rule regained momentum. In November 2022, the FEC prepared to pass a robust regulation — one applying disclaimers to nearly every online ad.<sup>21</sup> That robustness evoked resistance. Commissioner Sean Cooksey called the rule “burdensome and confusing,”<sup>22</sup> while libertarian groups decried it for sweeping in political speech.<sup>23</sup> The FEC yielded, cancelling a planned vote on “Draft A” and releasing a scaled-back “Draft B.”<sup>24</sup>

<sup>11</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 36 and 52 U.S.C.).

<sup>12</sup> See Final Rule, *supra* note 3, at 77,468. BCRA requires disclaimers on ads by political committees that advocate for or against candidates or solicit contributions, but it carves out “small items” and “impracticable” exceptions. *Id.* at 77,467.

<sup>13</sup> See *Shays v. FEC*, 337 F. Supp. 2d 28, 65–71 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

<sup>14</sup> See Final Rule, *supra* note 3, at 77,468.

<sup>15</sup> See *id.* at 77,468–69.

<sup>16</sup> See *id.* at 77,469.

<sup>17</sup> *Id.* at 77,469 & n.3. Consider the potential loopholes from focusing only on websites: If Senator Bernie Sanders posted an ad to Facebook.com, it would need a disclaimer. But if Senator Sanders posted that same ad to the Facebook app, it arguably would not be covered.

<sup>18</sup> See *id.* at 77,469.

<sup>19</sup> *Id.* (quoting Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,864, 12,864 (Mar. 26, 2018) (codified at 11 C.F.R. pts. 100, 110)).

<sup>20</sup> See Brian Beyersdorf, Note, *Regulating the “Most Accessible Marketplace of Ideas in History”: Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1088–89 (2019).

<sup>21</sup> See Ellen L. Weintraub (@EllenLWeintraub), TWITTER (Nov. 10, 2022, 3:48 PM), <https://twitter.com/EllenLWeintraub/status/1590808559599624211> [<https://perma.cc/9UJX-Z3WS>].

<sup>22</sup> Lachlan Markay, *FEC Targets Digital Ad Disclosure*, AXIOS (Nov. 10, 2022), <https://www.axios.com/2022/11/11/fec-targets-political-digital-ad-disclosure> [<https://perma.cc/WAX6-PR LH>].

<sup>23</sup> See, e.g., Brad Smith & David Keating, *FEC Draft Rule on Internet Communications Disclaimers Needs More Work*, INST. FOR FREE SPEECH (Nov. 16, 2022), <https://www.ifs.org/expert-analysis/fec-draft-rule-on-internet-communications-disclaimers-needs-more-work> [<https://perma.cc/5MYD-TH3K>].

<sup>24</sup> See Campaign Legal Ctr., Comment Letter on Proposed Rule for Internet Communication Disclaimers and Definition of “Public Communication” 1–2 (Nov. 30, 2022), <https://sers.fec.gov/fosers/showpdf.htm?docid=420944> [<https://perma.cc/V6F6-DBM4>] [hereinafter Campaign Legal Center Comment Letter].

Just three days later, the FEC passed Draft B by a 5–0 vote.<sup>25</sup> The new rule makes two main changes to online disclaimers. First, it mandates disclaimers for “internet public communications,” which now include ads that are “placed for a fee” on “website[s], digital device[s], application[s], [and] advertising platform[s].”<sup>26</sup> This new definition expands the old regime — which applied just to websites — yet omits Draft A’s coverage of ads “promoted” for a fee and ads on “services.”<sup>27</sup> The rule also applies to online ads regardless of whether the person who paid to place the ad originally created or distributed it.<sup>28</sup>

Second, the regulation defines what the mandated disclaimers must include. Beyond what’s applicable to all disclaimers — like “clear and conspicuous” presentation<sup>29</sup> — internet-specific rules require disclaimers that are viewable “without taking any action,” big enough to be “clearly readable,” and displayed “with a reasonable degree of color contrast.”<sup>30</sup>

Importantly, however, not all online ads need to meet these general disclaimer rules. To address the longstanding issue of space constraints, the new rule allows for “adapted disclaimers” when a full disclaimer would take up more than one quarter of the ad.<sup>31</sup> An adapted disclaimer must state who paid for the ad, but instead of locating that information on the ad itself, it just needs to give clear notice of how and where to find it.<sup>32</sup> Users must be able to access this information in one move or fewer — by, for example, scrolling over the ad or clicking a link.<sup>33</sup>

Chairman Allen J. Dickerson and Commissioner James E. Trainor III filed an Interpretive Statement.<sup>34</sup> To them, strict disclosure requirements can infringe “core political speech,”<sup>35</sup> so they must do no more than inform a viewer about an ad’s funder.<sup>36</sup> The Commissioners thus framed the new regulation as more of a clarification than an

<sup>25</sup> See Cristiano Lima & Aaron Schaffer, *FEC Expands Digital Ad Disclosure Rules, But Watchdogs Say Gaps Remain*, WASH. POST (Dec. 2, 2022, 8:59 AM), <https://www.washingtonpost.com/politics/2022/12/02/fec-expands-digital-ad-disclosure-rules-watchdogs-say-gaps-remain> [<https://perma.cc/M6NW-QJE8>]. Commissioner Ellen Weintraub abstained. See *id.*

<sup>26</sup> 11 C.F.R. § 110.11(c)(5)(i).

<sup>27</sup> Campaign Legal Center Comment Letter, *supra* note 24, at 2; see also Giorno, *supra* note 6.

<sup>28</sup> 11 C.F.R. § 110.11(c)(5)(ii).

<sup>29</sup> *Id.* § 110.11(c)(1); see also *id.* § 110.11(b).

<sup>30</sup> *Id.* § 110.11(c)(5)(iii)(A)–(C). A disclaimer for a video, for example, must be “visible for at least 4 seconds and appear without the recipient of the communication taking any action.” *Id.* § 110.11(c)(5)(iii)(D).

<sup>31</sup> *Id.* § 110.11(g)(2). This exception adds to the “small items” and “impracticable” exceptions. See Final Rule, *supra* note 3, at 77,475.

<sup>32</sup> 11 C.F.R. § 110.11(g)(1)(i)–(ii).

<sup>33</sup> *Id.* § 110.11(g)(1)(iii).

<sup>34</sup> Allen J. Dickerson & James E. “Trey” Trainor, III, Interpretive Statement (Dec. 1, 2022), <https://www.fec.gov/resources/cms-content/documents/Interpretive-Statement-Regarding-Reg-2011-02-Internet-Disclaimers-Dickerson-Trainor.pdf> [<https://perma.cc/XA7D-86RJ>].

<sup>35</sup> *Id.* at 7.

<sup>36</sup> See *id.* at 3.

expansion — a way to fix the FEC’s past “patchwork approach to the internet” and provide “clearer guidance” for novel internet advertising.<sup>37</sup> They also defended the regulation’s broad wording, arguing that the FEC should “draw upon technological minutia only as necessary” in a “fleeting and ephemeral” online world and instead prioritize “essential First Amendment principles.”<sup>38</sup>

Commissioner Sean J. Cooksey filed a Concurring Statement.<sup>39</sup> He had opposed Draft A, believing it would’ve “dramatically expanded” the FEC’s regulatory authority over protected speech.<sup>40</sup> But he approved Draft B because of what he saw as its “substantially narrowed” scope, applying just to “traditional paid advertising placed on the internet” and “providing sufficient flexibility for different kinds of ads,”<sup>41</sup> with multiple exceptions available.<sup>42</sup> To him, the regulation preserved the FEC’s “light touch to regulating political activity online” and saved “the internet’s special capacity to foster . . . political speech.”<sup>43</sup>

The FEC’s online disclaimer regulation is a step forward, helping bring the values of disclosure online.<sup>44</sup> It is, however, likely too small a step — missing too many ads and risking underenforcement. The FEC could fix these limitations with a new rule. But because these shortcomings are endemic to the FEC disclosure regime — and because the Supreme Court has constrained the FEC’s campaign finance power — Congress will need to strengthen online disclaimers.

The first limit of the regulation is its scope. In Draft A, backers touted the proposal as comprehensive, applying to nearly all online ads.<sup>45</sup> But the adopted Draft B self-consciously shrinks the rule’s reach. While Draft A applies to ads “placed *or promoted*” for a fee, Draft B applies only to ads “placed” for a fee; and while Draft A requires disclaimers for ads on “services,” Draft B cuts that term, reaching only ads on a “website, digital device, application, or advertising platform.”<sup>46</sup>

No one knows, for example, exactly how “promot[ing]” an ad is different from “plac[ing]” one, or how “service” differs from other

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<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> Final Rule, *supra* note 3, at 77,479 (concurring statement of Commissioner Sean J. Cooksey).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 77,479–80.

<sup>43</sup> *Id.* at 77,480.

<sup>44</sup> See *Online Political Ad Spending*, *supra* note 5.

<sup>45</sup> See Weintraub, *supra* note 21. This comprehensive coverage could have brought transparency and accountability to the \$2.1 billion spent on online political adds from 2018 to 2022. See *Online Political Ad Spending*, *supra* note 5.

<sup>46</sup> Campaign Legal Center Comment Letter, *supra* note 24, at 2. The FEC is conducting a separate rulemaking on whether to extend the regulation to ads “promoted for a fee.” See Memorandum from Allen Dickerson, Chairman, FEC, to Office of the Comm’n Sec’y, FEC 1 (Nov. 28, 2022), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-55-A.pdf> [<https://perma.cc/UU5M-FFPU>].

locations.<sup>47</sup> Yet the FEC's deletions create exploitable gaps. Will an ad be "promoted" — and thus exempt — if a campaign pays a social media influencer to share a video or pays Facebook for more "reach" on its post?<sup>48</sup> Will an ad be on a "service" — and thus exempt — if it's on Netflix's streaming service on a Roku TV? These line-drawing questions are sure to arise; watchdog groups worry the omissions will create "categories of political advocacy where the regulations won't apply."<sup>49</sup>

The second limit of the regulation is the risk that it will be applied narrowly. Despite the rule's last-minute haircut, it still *could* be read to reach most online activity. But the rule's development suggests the FEC will take a less capacious view. The Commissioners' actions support this narrow reading: Commissioner Weintraub, a champion of disclosure and Draft A, abstained from Draft B; Commissioner Cooksey, an opponent of Draft A, believes Draft B will avoid "unnecessarily burdening political speech,"<sup>50</sup> which suggests he thinks it won't apply broadly.<sup>51</sup> The Interpretive Statement further indicates a small reach: Chairman Dickerson and Commissioner Trainor emphasize the rule's exceptions and like that it "shields a wide swath of online speech."<sup>52</sup> For an agency known for inertia,<sup>53</sup> the fact that three Commissioners have trumpeted the rule's confines shows the FEC is unlikely to enforce the regulation aggressively.

Disclaimer advocates might believe these flaws are fixable — and the next fight is for the FEC to fix them.<sup>54</sup> But the regulation's wide exceptions and the FEC's reluctance to enforce it strongly mirror problems found throughout the FEC's disclosure regime — suggesting the rule's issues run deeper than the agency itself can correct.

On exceptions, the FEC has long struggled to police disclosure for many nonprofits and Super PACs, just like it appears set to do for online ads. In *Citizens United v. FEC*,<sup>55</sup> the Court upheld BCRA's disclosure provisions yet created loopholes for corporations and other groups, forming what Professor Richard Hasen calls "gaping holes" in the regime.<sup>56</sup> These holes grew as "social welfare" organizations and Super

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<sup>47</sup> See Shanna Ports, *Questions Remain Regarding New FEC Digital Ad Rules*, CAMPAIGN LEGAL CTR. (Dec. 7, 2022), <https://campaignlegal.org/update/questions-remain-regarding-new-fec-digital-ad-rules> [<https://perma.cc/29P6-N7TR>] ("The full implications of the new rule and how Commissioners will apply and enforce it remain unclear . . .").

<sup>48</sup> See Lima & Schaffer, *supra* note 25.

<sup>49</sup> *Id.*

<sup>50</sup> Final Rule, *supra* note 3, at 77,479 (concurring statement of Commissioner Sean J. Cooksey).

<sup>51</sup> See Lima & Schaffer, *supra* note 25.

<sup>52</sup> Dickerson & Trainor, *supra* note 34, at 2; see also Ports, *supra* note 47.

<sup>53</sup> See generally ANN M. RAVEL, *DYSFUNCTION AND DEADLOCK* (2017).

<sup>54</sup> Optimists in this vein might note the FEC didn't give up on the "promoted" language, but rather moved it to a later rulemaking. See Memorandum from Allen Dickerson to Office of the Comm'n Sec'y, *supra* note 46, at 1.

<sup>55</sup> 558 U.S. 310 (2010).

<sup>56</sup> Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 557 (2012); see also *Citizens United*, 558 U.S. at 369–70.

PACs proliferated, funneling into elections dark money whose origins the FEC deemed itself largely powerless to reveal.<sup>57</sup> Other forms of bankrolled political speech also escape the FEC's grasp, such as speech by trolls or foreign bots.<sup>58</sup> These limits, and the rules they make exceptions to, are different from those for online disclaimers. But they help illustrate how the gaps in online disclaimers mirror recurring problems in regulating politics on the internet.<sup>59</sup>

On enforcement, the Commissioners' statements implying the rule won't affect much online speech is troubling in light of the agency's history of underenforcing disclosure. Much of that history is attributable to the agency's oft-critiqued 3–3 bipartisan structure, which invites either compromised enforcement or none at all.<sup>60</sup> For example, after the D.C. Circuit functionally enabled the rise of Super PACs,<sup>61</sup> the FEC responded with a rule enforcing disclosure in only highly circumscribed circumstances.<sup>62</sup> The same problem arose in early internet-exception cases: when the FEC deadlocked on enforcement actions, online giants like Facebook avoided disclaimer compliance.<sup>63</sup> The FEC's limited enforcement powers<sup>64</sup> create the potential for recalcitrant commissioners to impose inertia — precisely what the Interpretive and Concurring Statements signal.

From this angle, the shortcomings of the rule are structural — not just specific to internet ads. On top of that, the Supreme Court, despite often invoking disclosure's virtues, has capped the FEC's ability to improve its disclosure regime on its own.<sup>65</sup> That means a solution will

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<sup>57</sup> “Social welfare” organizations, or 501(c)(4)s, are nonprofits that need not disclose their donors. See *Frequently Asked Questions About 501(c)(4) Groups*, OPENSECRETS, <https://www.opensecrets.org/outside-spending/faq> [<https://perma.cc/B6CA-LKET>]. The D.C. Circuit enabled Super PACs in *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010), but even there, it endorsed the value of disclosure, *id.* at 696, 698. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1459 (2014). The FEC responded to *SpeechNow* by issuing advisory opinions that let certain committees accept money without limit. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1006 (2011).

<sup>58</sup> See Beyersdorf, *supra* note 20, at 1097 (explaining that trolls and bots can purchase online political ads while evading detection by the FEC).

<sup>59</sup> Cf. Issie Lapowsky, *Big Tech's Ad Rules Leave Plenty of Room for Dark Money to Hide*, PROTOCOL (Apr. 8, 2020), <https://www.protocol.com/dark-money-facebook-political-ads> [<https://perma.cc/7YYQ-MDPS>] (noting gaps in social media companies' disclosure rules).

<sup>60</sup> See RAVEL, *supra* note 53, at 1.

<sup>61</sup> See *SpeechNow*, 599 F.3d at 698.

<sup>62</sup> See Briffault, *supra* note 57, at 1006. Similarly, after *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the FEC divided on whether donations not earmarked for electioneering needed disclosures, so advertisers assumed they didn't. See Heerwig & Shaw, *supra* note 57, at 1463–64.

<sup>63</sup> See Final Rule, *supra* note 3, at 77,468–69 (describing four advisory opinions and advisory opinion requests that functionally exempted internet advertisers from disclaimer requirements).

<sup>64</sup> See *Citizens for Resp. & Ethics in Wash. v. FEC*, 55 F.4th 918, 922 (D.C. Cir. 2022) (Millett, J., dissenting from the denial of rehearing en banc) (noting that decision to deny rehearing licenses minority of FEC commissioners to block judicial review of agency nonenforcement decisions).

<sup>65</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

have to come from outside the agency — and inside Congress, by passing a law that helps the FEC avoid two Court-imposed constraints.

First, Congress has to address the barren regulatory landscape the Court has left — one that has divorced disclaimer rules from their original statutory purpose. While the Court has almost always upheld disclosure laws,<sup>66</sup> it has done so while striking down nearly all substantive reforms, leaving disclosure as the *only* tool remaining to address money in politics.<sup>67</sup> That theoretically doesn't curtail the FEC, which could just enforce the disclosure laws that remain. But Congress did not intend these disclosure rules to exist on their own, severed from the rest of FECA and BCRA.<sup>68</sup> The Court may have neutered the FEC's ability to enforce a *comprehensive* regulatory regime, but Congress retains the power to make new disclosure policies designed to stand alone.<sup>69</sup>

Second, to survive a judiciary increasingly skeptical of disclosure, Congress has to better tailor disclaimer requirements to the purpose of disclaimers. No case has directly threatened disclosures like this rule. Yet courts have indicated their approval is waning. In *Americans for Prosperity Foundation v. Bonta*,<sup>70</sup> the Supreme Court found that a California law requiring charities to disclose their big donors' names failed exacting scrutiny, as it burdened donors' associational rights while being “dramatic[ally] mismatch[ed]” from the state's antifraud interest.<sup>71</sup> And in *Washington Post v. McManus*,<sup>72</sup> the Fourth Circuit found that a Maryland law requiring online platforms to disclose facts about the ads they publish was unconstitutional compelled speech.<sup>73</sup> These tailoring and free speech concerns<sup>74</sup> are beyond the power of the FEC, which

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<sup>66</sup> The Court upheld disclosure in multiple cases from 1976 to 2000, *see* Heerwig & Shaw, *supra* note 57, at 1453 & n.50, and endorsed BCRA's expanded disclosure rules in 2003 in *McConnell v. FEC*, 540 U.S. 93 (2003). Later, in *Citizens United*, the Court called disclosure “a less restrictive alternative to more comprehensive regulations of speech.” 558 U.S. at 369 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)).

<sup>67</sup> Nearly every law review article on disclosure seems to call disclosure the last campaign finance tool left. *See, e.g.*, Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 11 (2018); Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 433 (2016).

<sup>68</sup> *See* Levinson, *supra* note 67, at 433 (arguing Congress intended campaign finance rules to work in tandem, so stakeholders should be wary of the Court assuming one works alone); *see also* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 135 (2018) (“Campaign finance disclosure laws . . . have been a boon to deregulators.”).

<sup>69</sup> *Cf.* Heerwig & Shaw, *supra* note 57, at 1470 (citing studies showing how disclosure can be effective on its own, but only “under certain conditions and in certain forms”).

<sup>70</sup> 141 S. Ct. 2373 (2021).

<sup>71</sup> *Id.* at 2385–86.

<sup>72</sup> 944 F.3d 506 (4th Cir. 2019).

<sup>73</sup> *Id.* at 514–15; *see also* David L. Hudson Jr., *4th Circuit Invalidates Maryland Disclosure Law on Internet Political Ads*, FREE SPEECH CTR. (Dec. 12, 2019), <https://www.mtsu.edu/first-amendment/post/412/4th-circuit-invalidates-maryland-disclosure-law-on-internet-political-ads> [<https://perma.cc/NQV4-ATYU>].

<sup>74</sup> The Court in *Bonta* noted that exacting scrutiny applies to “compelled disclosure” cases even in “nonelection” contexts. 141 S. Ct. at 2383. Similarly, *McManus* suggested a “garden variety campaign finance regulation[]” would more likely be upheld. 944 F.3d at 517.

can't alter a statute's purpose. Congress, however, can — and should specify how an expansive online disclaimer rule promotes information or fights corruption.

Congress has multiple ways to enhance online disclaimers. One path would be to adopt Draft A's coverage of ads "promoted" for a fee and clarify the rules apply to ads on "services" (or even "any other online format") — narrowing the rule's potential exceptions.<sup>75</sup> Another would be to bolster the disclaimers themselves, making adapted disclaimers "require" (not just "enable") the viewer to see the disclaimer to scroll over.<sup>76</sup> And a third track might be to bolster enforcement by requiring the hosts of online ads to develop public databases of who pays for which ads on their platforms.<sup>77</sup> Yes, full-scale campaign finance reform is off the table.<sup>78</sup> But in disclosure, Congress has the legal authority and bipartisan support<sup>79</sup> needed to provide strong, clear rules for the FEC to enforce.

The FEC's online disclaimer rule is a step forward, helping voters know more about who funds the ads they see online. Still, its gaps in scope and enforcement show the limits of leaving disclosure's reach to the FEC. To make online disclaimers as strong as they should be, Congress has to act.

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<sup>75</sup> For a current effort to do so, see Memorandum from Allen Dickerson to Office of the Comm'n Sec'y, *supra* note 46.

<sup>76</sup> See 11 C.F.R. § 110.11(g)(1)(ii)–(iii).

<sup>77</sup> The Honest Ads Act, which failed as part of the For the People Act of 2021, H.R. 1, 117th Cong. (2021), proposed a similar database. See Honest Ads Act, S. 1356, 116th Cong. § 8(j)(1)–(2) (2019).

<sup>78</sup> Transforming the FEC is unlikely in the near term, given that H.R. 1, which was designed to fix the failures of the FEC, failed to pass. See Tracy King, *Three Big Ways the For the People Act Would Fix the FEC*, CAMPAIGN LEGAL CTR. (Feb. 23, 2021), <https://campaignlegal.org/update/three-big-ways-people-act-would-fix-fec> [<https://perma.cc/729G-83JC>]; see also Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 255–56, 256 n.6 (2010) (describing and citing failed FEC reform efforts).

<sup>79</sup> Every Commissioner, at least in theory, supported expanding disclaimers to online ads. See Lima & Schaffer, *supra* note 25 (noting 5–0 vote, with Commissioner Weintraub abstaining).