

Elections Affect Commerce: Why the FTC Should Regulate Political Endorsements by Social Media Influencers

Nina Mokhber Shahin*

TABLE OF CONTENTS

I.	INTRODUCTION	334
II.	THE PAST AND PRESENT SCOPE OF SOCIAL MEDIA REGULATION BY THE FCC, FEC, AND FTC	336
	<i>A. The Federal Communications Commission</i>	338
	<i>B. The Federal Election Commission—and the Problem</i>	340
	<i>C. The Federal Trade Commission</i>	344
III.	WHY THE FTC IS BEST SITUATED TO ACT NOW	346
	<i>A. The FCC is a Nonstarter</i>	347
	<i>B. The FEC is Ill-Equipped</i>	349
	<i>C. Fewer Roadblocks Lie Ahead for FTC Regulation</i>	351
IV.	CONCLUSION.....	357

* J.D., May 2026, The George Washington University Law School; B.A., 2021, University of California, Santa Barbara. My utmost thanks to Rizwan Chowdhry, Christina Hitchcock, and Michael Zschokke for their discerning and constructive feedback. Thank you to the editorial board of the Federal Communications Law Journal for their efforts to bring this volume to print. A final note of thanks to my parents, whose sacrifices made my higher education possible. All errors are my own.

I. INTRODUCTION

What you don't know won't hurt you. A dubious maxim:
sometimes what you don't know can hurt you very much.¹

Suppose you see an influencer² on Instagram or TikTok raving about a popular soft drink.³ Then you notice the caption, which reveals that they are a paid partner of the brand.⁴ The influencer may genuinely want you to know the post is an advertisement—but they also have no choice.⁵ In the realm of product placement, that disclosure is mandated by law.⁶ You can thank the Federal Trade Commission (“FTC”) for the transparency.⁷ The independent federal agency enforces existing antitrust and consumer protection laws, and promulgates new regulations under them.⁸ Now suppose that the influencer was not promoting a soft drink, handbag, or hotel stay.⁹ Suppose, instead, the promotion was for Kamala Harris’s 2024 presidential campaign.¹⁰ Or Mike Johnson’s next bid for the House of Representatives.¹¹ Or Cory Booker’s

1. MARGARET ATWOOD, *THE BLIND ASSASSIN* 137 (2000).

2. “Influencers,” as referred to in this Note, are individuals who cultivate an audience by publishing curated content to online social media platforms. A large following gives these individuals opportunities to earn money through promotional content partnerships. This subset of the marketing industry sees huge investments, which in 2020 alone totaled \$9.7 billion. Stasia Skalbania, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 669–674 (2022).

3. Gillian Follett, *Behind Poppi’s Influencer Marketing Strategy: Neon Sweatsuits*, AD AGE (Apr. 24, 2024), <https://adage.com/article/digital-marketing-ad-tech-news/behind-poppis-influencer-marketing-strategy-neon-sweatsuits/2554746> [<https://perma.cc/VWP4-6KW5>].

4. Alix Earle (@alix_earle), INSTAGRAM (Apr. 12, 2024), https://www.instagram.com/p/C5rg_AlPb6_/?img_index=1 [<https://perma.cc/J3LG-A4JK>].

5. *FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/B97S-RHUR>] [hereinafter *FTC Endorsement Guidance*]; *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. §§ 255.0–255.6 (2023).

6. 16 C.F.R. §§ 255.0–255.6.

7. The FTC shares this responsibility. For example, the Department of Justice’s Antitrust Division has enforcement authority for federal antitrust laws, and the Consumer Financial Protection Bureau has rulemaking authority for certain consumer protection issues. *The Enforcers*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> [perma.cc/3MTN-9NYZ]; *The CFPB*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/> [perma.cc/P9H7-KU89].

8. 16 C.F.R. §§ 255.0–255.6; *Enforcement*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement> [perma.cc/5TWG-JE8L].

9. Each of those promotions would be subject to the FTC’s endorsement regulations. 16 C.F.R. §§ 255.0–255.6.

10. Malachi Barrett, *Harris Campaign Enlists Detroit Social Media Stars to Reach Young Voters*, BRIDGEDETROIT (Aug. 30, 2024), <https://www.bridgedetroit.com/harris-campaign-enlists-detroit-social-media-stars-to-reach-young-voters/> [perma.cc/5PEJ-HL2J].

11. Cami Mondeaux, *Mike Johnson Looks Ahead to 2026 Fundraising with House Majority on the Line*, WASH. EXAM’R (Jan. 13, 2025), <https://www.washingtonexaminer.com/news/campaigns/congressional/3284589/mike-johnson-2026-early-efforts-expand-house-gop-majority/> [perma.cc/F54Q-P5MD].

2026 Senate run.¹² If the influencer was paid for the endorsement, surely the law would require similar transparency? Surely not.

There is a troubling loophole in social media regulation. This loophole enables influencers to be paid for covert political promotions.¹³ And it was exploited and reported on extensively with respect to the 2024 presidential election.¹⁴ Why does the loophole persist? The FTC reasons that its authority to regulate endorsements, online and elsewhere, does not extend to extend to political advertising.¹⁵ Perhaps regulatory responsibility lies with the Federal Communications Commission (“FCC”)?¹⁶ Perhaps not. While “communications” is in its name, the FCC does not regulate online content.¹⁷ Surely, then, the Federal Election Commission (“FEC”), the agency directly responsible for the administration of campaign finance laws?¹⁸ Yes, the FEC *could* act.¹⁹ But when the opportunity arose, the FEC declined to close the

12. David Wildstein, *Booker Has Almost \$10.5 Million Banked for 2026*, NEW JERSEY GLOBE (Oct. 15, 2023, 3:30 PM), <https://newjerseyglobe.com/congress/booker-has-almost-10-5-million-banked-for-2026/> [perma.cc/G3ZZ-3DUD].

13. Unless otherwise stipulated, this Note implicates the federal level when referencing elections, campaigns, candidates, political committees, endorsements, and related endeavors.

14. Rebecca Kern, *Seeing a Viral Pro-Biden TikTok? A PAC Might Have Paid for It*, POLITICO (Jan. 23, 2024, 10:00 AM EST), <https://www.politico.com/news/2024/01/23/biden-campaign-social-media-influencers-00136389> [perma.cc/P827-UTQK]; Clare Duffy & Brian Fung, *Influencers Are Playing a Big Role in This Year’s Election. There’s No Way to Tell Who’s Getting Paid for Their Endorsements*, CNN (Oct. 29, 2024, 6:00 AM EDT), <https://www.cnn.com/2024/10/29/tech/influencers-presidential-campaign-paid-disclosure/index.html> [perma.cc/2SMS-FMTW]; Geoff Harris, *TikTok Influencers Play Pivotal Role in 2024 Election, Reshaping Political Engagement*, CBS AUSTIN (Jan. 20, 2025, 9:33 PM), <https://cbsaustin.com/news/nation-world/power-reach-of-younger-influencers-feltduring-presidential-election-president-donald-trump-re-election-campaign-content-creator-tiktok-bytedance-millions-of-followers-gen-z> [perma.cc/V9DH-6U6W]; Makena Kelly, *A Visual Guide to the Influencers Shaping the 2024 Election*, WIRED (Aug. 15, 2024, 7:15 AM), <https://www.wired.com/story/visual-guide-to-influencers-shaping-2024-election/> [perma.cc/6CRW-GYQM]; Annika Pillai, *How Online Influencers Are Shaping the 2024 Election*, TUFTS DAILY (Nov. 5, 2024), <https://www.tuftsdaily.com/article/2024/11/how-online-influencers-are-shaping-the-2024-election> [perma.cc/L35B-UF6L]; Laura Barrón-López, Saher Khan & Shrai Papat, *How Social Media Influencers Are Playing a Role in the Presidential Election*, PBS NEWSHOUR (Mar. 19, 2024, 6:40 PM EST), <https://www.pbs.org/newshour/show/how-social-media-influencers-are-playing-a-role-in-the-presidential-election> [perma.cc/HJM8-97JU].

15. “The FTC doesn’t have jurisdiction over political advertisements.” *FTC Endorsement Guidance*, *supra* note 5.

16. See Allegra D’Virgilio, *The U.S. Government’s Role in Regulating Social Media Disinformation*, N.U. POL. REV. (May 19, 2022), <https://nupoliticalreview.org/2022/05/19/the-us-governments-role-in-regulating-social-media-disinformation/> [perma.cc/228L-7SM2] (misrepresenting social media regulation the FCC’s jurisdiction and directing readers to the FCC’s “Social Media” webpage, which merely presents links to the FCC’s various social media accounts).

17. *The FCC and Speech*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/fcc-and-speech> [perma.cc/9QLL-Z7KX] (last updated Aug. 31, 2022).

18. *Mission and History*, FED. ELECTION COMM’N, <https://www.fec.gov/about/mission-and-history/> [perma.cc/PH8K-B744].

19. *See id.*

loop.²⁰ So for now, your favorite influencer often has no legal obligation to disclose when they are paid to promote a politician.²¹ And worse, where payments from campaigns and Super PACs are distilled through influencer management agencies, even disclosed disbursements may be impossible to trace to individual influencers.²² This Note details the historic regulatory authority of relevant federal agencies, identifies potential barriers to their on-point rulemaking, and argues that one agency—the FTC—is best suited to mandate transparency in political advertising by influencers.

II. THE PAST AND PRESENT SCOPE OF SOCIAL MEDIA REGULATION BY THE FCC, FEC, AND FTC

Political campaigns have long used popular technology to influence voters, necessitating regulatory oversight to preserve transparency. Take the telephone, for instance. From 1945 to 1970, the number of American households with a telephone jumped from more than 50% to more than 90%.²³ Concurrently, phone banking became a high-profile campaign staple.²⁴ When social media platforms arrived on scene, politicians moved faster. A mere 5% of American adults used social media platforms in 2005, the year before Facebook hosted its first political advertisements.²⁵ By 2021, when surveys showed more than 70% of adults used social media, its political use had exploded, and federal campaign strategy began to include the engagement of paid influencers.²⁶ Political use of older technology was by then largely regulated. In the telephone's case, Congress had enacted the Telephone Consumer Protection Act, empowering the FCC to administer restrictions on

20. Shana M. Broussard & Ellen L. Weintraub, *Statement of Commissioners Ellen L. Weintraub and Shana M. Broussard Regarding the Commission's Adoption of Final Rules in REG 2013-01 (Technological Modernization)*, FED. ELECTION COMM'N (Dec. 14, 2023), <https://www.fec.gov/resources/cms-content/documents/Reg-2013-01-TechMod-Final-Statement-ELW-and-SMB.pdf> [perma.cc/VA8N-N5QH].

21. Duffy & Fung, *supra* note 14.

22. "It is impossible to discern how much of that [FEC data] has gone directly to influencers because PACs and campaigns typically pay firms that then contract work to influencers." Stephanie Lai, *Campaigns Pay Influencers to Carry Their Messages, Skirting Political Ad Rules*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/us/elections/influencers-political-ads-tiktok-instagram.html>.

23. Mark Landler, *Multiple-Family Phone Lines: A Post-Postwar U.S. Trend*, N.Y. TIMES (Dec. 26, 1995), <https://www.nytimes.com/1995/12/26/us/multiple-family-phone-lines-a-post-postwar-us-trend.html>.

24. All Things Considered, *Phone Banks: A Staple of Campaigning Since 1968*, NPR (July 31, 2012, 3:00 PM ET), <https://www.npr.org/2012/07/31/157678602/phone-banks-a-staple-of-campaigning-since-1968> [perma.cc/ZC22-S85Q].

25. University student candidates, early Facebook users, were the first to buy campaign ads on the platform. Merrill Weber, *Reform for Online Political Advertising: Add on to the Honest Ads Act*, Note, 74 FED. COMM. L.J. 81, 83 (2022); Katie Harbath & Collier Fernekas, *A Brief History of Tech and Elections: A 26-Year Journey*, BIPARTISAN POL'Y CTR. (Sept. 28, 2022), <https://bipartisanpolicy.org/wp-content/uploads/2022/09/A-Brief-History-of-Tech-and-Elections-A-26-Year-Journey.pdf> [perma.cc/3YWX-CVPY].

26. Harbath & Fernekas, *supra* note 25.

phone banking and adjacent practices.²⁷ The convergence of social media and elections implicates new transparency issues,²⁸ obscured political promotion being one, but federal oversight is not yet as robust as for earlier inventions.

For federal agencies, statutory authority and the First Amendment pose substantive roadblocks to increased social media regulation. The First Amendment prohibits the federal government from enacting laws that unduly abridge the right of free speech, and expressive conduct—like hosting or posting content online—falls under the speech umbrella.²⁹ These protections apply regardless of the degree to which individuals, organizations, and social media platforms fall within the regulatory jurisdiction of independent federal agencies.³⁰ The judiciary scrutinizes laws regulating protected speech for their validity.³¹ Content-based speech restrictions are typically subject to strict scrutiny, while content-neutral restrictions (like those that regulate the time or place of expression) are subject to lesser, intermediate forms of scrutiny.³² To withstand strict scrutiny, the government must demonstrate that a legal constraint is the least restrictive means of achieving its crucial interest, a standard oft-called “‘strict’ in theory and fatal in fact.”³³ With respect to jurisdiction, because an agency derives power by Congressional delegation, it may only regulate within the scope of its statutory authority.³⁴ So an agency may not regulate social media if its authorizing legislation cannot be read to include that oversight.³⁵ First Amendment and jurisdictional challenges are consequently a frequent obstacle to the FCC, FEC, and FTC’s diverse rulemaking efforts.³⁶

The structure of an agency may create procedural hurdles for rulemaking. Organizational structure varies between independent federal regulatory agencies.³⁷ Legislation establishing an agency often defines its

27. 47 U.S.C. § 227; *FCC Actions on Robocalls, Telemarketing*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/telemarketing-and-robocalls> [<https://perma.cc/3U7R-DGFA>] (last updated July 23, 2018).

28. Harbath & Fernekes, *supra* note 25.

29. *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023) (reiterating that “the First Amendment extends to all persons engaged in expressive conduct” in holding that website design was protected speech). It should be noted that not all conduct is speech under the meaning of the First Amendment. *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

30. *See* U.S. CONST. amend. I (“Congress shall make no law...abridging the freedom of speech”).

31. VICTORIA L. KILLION, CONG. RSCH. SERV., R47986, FREEDOM OF SPEECH: AN OVERVIEW (2024).

32. *Id.*

33. *Id.*; Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

34. TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2025).

35. *Id.*

36. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411 (1990); *Reno v. ACLU*, 521 U.S. 844 (1997).

37. *See* 47 U.S.C. § 154; 15 U.S.C. § 41; 52 U.S.C. § 30106.

structure.³⁸ This is true of the FCC, FTC, and FEC's collegial body compositions, or commissions.³⁹ Because an agency quorum (the number of commissioners who must be present for decisions to be made) is defined by statute, it is inflexible.⁴⁰ This can limit these agencies' ability to promulgate regulations.

While the FCC, FEC, and FTC each enforce some social media-adjacent directives, news outlets, scholars, and elected officials alike advocate for increased regulation.⁴¹ Examination of each agency's statutory authority and relevant administrative efforts illustrates how federal regulation can advance transparency—and, in the FEC's case, how it sometimes fails to do enough.

A. *The Federal Communications Commission*

The Communications Act of 1934 (“the Communications Act”) streamlined federal management of public interstate communications by creating the FCC to oversee the phone, radio, and telegraph industry.⁴² As technology expanded interstate communication, Congress amended its legislation to clarify whether new services, like cable television, were subject to FCC regulation.⁴³ Though updates to the Communications Act expanded FCC jurisdiction, the agency lacks discretion to freely regulate all methods of interstate communication, including internet content.⁴⁴

38. *Id.*

39. *Id.*

40. *Id.*

41. See 47 U.S. Code § 230; 11 CFR 100.26, as amended at 89 FR 210–212, 214, Jan. 2, 2024; 88 FR 48092; see generally Lai, *supra* note 22; Marshall Auerback, *Don't Leave Social Media Regulation to the Platforms, Bring in the FCC*, AM. COMPASS (July 22, 2021), <https://americancompass.org/dont-leave-social-media-regulation-to-the-platforms-bring-in-the-fcc/> [perma.cc/3DN7-NNA7] (arguing that the FCC should regulate social media platforms, rather than permitting self-regulation to continue); Luke J. Matthews, Heather J. Williams & Alexandra T. Evans, *Protecting Free Speech Compels Some Form of Social Media Regulation*, RAND CORPORATION (Oct. 20, 2023), <https://www.rand.org/pubs/commentary/2023/10/protecting-free-speech-compels-some-form-of-social.html> [perma.cc/885Y-HT6W] (calling government intervention over social media platforms overdue); Pichaya P. Winichakul, *THE MISSING STRUCTURAL DEBATE: REFORMING DISCLOSURE OF ONLINE POLITICAL COMMUNICATIONS*, 93 N.Y.U. L. REV. 1387 (2018) (advocating administrative reform to competently address foreign interference of social media platforms); Elizabeth A. Casale, *Influencing the FTC to Update Disclosure Rules For the Social Media Era*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1 (2019) (declaring that the FTC should incorporate influencers into its disclosure regulations, which it had not done at the time and still does not with respect to political endorsements).

42. Title 47 of the United States Code codifies the Communications Act and additional legislation granting the FCC its subject matter jurisdiction and rulemaking authority. *The Communications Act of 1934*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288#background> [perma.cc/F5PZ-Y5ZT]; see generally 47 U.S.C. § 151 et seq. (containing the provisions of the Telecommunications Act of 1934 as amended).

43. See, e.g., 47 U.S.C. § 325.

44. See, e.g., 47 U.S.C. § 221(b) (limiting the FCC's authority to regulate where exchange services are the jurisdiction of local government).

Under the Communications Act, the FCC broadly regulates where “common carriers” and where “broadcasting” are concerned.⁴⁵ The FCC’s jurisdiction relies on how a technology or entity is classified—and not all services qualify.⁴⁶ Telecommunications services are regulated as common carriers.⁴⁷ Telecommunications services, “regardless of the facilities used,” are those which offer “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”⁴⁸ If a technology merely offers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [including] electronic publishing,” it is an information service.⁴⁹ Information services are not regulated as common carriers.⁵⁰ “Broadcasters,” entities to whom the FCC grants broadcasting licenses, are regulated separately (also not as common carriers).⁵¹

The primary difference between common-carrier and broadcasting regulation is that the FCC regulates broadcasters with respect to their content and its allotted frequencies and common carriers with respect to their service distribution methods.⁵² Title II of the Communications Act subjects qualified common carriers to mandatory access regulations set by the FCC.⁵³ Case in point, the FCC prohibits common carriers from engaging in unreasonable business practices.⁵⁴ Public telephone companies are one example of undisputed common carriers under the Communications Act.⁵⁵ The FCC regulates broadcasters under Title III of the Communications Act.⁵⁶ Public television channels and radio stations are examples of broadcasters under the Communications Act.⁵⁷ Because they transmit information through a limited medium—a public television station, for instance, can only broadcast for as many hours as there are in a day—broadcasters licensed by the FCC are subject to content regulations.⁵⁸ The Supreme Court has held that that oversight faces diminished First Amendment scrutiny because the unique nature of broadcast media heightens the government’s regulation interests.⁵⁹

45. 47 U.S.C. § 151 et seq.

46. *See id.*

47. 47 U.S.C. §§ 201–276.

48. 47 U.S.C. § 153.

49. *Id.*

50. 47 U.S.C. §§ 201–276.

51. While FCC broadcasters are not common carriers for purposes of the Communications Act, Supreme Court analyses of broadcasters’ speech protections are “[rooted] in the common law doctrines related to [historic] common carriers.” VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 27, 30 (2019); 47 U.S.C. §§ 201-276.

52. Sindhu Zagoren, *Common Carriers, Broadcasters, and the Fight Over the Internet: Toward a Material Model of Mediation*, 24 DEMOCRATIC COMMUNIQUE 28, 31 (2011).

53. 47 U.S.C. §§ 201-276.

54. 47 U.S.C. §§ 201(b).

55. 47 U.S.C. § 153.

56. 47 U.S.C. §§ 301-399.

57. 47 U.S.C. § 396.

58. *See* BRANNON, *supra* note 51, at 28.

59. *Id.*

The FCC does not regulate internet content.⁶⁰ The Telecommunications Act of 1996 (“the 1996 Act”) was a notable amendment to the Communications Act, in part because it was the first to contemplate the Internet.⁶¹ Congress attempted to bring internet content regulation under FCC jurisdiction through Title V, the Communications Decency Act.⁶² The FCC by then already moderated broadcast content for offensive speech (e.g., obscenity).⁶³ The provisions of the new title imposed criminal sanctions internet users whose indecent or obscene speech might reach minors—provisions the Supreme Court found violated the First Amendment.⁶⁴ In *Reno v. ACLU*, the Court determined the unique considerations which permitted “qualifying the level of First Amendment scrutiny that should be applied” to traditional broadcasters were not relevant to the Internet.⁶⁵ The only internet-related provision of Title V that remains good law is Section 230, where (c)(1) provides that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁶⁶ So Section 230 shields a social media platform from criminal liability for posts by its platform users, but does not expand the FCC’s regulatory jurisdiction to either users or platforms.⁶⁷

B. *The Federal Election Commission—and the Problem*

Established by the Federal Election Campaign Act (“FECA”), the FEC’s mission is “to protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws.”⁶⁸ The FEC has faced significant First Amendment challenges to statutory limits it enforced on political spending and broadcasting by corporations and unions.⁶⁹ The Bipartisan Campaign Reform Act of 2002 (“BCRA”) amended FECA to limit issue advocacy advertisements leading up to elections and to limit campaigns’ abilities to accept soft money (funds beyond the scope of FEC regulation).⁷⁰ But the Supreme Court in *Citizens United v. Federal Election Commission* held that political speech made by “associations of citizens,” whether via spending or broadcasting, was protected by the First Amendment; in doing so, the Court

60. *The FCC and Speech*, *supra* note 17.

61. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

62. *Id.*

63. *The History of the Federal Communications Commission (FCC)*, MITEL, <https://www.mitel.com/articles/history-federal-communications-commission-fcc#> [perma.cc/588G-RDFZ]. Independent of the broadcast media context, obscene material is not protected speech under the First Amendment. *Miller v. California*, 413 U.S. 15 (1973).

64. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *Reno*, 521 U.S. at 844.

65. *Reno*, 521 U.S. at 870.

66. 47 U.S.C. § 230.

67. *Id.*

68. 52 U.S.C. § 30106; *Mission & History*, *supra* note 18.

69. *See generally* 52 U.S.C. § 30104; *see, e.g., Citizens United*, 558 U.S. at 318.

70. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101 et seq.).

found unconstitutional BCRA provisions restricting corporate independent expenditures and advertising.⁷¹ Disclosure mandates, which do not “prevent anyone from speaking,” and “help citizens ‘make informed choices in the political marketplace,’” endured.⁷² Because disclosure mandates are constitutional, the FEC continues to impose them not only with respect to political spending, but also with respect to political advertising.⁷³

The FEC mandates disclosure of qualified political advertisements, or “public communications.”⁷⁴ A “public communication” must be marked with a clear disclaimer.⁷⁵ While the FEC has updated its definition of “public communication” for technological relevance, the latest definition remains insufficient, creating a transparency loophole for individual influencers.⁷⁶ The current definition and accompanying disclosure guidelines fail to account for how influencer marketing is utilized to advance political campaigns.⁷⁷

That what constitutes a “public communication” is inadequate reflects the FEC’s unwillingness to issue comprehensive social media regulations. The FEC has historically avoided regulating the Internet.⁷⁸ When BRCA was ratified, the agency refused to apply the statute’s disclaimer requirements to internet-hosted advertisements that would otherwise compel disclosure.⁷⁹ When federal courts held that the FEC’s exemptive administration of those statutory provisions was legally deficient, the FEC incorporated disclosure requirements to some advertisements placed on websites.⁸⁰ But the commission delayed the issue of more robust internet regulations for over a decade thereafter.⁸¹ Finally, in November 2022, it issued draft rules to update the definition of “public communication.”⁸² “Draft A” would apply disclaimers to almost all online advertisements—but the FEC passed “Draft B” for proposed rulemaking.⁸³ That proposed rule would designate as a “public communication” only internet content “placed” for a fee—but not

71. *Citizens United*, 558 U.S. at 372.

72. *Id.* at 366–67 (quoting *McConnell v. FEC*, 540 U.S. 93, at 197, 201).

73. *Advertising and Disclaimers*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/> [perma.cc/P8ZB-33WL].

74. *Id.*

75. *Id.*

76. Internet Communication Disclaimers and Definition of “Public Communication,” 11 C.F.R. § 100.26 (2022), as amended by Technological Modernization, Notice 2023-20, 89 Fed. Reg. 196, 210–211, 214 (Jan. 2, 2024); *Advertising and Disclaimers*, *supra* note 73.

77. Daniel I. Weiner & Harry Isaiah Black, *Comment to the FEC: Adopt Updated Rules Requiring Transparency for Paid Influencers*, BRENNAN CTR. FOR JUST. (Jan. 23, 2023), <https://www.brennancenter.org/our-work/research-reports/comment-fec-adopt-updated-rules-requiring-transparency-paid-influencers> [https://perma.cc/YSTX-CLYG].

78. *Internet Communication Disclaimers and Definition of Public Communication*, Comment, 136 HARV. L. REV. 2201 (2023), <https://harvardlawreview.org/print/vol-136/internet-communication-disclaimers-and-definition-of-public-communication/> [https://perma.cc/5CVG-ZKR8] [hereinafter *Public Communication Comment*].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2202–2203.

content “promoted” for a fee.⁸⁴ Legal scholars and nonprofits identified myriad problems with the update as proposed.⁸⁵ The Brennan Center For Justice, a nonprofit law and public policy institute, highlighted the implications of omitting “promotional” content from mandatory disclosure requirements.⁸⁶ The organization published its public comment in response to the FEC’s rulemaking notice.⁸⁷

The current rules, while a significant improvement, do not provide the regulated community or the wider public with clear guidance as to how the disclaimers will apply to newer methods of online campaign communication, including those in which an advertiser might not literally be paying a fee to place content on a website, digital device, application, or advertising platform. There is no principled distinction between these newer methods of paid communication and typical online ads where the Commission’s disclaimer rules unambiguously apply. In all cases, an advertiser is paying to disseminate a covered political message. If anything, the need for clear disclaimers is even greater for nontraditional advertising that resembles organic content. [...] Other methods, like paying an influencer to share a campaign’s organic content or paying an online platform to boost that content in search results, might also be harder to recognize as paid communications than a typical online ad.⁸⁸

While the final rule redefining “public communication” is inclusive of promotional content, it wholly fails to address these consequences.⁸⁹ Under the final rule, promulgated in 2024, online messages are public communications “promoted for a fee” *only if* “payment is made to a website, digital device, application, or advertising platform.”⁹⁰ These parameters profoundly dilute the impact of incorporating promotional language to the rule because they omit payments made to individuals.⁹¹

84. Internet Communication Disclaimers and Definition of “Public Communication,” 87 Fed. Reg. at 77467, 77470–71.

85. Weiner & Black, *supra* note 77; *Public Communication Comment*, *supra* note 78.

86. Weiner & Black, *supra* note 77.

87. *Id.*

88. *Id.*

89. 11 C.F.R. § 100.26, as amended by 89 Fed. Reg. 214, Jan. 2, 2024.

90. *Id.*

91. *Id.*

Individuals are required to disclose their political advertising on social media only if it displays “express advocacy.”⁹² The same disclaimer mandate applies to independent expenditures, which occur when individuals or organizations spend to procure campaign advertisements containing “express advocacy” without campaign input.⁹³ “Express advocacy” is itself communication that “unmistakably urges election or defeat of one or more clearly identified [candidates].”⁹⁴ Express advocacy may be established in one of two ways.⁹⁵ The first is through “explicit words of advocacy of election or defeat.”⁹⁶ The second is an “only reasonable interpretation” test.⁹⁷

In the absence of such “explicit words of advocacy of election or defeat,” a communication expressly advocates when, taken as a whole and with limited reference to external events, such as the proximity to the election, it can only be interpreted by a “reasonable person” as advocating the election or defeat of one or more clearly identified [candidates].⁹⁸

“If reasonable minds could not differ as to the unambiguous electoral advocacy of the communication, it is express advocacy regardless of what the author intended.”⁹⁹ Individual influencers who avoid express advocacy under these standards are not required to disclose if they were paid to promote a candidate, even when paid by an entity other than a campaign.¹⁰⁰ This avoidance obscures the source of political content consumed by social media users and erodes election transparency.¹⁰¹

Omitting individuals from promotional public communication disclosures obfuscates other disclosures mandated for election transparency. While the FEC requires public disclosure of many disbursements made by campaigns, PACs, and Super PACs, disbursement tracking offers less

92. Disclaimers are also required for any individual’s “electioneering communication” containing express advocacy; because electioneering communications are definitionally confined to broadcast, cable, and satellite communications, this requirement is irrelevant to individual influencers’ social media messaging. *Public Communications*, FED. ELECTION COMM’N, <https://www.fec.gov/press/resources-journalists/public-communications/> [perma.cc/VK8G-L3LP]; *Making Electioneering Communications*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/> [perma.cc/DKH8-MUXU].

93. *Making Independent Expenditures*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/> [perma.cc/GQ2Z-RY7Q].

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Making Independent Expenditures*, *supra* note 93.

100. *Public Communications*, *supra* note 92.

101. *See* Broussard & Weintraub, *supra* note 20.

transparency than clear disclaimers.¹⁰² The latter is more accessible. Disbursement tracking requires an individual consumer to seek out the expenditures made by a particular campaign or political action committee. Disclaimers require nothing from consumers because they append material already being consumed. When they are examined, disbursements are less granular than disclaimers. In 2024, for example, the Super PAC Priorities USA spent \$7,163,532 on “Media.”¹⁰³ Under that umbrella, \$3,743,790 went to “web ads,” \$2,810,604 to “unspecified media buys,” \$471,793 to “media production,” and \$47,723 to “miscellaneous media.”¹⁰⁴ Expenditure details reflect neither what “web ads” were placed nor with whom.¹⁰⁵ If new regulation were to compel more granular disbursement reports, the high-volume spending of large campaigns and Super PACs would produce an unnavigable quantity of records. That requirement would still fail to account for the fact that disbursements made in this context may not be made to individual influencers.¹⁰⁶ Many influencers belong to management groups that contract with campaigns on their behalf, such that any disbursement record would reflect payment to the relevant management company.¹⁰⁷ And entities that are not campaigns are wholly shielded from reporting disbursements of this nature.¹⁰⁸ Because organizational funds spent on advertisements that do not contain express advocacy are definitionally not “independent expenditures,” they are not subject to the FEC’s reporting requirements.¹⁰⁹ Finally, disbursement tracking necessitates some foundational knowledge. Even if a social media user suspects that content is political promotion, they may not be aware of or be able to determine which expenditure records to consult for more clarity. Without knowing certain disclosures are mandated by law, they may not even be aware that relevant records exist.

C. The Federal Trade Commission

The Federal Trade Commission Act of 1914 (“FTC Act”) established the FTC and authorized the agency to regulate “unfair or deceptive acts or

102. *Making Independent Expenditures*, *supra* note 93; L. PAIGE WHITAKER, CONG. RSCH. SERV., IF12691, PACS AND SUPER PACS IN FEDERAL ELECTION CAMPAIGNS: LEGAL FRAMEWORK (2024).

103. Ctr. for Responsive Pol., *Priorities USA Action PAC Expenditures*, OPENSECRETS, <https://www.opensecrets.org/political-action-committees-pacs/priorities-usa-action/C00495861/expenditures/2024> [perma.cc/N3QN-F4Z4].

104. *Id.*

105. *Id.*

106. Lai, *supra* note 22.

107. *Id.*; Laura Barrón-López & Matt Loffman, *A Look at the Massive Donations to Campaigns and Super PACs This Election Season*, PBS NEWSHOUR (June 21, 2024), <https://www.pbs.org/newshour/show/a-look-at-the-massive-donations-to-campaigns-and-super-pacs-this-election-season> [perma.cc/A53Q-X5NR].

108. Ctr. for Responsive Pol., *Priorities USA Action Independent Expenditures*, OPENSECRETS, <https://www.opensecrets.org/political-action-committees-pacs/priorities-usa-action/C00495861/independent-expenditures/2024> [perma.cc/8UYA-SJ6H].

109. *Id.*; *Making Independent Expenditures*, *supra* note 93.

practices in or affecting commerce.”¹¹⁰ Signed into law later the same year, the Clayton Antitrust Act (“Clayton Act”) empowered the FTC to exercise jurisdiction over additional antitrust and consumer protection issues.¹¹¹ The predecessor to the FTC and Clayton Acts was the Sherman Antitrust Act (“Sherman Act”), codified in 1890 as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”¹¹² Although the FTC does not directly enforce violations of the Sherman Act, all Sherman Act offenses constitute enforceable per se violations of the FTC Act.¹¹³ These policy mandates give the agency broad latitude to promulgate diverse rules and institute expansive enforcement actions.¹¹⁴

FTC regulation of commercial activity typically faces diminished First Amendment scrutiny. Before the advent of modern internet, the Supreme Court held that commercial speech, or “expression related solely to the economic interests of the speaker and its audience,” is entitled less First Amendment protection than other forms of speech.¹¹⁵ Although commercial transactions are “content-based,” because they fall within “an area traditionally subject to government regulation,” government interference with related speech is subject to intermediate scrutiny.¹¹⁶ But there is an important exception: the intermediate-scrutiny standard applies only if commercial speech is “neither misleading nor related to unlawful activity,” because protection for commercial speech is premised on its informational function.¹¹⁷ “The government may ban forms of communication more likely to deceive the public than to inform it” with “no constitutional objection.”¹¹⁸

Over time, the FTC has adapted its regulation of deceptive commercial speech for emerging technologies, including social media.¹¹⁹ As the Internet became a consumer-facing marketplace, the FTC regulated accordingly.¹²⁰ Merchandise rules that govern conditions of receipt and refund, for example, were updated to incorporate internet orders.¹²¹ Today, the FTC primarily regulates influencers through its Guides Concerning the Use of Endorsements

110. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

111. Clayton Act, 15 U.S.C. §§ 12–27.

112. *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958); 15 U.S.C. §§ 1–7.

113. *FTC v. Cement Inst.*, 333 U.S. 683, 694–695 (1948).

114. 15 U.S.C. § 45(a)(2).

115. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–566 (1980).

116. *Id.*

117. *Id.*

118. *Id.* at 564.

119. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/F7XQ-4QAN>].

120. *See, e.g.*, Mail, Internet, or Telephone Order Merchandise, 16 C.F.R. § 435 (2025); *FTC Issues Final Amendments to Mail or Telephone Order Merchandise Rule*, FED. TRADE COMM’N, (Sept. 11, 2014), <https://www.ftc.gov/news-events/news/press-releases/2014/09/ftc-issues-final-amendments-mail-or-telephone-order-merchandise-rule> [perma.cc/PW9M-FYAQ].

121. 16 C.F.R. § 435.

and Testimonials in Advertising.¹²² In connection with agency's consumer-protection mission, the rules seek to ensure that Americans are not misled by covert product placement.¹²³ On social media platforms, that means the FTC requires influencers to clearly disclose any material connection to products they endorse.¹²⁴ The scope of material connections is expansive:

Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media promotions.¹²⁵

These guidelines ensure maximum transparency by requiring that even an unpaid connection which might otherwise mislead viewers be disclosed.¹²⁶ While the rule makes copious reference to "product," the term is inclusive of physical goods, services, and other forms of product.¹²⁷

III. WHY THE FTC IS BEST SITUATED TO ACT NOW

An individual disclosure mandate for influencers paid to publish political endorsements is needed to further existing federal policy aims—namely, that transparency makes Americans safer. FCC regulations that guarantee transparent pricing by common carriers ensure Americans can rely on the stability of those communication services' contracts.¹²⁸ Existing FEC disclosure mandates improve Americans' political awareness ahead of elections.¹²⁹ And current FTC endorsement regulations for influencers make Americans better informed about the nature of internet content they consume.¹³⁰ Rulemaking is the answer, not only because it would complement these agencies' underlying policy goals, but also because it would complement existing regulation—which requires disclosure for other express and indirect commercial endorsements. Ambiguous political endorsements remain unchecked, degrading election transparency by blurring the line between entertainment and political advertising for a burgeoning number of

122. 16 C.F.R. §§ 255.0–255.6

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. "The Commission is also deleting 'or service' from 'product or service,' because the term 'product' includes a 'service.'" 88 Fed. Reg. 48092, 48093 (codified at 16 C.F.R. § 255.0).

128. 47 U.S.C. § 201(b).

129. *See, e.g., McConnell*, 540 U.S. at 201 (noting the public interest in pre-election transparency afforded by legislation presently codified at 52 U.S.C. §30104).

130. 16 C.F.R. §§ 255.0–255.6.

American social media users. For substantive and structural reasons,¹³¹ the FTC is the right agency to close the gap—and should do so by updating its endorsement regulations to include political promotion.

A. *The FCC is a Nonstarter*¹³²

The FCC is poorly suited to close this gap because social media regulation would likely fall outside the agency’s jurisdiction. Courts have been unwilling to classify new technologies as telecommunications services subject to FCC regulation as common carriers.¹³³ In addition, Congress withdrew the FCC’s authority over election-related matters.¹³⁴

131. This Note offers a structural rationale for its prescription, premised on current Supreme Court jurisprudence interpreting the Executive Removal Power under Article II. The landmark case for removal doctrine is *Humphrey’s Executor v. United States*. The *Humphrey’s* decision upheld statutory limits on the President’s power to remove commissioners of independent agencies. The Supreme Court found that where the FTC was a multimember body exercising legislative and judicial functions, its commissioners could only be removed for cause. In the second Trump administration, the Justice Department declared that it would seek to have *Humphrey’s Executor* overturned and President Trump fired two Democratic FTC commissioners without cause. The commissioners challenged their firings, and the U.S. District Court for the District of Columbia held that the removal attempts were illegal and issued a reinstatement order for former commissioner Rebecca Slaughter. The U.S. Court of Appeals for the D.C. Circuit denied the Justice Department’s bid for a stay of the D.D.C. order, but the Supreme Court issued certiorari before judgment and granted the stay request. The Court heard oral argument on December 8, 2025. The Court’s decision in that case, *Trump v. Slaughter* (expected summer 2026) is likely to restrict or overturn *Humphrey’s Executor*; as of May 2026, *Humphrey’s Executor* remains good law. Ann E. Marimow, *Highlights of the Supreme Court Argument on Firing Independent Agency Heads*, N.Y. TIMES (Feb. 20, 2026), <https://www.nytimes.com/live/2025/12/08/us/trump-supreme-court-presidential-power>; *Fighting the Consolidation of Power and Illegal FTC Purges*, PROTECT DEMOCRACY UNITED (Mar. 27, 2025), <https://protectdemocracy.org/work/fighting-the-consolidation-of-power-and-illegal-ftc-purges/> [perma.cc/9EDH-Y24F]; Carrie Campbell Severino, *Humphrey’s Executor’s Days Are Likely Numbered as Cases Regarding the President’s Power to Remove Rev Up*, NAT’L REV. (Apr. 4, 2025, 2:35 PM), <https://www.nationalreview.com/benchmemos/humphreys-executors-days-are-likely-numbered-as-cases-regarding-the-presidents-power-to-remove-rev-up/> [perma.cc/E9DL-JWF6]; Lydia Wheeler & Jess Bravin, *Supreme Court to Reconsider Limits on President’s Power to Fire Top Officials*, WALL ST. J. (Sept. 22, 2025, 5:38 PM ET), <https://www.wsj.com/us-news/law/supreme-court-trump-ftc-rebecca-kelly-slaughter-cb69e8f3>; *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

132. While FCC regulation would likely fail judicial review, interagency support may give the FCC new purpose. Under 47 U.S.C. § 162, the FCC may “promote the carrying out of...or otherwise to arrange for such research and development [in connection with any matter in relation to which the Commission has jurisdiction] to be carried out by others.” The FCC has oversight of political advertising by broadcasters, so it could reasonably identify political advertising by influencers as “in relation” to their jurisdiction. Interagency support has been leveraged this way before—the Do-Not-Call registry, an FCC rule, was established in coordination with the FTC. 47 U.S.C. § 162; *Political Programming*, FED. COMM’NS COMM’N, <https://www.fcc.gov/media/policy/political-programming> [perma.cc/G7Y4-MDSG]; *FCC Actions on Robocalls, Telemarketing*, *supra* note 27.

133. Marc S. Martin, Dania Assas & Brandon R. Thompson, *Why the FCC’s Net Neutrality Rules Were Struck Down*, PERKINS COIE (Jan. 7, 2025), <https://perkinscoie.com/insights/update/why-fccs-net-neutrality-rules-were-struck-down> [<https://perma.cc/R3SY-XWUB>].

134. 47 U.S.C. § 801 (repealed 1974 by Pub. L. No. 93–443, 88 Stat. 1263).

The FCC cannot regulate social media platforms as common carriers.¹³⁵ Courts have already blocked the FCC from classifying internet service providers (“ISPs”) as “common carriers.”¹³⁶ During the Obama administration, the FCC reclassified ISPs as Title II common carriers in support of promulgating net neutrality rules.¹³⁷ In 2025, the U.S. Court of Appeals for the Sixth Circuit struck down the FCC’s new classification.¹³⁸ The court in *Ohio Telecom Association v. FCC* ruled that ISPs provide “only an ‘information service,’” and the alternative conclusion was both “inconsistent with the plain language of the Communications Act” and one the FCC exceeded its authority to reach.¹³⁹ As others have recognized, the appellate court faithfully adhered to the modern standard of judicial review for agency interpretations of law.¹⁴⁰ While certain Supreme Court Justices may be sympathetic,¹⁴¹ the FCC’s failure to bring ISPs under common carrier rules in lower courts makes it highly unlikely they would succeed with ISP-hosted social media platforms. If courts are unconvinced that running internet servers offers “telecommunications for a fee directly to the public,” social media platforms don’t offer telecommunications either. Both ISPs and social media platforms offer users the capability to make information available via electronic publishing—so both broker an “information service.”

Even with a jurisprudential shift in evaluating common carriers, the FCC would be unlikely to successfully regulate individual social media users. The agency presently derives its individual enforcement authority under specific statutory provisions.¹⁴² The FCC enforces provisions prohibiting, for example, tampering with public radio transmissions, running unlicensed public radio operations, selling jamming devices to break up radio waves, and engaging in illegal telemarketing practices.¹⁴³ It would not be enough if FCC *could* regulate platforms as common carriers. That would only enable the agency to impose distribution restrictions.¹⁴⁴ To leverage platform distribution regulation to combat individuals’ covert political advertisements

135. The prospect of platforms as “common carriers” is increasingly raised in scholarly debates over First Amendment speech protections and viewpoint censorship. Joel Thayer, *The FCC’s Legal Authority to Regulate Platforms as Common Carriers*, FED. SOC’Y BLOG (Mar. 29, 2021), <https://fedsoc.org/commentary/fedsoc-blog/the-legal-authority-for-the-fcc-to-regulate-platforms-as-a-common-carrier> [perma.cc/Q22U-SGC3]; Shaun B. Spencer, *The First Amendment and the Regulation of Speech Intermediaries*, 106 MARQ. L. REV. 27 (2022); Christopher S. Yoo, *What’s in a Name? Common Carriage, Social Media, and the First Amendment*, 119 NW. U. L. REV. ONLINE 49 (2024); Martin et al., *supra* note 133.

136. *Ohio Telecom Ass’n v. FCC* (In re MCP No. 185), 124 F.4th 993 (6th Cir. 2025).

137. Martin et al., *supra* note 133.

138. The first Trump administration reversed the classification, and the Biden administration resuscitated it—at which time it faced new legal challenges. *Id.*

139. *Ohio Telecom Ass’n*, 124 F.4th at 1009. The FCC in the second Trump administration did not file a petition for writ of certiorari. *Ohio Telecom Ass’n v. FCC* (In re MCP No. 185), No. 24-7000, 2025 LX 271408 (6th Cir. Mar. 11, 2025).

140. Martin et al., *supra* note 133.

141. Lawrence J. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers*, 76 FED. COMM. L.J. 1, 23–24 (2023).

142. 47 U.S.C. § 227; 47 U.S.C. § 302; 47 U.S.C. § 333; 47 U.S.C. § 301.

143. 47 U.S.C. § 227; 47 U.S.C. § 302; 47 U.S.C. § 333; 47 U.S.C. § 301.

144. Zagoren, *supra* note 52 at 31; 47 U.S.C. §§ 201–276.

is to put a square peg in a round hole. Effective regulation would require punishing platforms for user violations, which runs afoul of Section 230.¹⁴⁵ And, as noted, the Supreme Court has already rejected bids for the FCC to regulate internet content like broadcaster content.¹⁴⁶

Further, on-point regulation by the FCC would contradict congressional intent. The congressional record makes this clear.¹⁴⁷ Congress had once granted the FCC explicit oversight in this area—with 47 U.S.C. §§ 801 to 805.¹⁴⁸ Those provisions first restricted campaign expenditures to various forms of communications media.¹⁴⁹ When FECA was passed, §§ 801 to 805 were repealed, transferring all relevant authority from the FCC to the new FEC.¹⁵⁰

B. The FEC is Ill-Equipped

Although obscured political advertisements fall squarely within FEC jurisdiction, procedural obstacles and substantive challenges leave the agency ill-equipped to comprehensively address the issue.

The FEC's unique organizational structure begets regulatory inefficiency, worsened by the present political climate. Both the FCC and FTC are headed by a five-person commission, where no more than three commissioners can be of one political party.¹⁵¹ For these two agencies, three commissioners are required for a quorum.¹⁵² No more than three FEC commissioners can be of the same political party—but the FEC's governing body consists of six commissioners, and four are required for a quorum.¹⁵³ Bipartisan commissioner appointment and participation are thereby required to conduct FEC business.¹⁵⁴ This quorum structure has previously stalled and deadlocked agency action.¹⁵⁵ From August 2019 to December 2020, for

145. While mounting partisan concerns suggest this may change, Section 230 remains good law as of May 2026. Paolo Confino, *Trump's Pick for FCC Chair Wants to Eliminate the Law Shielding Social Media Companies from Legal Consequences for Posts on Their Platforms*, FORTUNE (Nov. 19, 2024, 12:07 AM EST), <https://fortune.com/2024/11/19/trump-fcc-pick-repeal-section-230-meta-facebook-instagram-tiktok-x-youtube/> [perma.cc/WC2N-DC6R].

146. *Reno*, 521 U.S. at 870.

147. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

148. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93-443, 88 Stat. 1263.

149. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93-443, 88 Stat. 1263.

150. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93-443, 88 Stat. 1263.

151. 47 U.S.C. § 154; 15 U.S.C. § 41.

152. 47 U.S.C. § 154; 15 U.S.C. § 41.

153. 52 U.S.C. § 30106.

154. *See id.*

155. Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html>.

instance, the FEC had a quorum for only three months.¹⁵⁶ And, as of May 2026, the FEC has lacked a quorum since April 2025.¹⁵⁷ Ahead of the 2018 midterm elections, when the agency did have a quorum, commissioner deadlock left the FEC unable to promulgate a rule “expanding disclaimers to ‘internet-enabled device[s] or application[s].’”¹⁵⁸ The current Republican administration has actively facilitated the absence of an FEC quorum.¹⁵⁹ Any internal opposition to omitting individuals from public communication guidelines came from current and former Democratic commissioners.¹⁶⁰ For these reasons, it is unlikely that the FEC could overcome structural challenges to issue updated regulation.

And the Supreme Court will likely be more critical of disclosure requirements and related First Amendment implications in future.¹⁶¹ Although the Supreme Court has declared FECA and BRCA’s disclosure requirements constitutional, recent jurisprudence suggests new requirements will be subject to heightened scrutiny.¹⁶² Legal scholars have identified the federal judiciary at-large as “increasingly skeptical of disclosure.”¹⁶³ For example:

No case has directly threatened disclosures like [those mandated by the FEC’s public communications rule]. Yet courts have indicated their approval is waning. In *Americans for Prosperity Foundation v. Bonta*, 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. And in *Washington Post v. McManus*, the Fourth Circuit found that a Maryland law requiring online platforms to disclose facts about the ads they publish was unconstitutional compelled speech.¹⁶⁴

156. Zach Montellaro, *Federal Campaign Finance Watchdog Has Full Slate for First Time in Years*, POLITICO (Dec. 9, 2020, 1:04 PM EST), <https://www.politico.com/news/2020/12/09/federal-elections-commission-quorum-443919> [perma.cc/Z7TB-TNGD].

157. Ashley Lopez, *The Federal Election Commission Is Down to 2 Members. So Its Work Is at a Standstill*, NPR (Oct. 4, 2025, 5:00 AM EST), <https://www.npr.org/2025/10/04/nx-s1-5559763/fec-no-quorum-campaign-finance> [perma.cc/JUL9-Y7AU]; Defendant’s Notice to the Complaint for Declaratory and Injunctive Relief, *Senate Majority PAC v. FEC*, Civ. No. 26-336 (D.D.C. Apr. 6, 2026), <https://www.fec.gov/resources/cms-content/documents/fec-notice-of-lack-of-quorum-26-336-04-06-2026.pdf> [https://perma.cc/7R7W-QK6S].

158. *Public Communication Comment*, *supra* note 78.

159. Lopez, *supra* note 157.

160. Broussard & Weintraub, *supra* note 20.

161. *Public Communication Comment*, *supra* note 78.

162. *Id.*; *Citizens United*, 558 U.S. at 372.

163. *Public Communication Comment*, *supra* note 78.

164. *Id.* at 2206.

Courts are evaluating purported government interests more critically when ruling on First Amendment challenges to some mandated disclosures.¹⁶⁵

C. Fewer Roadblocks Lie Ahead for FTC Regulation

The FTC is best situated to close the regulatory loophole for influencers paid to promote federal campaigns. Considering the FTC's jurisdiction over "unfair or deceptive acts or practices in or affecting commerce," the agency should reverse its outdated determination that it lacks authority to regulate political advertising.¹⁶⁶ FTC regulation has routinely and appropriately expanded to account for an evolving technological landscape. In the present one, influencers retained for political promotion affect commerce, and those promotions should be marked with a clear disclaimer.

The FTC's authorizing legislation does not delineate that which "affects commerce," and commerce is itself a broad concept. The FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."¹⁶⁷ But the statute does not shed additional light on qualifying "acts or practices," it merely stipulates that "'commerce' means commerce among the several States or with foreign nations."¹⁶⁸ The same is true for the Sherman and Clayton Acts.¹⁶⁹ That capacious definition suggests congressional intent for a similarly broad understanding of activities "affecting commerce." Other pieces of federal legislation define "commerce" with a bit more specificity. Under the Labor-Management Relations Act, for instance, commerce is "trade, traffic, commerce, transportation, or communication among the several States."¹⁷⁰ Black's Law Dictionary bases its definition for "affecting commerce" on this statute; it defines the phrase as "touching or concerning business, industry, or trade" when applied to "an industry, activity, etc."¹⁷¹ These more detailed definitions are, from a policy perspective, nearly as broad. And each definition supports a reading of the FTC Act to include jurisdiction over political advertising as activity that "affects commerce."

Political advertising *is* a practice "affecting commerce." Political promotions create a direct commercial transaction between an influencer and the entity providing them payment—whether that entity is a candidate's campaign, a political action committee, or an influencer management group.¹⁷² Moreover, while political endorsements may not induce *viewers* to engage a transaction in the way of product advertising, they still have great downstream potential to affect interstate traffic, transportation, and communication.¹⁷³ Elected officials control policy outcomes affecting

165. *See id.*

166. 15 U.S.C. § 45.

167. *Id.*

168. 15 U.S.C. § 45.

169. 15 U.S.C. §§ 1, 12.

170. 29 U.S.C. § 152.

171. *Affecting Commerce*, BLACK'S LAW DICTIONARY (12th ed. 2024).

172. Lai, *supra* note 22.

173. *See* Duffy & Fung, *supra* note 14.

individual and national economic wellbeing. Those officials are elected by voters who are susceptible to viewing undisclosed political advertisements posted by influencers.¹⁷⁴ On a national scale, for instance, President Trump won his 2024 bid for reelection on a campaign that included scores of economic promises.¹⁷⁵ Post-inauguration, he imposed significant tariffs on United States trading partners.¹⁷⁶ The widescale tariffs caused significant market downturn, and millions of American stockholders saw their portfolio values plummet.¹⁷⁷ Although the tariff policy was struck down on judicial review, the policy and related economic promises illustrate a causal connection between political campaigns and commercial effect.¹⁷⁸

Critically, a reading of the FTC Act to cover deceptive political advertising would likely survive judicial review. An agency's interpretation of its authorizing statute receives no deference from courts.¹⁷⁹ But in addition and without any deference to the FTC's interpretation, the Supreme Court has broadly interpreted the FTC Act.¹⁸⁰ In *FTC v. Motion Picture Advertising Service Co.*, the Supreme Court held that "Congress advisedly left the concept [of 'unfair methods of competition'] flexible to be defined with particularity by the myriad of cases from the field of business" in finding exclusive contracts warranted a charge by the FTC.¹⁸¹ The Court had previously held in *FTC v. Ruberoid Co.* that "the Commission is not limited to prohibiting [an] illegal practice in the precise form in which it is found to have existed in the past," suggesting that restrictions on political advertising as commercial activity might have greater weight in the information era.¹⁸² Consistent with *FTC v. Ruberoid Co.*, agency efforts to keep pace with digital advancement recently included discussion of artificial intelligence technology—notably more attenuated from obvious commercial activity than political advertisements are.¹⁸³ To that end, the Supreme Court found in *FTC v. Sperry & Hutchinson Co.* that "the Federal Trade Commission does not arrogate excessive power to itself" if it "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."¹⁸⁴ This empowers the FTC to justify regulation with public policy, even without support from statutory text or legislative history.¹⁸⁵ And with respect to the

174. See Cody Couture & Ann L. Owen, *Political Advertising and Consumer Sentiment: Evidence from U.S. Presidential Elections*, EUR. J. OF POL. ECON. 86 (2025).

175. *Trump's Economic Promises Timeline*, U.S. REP. LLOYD DOGGETT, <https://doggett.house.gov/issues/trumps-economic-promises-timeline> [perma.cc/BH5T-FF9P].

176. Alan Rappeport, *Trump Imposes Sweeping Tariffs, Escalating Trade War*, N.Y. TIMES (Apr. 8, 2025), <https://www.nytimes.com/2025/04/08/us/politics/trump-tariffs-greer.html>.

177. *Id.*

178. *Learning Res., Inc. v. Trump*, 146 S. Ct. 628 (2026).

179. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

180. *Id.*; *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953).

181. *Motion Picture Advertising Service Co.*, 344 U.S. at 394.

182. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

183. Comment from the Fed. Trade Comm'n on Artificial Intelligence and Copyright, Fed. Trade Comm'n Advocacy Filing (Nov. 1, 2023) (transcribing Oct. 4, 2023 roundtable).

184. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1971).

185. *Id.*

Constitution itself, the Supreme Court has broadly interpreted the Commerce Clause and consequent congressional powers, recognizing activities that appear unrelated to commerce on their face may nonetheless impact the interstate economy.¹⁸⁶

FTC regulation of political advertising would unlikely violate the First Amendment. The strongest evidence is that the FEC's administration of BRCA disclaimer requirements, which are substantially equivalent, has been declared constitutional.¹⁸⁷ Jurisdictional challenges thereby pose a greater threat to on-point FTC regulation. And because this Note prescribes revision of existing FTC regulation, the judiciary's skepticism of novel disclosure schemes is not implicated.

If these assertions fail to hold, it remains true that FTC rulemaking has survived First Amendment challenges even under standards of scrutiny necessitating narrow tailoring.¹⁸⁸ In *National Federation of the Blind v. FTC*, for example, the Fourth Circuit applied heightened scrutiny to an agency rule restricting the conduct of professional telemarketers who solicit charitable donations on behalf of non-profit organizations.¹⁸⁹ The court found that because the telemarketing rule was "narrowly drawn" to serve the "strong subordinating interest" of protecting residential peace," it "[embodied] a proper compromise between the important speech interests of charities and the equally important need to protect the public from excessive intrusions into the home."¹⁹⁰ On appeal, the Supreme Court denied the petition for a writ of certiorari.¹⁹¹ The denial without listed dissent might suggest no Justice believed a reversal would "have national significance," "harmonize conflicting decisions in the federal Circuit courts" or "have precedential value."¹⁹²

Mandatory disclaimers for political endorsements by influencers should be subject to diminished scrutiny. When an influencer is paid to produce and post content, the material constitutes commercial speech. That the material is of a political character should not wholly vitiate its commercial attributes, for an influencer's failure to make required disclosures would nonetheless deceive social media users. Given that the First Amendment does

186. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

187. *Citizens United*, 558 U.S. at 366–371.

188. *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334 (4th Cir. 2005).

189. Rather than apply traditional intermediate scrutiny, the court applied a standard specific to charitable solicitations, as established by *Village of Schaumburg v. Citizens for a Better Environment*. In that case, the Supreme Court determined that charitable solicitations were not purely commercial speech, but similar enough to other protected speech forms to compel heightened scrutiny. *Id.* at 338; *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

190. *Id.* at 351 (quoting *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 960–961 (1984)).

191. Petition for Writ of Certiorari, *Nat'l Fed'n of the Blind v. FTC*, 547 U.S. 1128 (2006) (No. 05-927).

192. *Id.*; *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures> [perma.cc/P7AV-N2AD].

not protect misleading commercial speech, on-point regulation should not compel heightened scrutiny.¹⁹³

Even under a more demanding test, applicable FTC disclosure regulations should face no more than intermediate scrutiny resembling the standard for charitable solicitations and traditional commercial speech. Regulation of this kind represents the FTC's strong interest in circumventing consumer deception, one underlying swaths of agency rulemaking.¹⁹⁴ Moreover, because a relevant rulemaking would impose no greater burden on social media influencers than is already placed on them to disclose other material relationships, the regulation would be narrowly drawn.¹⁹⁵

The FTC also faces fewer political hurdles in rulemaking. Unlike bodies requiring bipartisan quorums (e.g., the FEC), the FTC can conduct business with commissioners from a single political party, insulating it from equivalent gridlock concerns.¹⁹⁶ Thanks to this structure, the current FTC Chair, a Republican, recently secured a successful vote without the support of any Democratic commissioners.¹⁹⁷ Furthermore, amid increasing political divisions, FTC policies receive relatively bipartisan support, depressing the agency's regulatory risk.¹⁹⁸ While executive appointee votes have split along party lines in recent years, the FTC's previous chair, Lina Khan, was confirmed with support from both Democrats and Republicans.¹⁹⁹ Congressional representatives from both major parties have introduced bills to expand the FTC's consumer protection authority.²⁰⁰ With respect to social media in particular, legislators and commentators across the political spectrum say the FTC should be the regulating agency.²⁰¹ The Social Media NUDGE Act, introduced by Democratic Senator Amy Klobuchar in 2022, would have directed the FTC to promulgate regulations addressing harms caused by social media platforms.²⁰² Libertarian First Amendment scholar Eugene Volokh has suggested antitrust jurisdiction as an alternative avenue

193. *Cent. Hudson*, 447 U.S. at 563.

194. *About the FTC: Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> [perma.cc/CQM7-DDX2].

195. See 16 C.F.R. §§ 255.0–255.6.

196. 15 U.S.C. § 41.

197. Jody Godoy, *FTC Chair Ferguson Wins First Vote Over Trump's DEI Purge*, REUTERS (Jan. 24, 2025, 1:41 PM EST), <https://www.reuters.com/world/us/ftc-chair-ferguson-wins-first-vote-over-trumps-dei-purge-2025-01-24/> [perma.cc/8X2U-QV3A].

198. Michael Liedtke & The Associated Press, *Big Tech Antitrust Push 'Still Has Legs to It' Despite Regime Change*, FORTUNE (Nov. 17, 2024, 10:58 AM EST), <https://fortune.com/2024/11/17/big-tech-antitrust-ftc-lina-khan-biden-trump-mergers-acquisitions-deals/> [perma.cc/KWL6-WBFH].

199. Russell Brandom, *Amazon Says New FTC Chair Shouldn't Regulate It Because She's Too Mean*, THE VERGE (June 30, 2021, 3:06 PM EDT), <https://www.theverge.com/2021/6/30/22557456/amazon-lina-khan-recusal-petition-federal-trade-commission-antitrust> [perma.cc/FFJ7-RQBG].

200. See, e.g., PBM Act of 2024, H.R. 10362, 118th Cong. (2024); Performance Life Disclosure Act of 2024, H.R. 10031, 118th Cong. (2024).

201. See, e.g., Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?* 1 J. FREE SPEECH L. 377 (2021); Social Media NUDGE Act, S. 3608, 117th Cong. § 6 (2022).

202. Social Media NUDGE Act, S. 3608, 117th Cong. § 6 (2022).

for regulating social media platforms.²⁰³ Lately, and perhaps in recognition of the FTC's lackluster claim for jurisdiction over platforms, the FTC has initiated something of the latter approach itself.²⁰⁴ In 2025, the agency initiated a public request for information regarding censorship actions taken by technology platforms.²⁰⁵ The FTC's justification? That "FTC staff [was] interested in understanding how consumers have been harmed—including by potentially unfair or deceptive acts or practices, or potentially unfair methods of competition—by technology platforms that limit users' ability to share their ideas or affiliations freely and openly."²⁰⁶ In short, the broad mandate of the FTC Act.²⁰⁷ If the agency is empowered to apply the FTC Act to social media contexts this attenuated from traditional notions of deceptive commercial practices, it must be equally empowered to regulate covert political endorsements by influencers under the statute.

The best course of action for the FTC is to revise the agency's Guides Concerning the Use of Endorsements and Testimonials in Advertising. Section 255.0 currently defines a "product" requiring disclosure of material connection as "any product, service, brand, company, or industry."²⁰⁸ The most straightforward amendment would revise the definition of "product" to include political products. An update could be as minor as "the term 'product' includes any product, service, brand, company, industry, or political campaign." If the FTC seeks to avoid promulgation of the term "campaign," the preamble to a revised rule might instead extrapolate that a preexisting category of "product," such as "brand," includes those of a political nature. In layman's terms, "brand" denotes not only products manufactured under a particular name, but "a particular type or kind of something" and "a person's image, persona, or manner of presentation, regarded as an asset."²⁰⁹ To that end, campaigns and other entities that transmit payment to influencers are essentially political brands.²¹⁰ Not only do organizations like Super PACs represent a particular political or ideological affiliation, but candidates effectively sell an individual "brand" when their campaigns contract with influencers.²¹¹ Administratively, it is more efficient to promulgate a revised rule than a new one. Because most existing regulations have already survived the notice-and-comment process, future rulemaking is unlikely to face

203. As opposed to classifying platforms as common carriers. Volokh, *supra* note 204, at 461.

204. See *Request for Public Comment Regarding Technology Platform Censorship*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf [perma.cc/97H6-VZ9Z].

205. *Id.*

206. *Id.*

207. 15 U.S.C. § 45.

208. 16 C.F.R. § 255.0.

209. *Brand*, OXFORD ENGLISH DICTIONARY (online ed. 2025), https://www.oed.com/dictionary/brand_n [https://perma.cc/7LQJ-V6CQ].

210. See Ciara Torres-Spelliscy, *The Power of Branding in Politics*, BRENNAN CENTER FOR JUSTICE (October 16, 2019) <https://www.brennancenter.org/our-work/analysis-opinion/power-branding-politics> [https://perma.cc/U6M7-VBTF].

211. *Id.*

significant additional challenges.²¹² And the longevity of an existing rule without legal challenge further entrenches the agency's authority. In this case, the relevant FTC rule was first promulgated in 1975.²¹³

For consumers, the next step is to utilize the FTC's petition for rulemaking process.²¹⁴ The FTC permits private individuals to participate in its rulemaking efforts by submitting a proposal that includes a request for FTC action, an explanation of how the petitioner's interests are affected, and any bases for the request (facts and law, including supporting data).²¹⁵ When the FTC does not advance a private proposal, it dismisses the petition without prejudice, permitting the issue to be reraised at a later date.²¹⁶ In lieu of an original proposal, the subject could also be raised in response to an interim rule issued by the agency.²¹⁷ Given that the FTC's endorsement guides were last amended in 2023, the opportunity for comment may not soon arise.²¹⁸ But the potential for future notice-and-comment periods or a favorable response to a petition for rulemaking warrants optimism. Data exists to suggest that federal regulators do give heed to public entreaties.²¹⁹

212. And the FTC was able to promulgate rule updates considering influencers even faced with some resistance. *See generally* Craig C. Carpenter & Mark Bonin II, *To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides*, 23 VAND. J. ENT. & TECH. L. 253 (2021) (arguing that FTC enforcement actions should not be more punitive with respect to influencers who violate endorsement regulations); Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247 (2019-2020) (detailing the consequences of marketing nondisclosure by fashion influencers).

213. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0, 255.3, 255.4 (1975).

214. *Section 18 Rulemaking Booklet*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/Section-18-Rulemaking-Booklet.pdf [perma.cc/S8EL-MEZC].

215. 16 C.F.R. § 1.31 (b), (c).

216. 16 C.F.R. § 1.31 (g).

217. *See* Weiner & Black, *supra* note 77.

218. Before the latest update, the Endorsement Guides were revised in 2009. *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM'N (June 29, 2023) <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements> [perma.cc/TY2C-4DJ6]; Helen O. Ogunyanwo, *FTC Issues Long-Awaited Updates to the Endorsement Guides*, CROWELL & MORING LLP (May 22, 2022), <https://www.crowell.com/en/insights/client-alerts/ftc-issues-long-awaited-updates-to-the-endorsement-guides> [perma.cc/Z4TQ-UJ5V].

219. Take, for instance, that the definition of "public communication" ultimately promulgated by the FEC in 2024 partially addressed comments the agency received regarding the proposed rule's lack of "promoted for" language. Weiner & Black, *supra* note 77; *Public Communication Comment*, *supra* note 78; *see also* Andrei A. Kirilenko, Shawn Mankad & George Michailidis, *Do U.S. Financial Regulators Listen to the Public? Testing the Regulatory Process with the RegRank Algorithm* (Robert H. Smith Sch., Research Paper, 2014), <https://ssrn.com/abstract=2377826> (finding a positive incorporation rate for comments received during the notice-and-comment period to final CFTC regulations).

IV. CONCLUSION

The law currently prevents an influencer from secretly promoting even a pastry online—but it does not prohibit secret political promotion. Americans deserve to know when the political content they consume online is paid for by a campaign or a private organization, even when the content does not constitute express advocacy. The FTC must acknowledge that undisclosed political endorsements are commercially delusive. The agency ensures that an influencer may not hide when they promote a product for profit, even when the promotion is indirect. The FTC should seek to enjoin covert political advertisements by influencers in its Guides Concerning the Use of Endorsements and Testimonials in Advertising, under the agency's authority to regulate deceptive practices affecting commerce. This prescription recognizes the far-reaching commercial impact of the political process while sidestepping legal and procedural challenges other agencies would face rulemaking in this area. Relevant FTC rulemaking would increase election transparency for the millions of American social media users who consume influencer content.

