Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

July 21, 2023

H.R. 4563, the American Confidence in Elections Act (ACE Act): Legal Background

On July 11, 2023, H.R. 4563, the American Confidence in Elections Act (ACE Act), was introduced in the 118th Congress. The ACE Act proposes to amend federal election law primarily in the areas of election administration and campaign finance. On July 13, 2023, the Committee on House Administration, one of the committees of jurisdiction, held a markup and ordered the bill to be reported, as amended. This In Focus provides an overview of the constitutional framework for federal election law and the legal background relating to two major areas of law that the ACE Act proposes to amend: federal election administration law and federal campaign finance law. For a policy overview of the ACE Act, see CRS In Focus IF12451, *H.R. 4563, the American Confidence in Elections (ACE) Act*, coordinated by Karen L. Shanton.

Constitutional Framework

Although federal elections have national impact, they are primarily administered according to state laws. Article I, Section 4, clause 1, of the U.S. Constitution, known as the Elections Clause, authorizes to the states the initial and principal authority to administer elections within their jurisdictions. Specifically, the Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." As a result of this decentralized authority, states vary significantly in how they administer the federal voting process and elections. For example, states have enacted differing laws addressing early voting, absentee voting, deadlines for voter registration, voter identification (ID) laws, and standards for drawing congressional redistricting maps.

At the same time, the Elections Clause provides Congress with the authority to "override" state laws regulating federal elections. See *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Under that authority, Congress has enacted laws such as the National Voter Registration Act and the Help America Vote Act, discussed below, which dictate how states must administer certain aspects of the federal election process.

A parallel constitutional provision addressing presidential elections known as the Electors Clause—in Article II, Section 1, clause 2—provides that "[e]ach state shall appoint" electors for President and Vice President in the manner "as the Legislature thereof may direct." Further, Article II, Section 1, clause 4, provides Congress with the power to determine when the states choose their electors and "the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

Federal Election Administration Law

Federal law regulates federal election administration, which includes procedures for voter registration and voter roll maintenance.

Voter Registration

For federal elections, the National Voter Registration Act of 1993 (NVRA), also known as the "motor-voter law," requires states to provide for mail-in voter registration and to establish voter registration procedures for eligible citizens at motor vehicle departments and at certain other state agencies. As amended by the Help America Vote Act of 2002 (HAVA), the NVRA requires the Election Assistance Commission (EAC) to create a nationally uniform voter registration form—called the Federal Form—for applicants to use to register by mail and at certain state and local offices. The NVRA specifies that the Federal Form can require identifying information from an applicant only to assess eligibility and must include a statement specifying eligibility requirements, including citizenship, an attestation that the applicant meets each requirement, and the applicant's signature under the penalty of perjury. The law allows states to create their own mail voter registration forms for federal elections so long as those forms comport with NVRA requirements and states also accept the Federal Form.

The Supreme Court held that the NVRA's requirement that states use the Federal Form for registering voters in federal elections preempted a state law requiring documentary proof of citizenship for registering to vote. The Court also determined that, although the NVRA precludes a state from requiring an applicant using the Federal Form to provide additional proof of citizenship beyond what the form requires, a state has the power to ask the EAC to include the requirement in the form's state-specific instructions. See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

The ACE Act would amend the NVRA to permit states to require applicants to provide proof of citizenship with both the Federal Form and state-created forms.

Voter Roll Maintenance

As amended by HAVA, the NVRA contains both requirements and restrictions relating to the removal of registrants from federal election voter rolls. The NVRA prohibits states from removing individual registrants except under certain circumstances, including "by reason of" the registrant's change in residence. At the same time, the

NVRA requires states to "conduct a general program that makes a reasonable effort to remove" the names of voters who have changed residence. In a provision that the Supreme Court has called the "Failure-to-Vote Clause," the NVRA provides that such state programs cannot result in removing a voter's name from the rolls for an individual's "failure to vote," unless the person has either not notified the registrar or responded to a notice sent by the registrar and has not voted in two or more consecutive general federal elections. In interpreting this provision, the Court has held that a state process using voter inactivity to *initiate* a process to remove registrants from its voter rolls did not violate the NVRA's Failure-to-Vote Clause, because the registrant's failure to vote was not the sole determinant for removal. See *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

The ACE Act would require the EAC's Standards Board and Local Leadership Council to issue "voluntary considerations" for states regarding aspects of federal election administration, including voter registration list maintenance.

Federal Campaign Finance Law

The Federal Election Campaign Act (FECA) primarily regulates federal election campaigns in three ways: contribution limits, source restrictions, and disclosure and disclaimer requirements.

Many provisions of FECA have been challenged in court under the First Amendment with mixed results. According to the Supreme Court, limits on campaign contributions—which involve giving money to an entity—and limits on expenditures—which involve spending money directly for electoral advocacy—implicate rights of political expression and association under the First Amendment. The Court, however, has afforded different degrees of First Amendment protection and levels of scrutiny to contributions and expenditures. Contribution limits are subject to a more lenient standard of review than expenditure limits, the Court has held, because they impose only a marginal restriction on speech and will be upheld if the government can demonstrate that they are a closely drawn means of achieving a sufficiently important governmental interest. In contrast, the Court has determined that because they impose a substantial restraint on speech and association, expenditure limits are subject to "strict scrutiny," requiring that they be narrowly tailored to serve a compelling governmental interest. See *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court's two most recent major campaign finance decisions have held that only quid pro quo corruption or its appearance constitute a sufficiently important governmental interest to justify limits on contributions and expenditures. See *McCutcheon v. FEC*, 572 U.S. 185 (2014); *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022).

Contribution Limits

Contribution limits refer to how much a donor can contribute and how contributions can be made. FECA establishes specific contribution limits on how much money a donor may contribute to a candidate, party, and political committee. The Supreme Court has generally upheld the constitutionality of such contribution limits. See *Buckley v. Valeo*, 424 U.S. 1 (1976). In addition, FECA provides for related restrictions, including the ban on contributions made by one person through a conduit, the ban on converting campaign contributions for personal use, and the treatment of communications a donor makes in coordination with a candidate or party as contributions.

Source Restrictions

FECA contains several bans—known as source restrictions—on *who* may make campaign contributions. Source restrictions include the ban on corporate and union campaign contributions that are made directly from treasury funds. FECA requires corporations and unions seeking to make contributions to establish political action committees (PACs). The Supreme Court has upheld the ban on corporate and union contributions directly from treasury funds. See *FEC v. Beaumont*, 539 U.S. 146 (2003). In contrast, the Court has held that a ban on corporate and labor union independent *spending* is unconstitutional. See *Citizens United v. FEC*, 558 U.S. 310 (2010). FECA source restrictions also include the ban on federal contractor contributions and the ban on foreign national contributions and expenditures in federal, state, and local elections.

Disclaimer and Disclosure Requirements

FECA establishes disclaimer and disclosure requirements. FECA's disclaimer requirements mandate that statements of attribution appear directly on campaign-related communications. FECA's disclosure requirements mandate that political committees register with the FEC and comply with periodic reporting requirements. In addition, the law requires other entities—such as labor unions and corporations, including incorporated organizations that are tax-exempt under Section 501(c)(4) of the Internal Revenue Code—that make independent expenditures or electioneering communications to disclose certain information.

The Supreme Court has generally affirmed the constitutionality of FECA's disclosure and disclaimer requirements. In contrast to the standard of "strict scrutiny" applied to expenditure limits, the Supreme Court has applied the somewhat less rigorous "exacting scrutiny" standard to disclaimer and disclosure requirements. It requires the government to show that its action is substantially related to a sufficiently important interest. Applying "exacting scrutiny" to FECA's disclaimer and disclosure laws, the Court has identified three government interests justifying these requirements: (1) providing voters with information, (2) deterring quid pro quo candidate corruption and avoiding its appearance, and (3) facilitating the enforcement of campaign finance law. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010).

Among other things, the ACE Act would amend FECA to index certain contribution limits for inflation, repeal limits on coordinated party expenditures, and extend the ban on foreign national contributions and expenditures to state and local ballot initiatives.

L. Paige Whitaker, Legislative Attorney

IF12453

Disclaimer