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Before the California Fair Political Practices Commission

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Good morning and thank you for inviting me to make some opening remarks at this hearing on a subject of great importance.

As the subcommittee knows, I had the privilege of chairing the Bipartisan California Commission on Internet Political Practices which issued a final report in December, 2003. That report is available on the Commission's website. I have brought copies with me for those who want to read a hard copy of our work.

One of our panel's vice chairs, Professor Deirdre Mulligan of Berkeley Law School, hoped to be here today. When that proved impossible she agreed to submit a written statement, and she asked me to discuss some of her thoughts during my presentation. I will do so at the end of my remarks.

There are a few points that I would like to stress as the FPPC engages in its important work in this area.

In my view, and I am certain that our commission would have agreed, changes in technology and political practices make your effort to revisit this area both inevitable and essential.

In some respects, it seems that our commission's work was conducted – and our report issued – a lifetime ago. When the legislature created our commission it knew that we would be exploring the implications of a field in a constant state of change. Our report attempted to take that into account. It was clear that the importance of the Internet would continue to grow – and it has. When we issued our report at the end of

2003, we cited a Pew study that found that in the previous national campaign – the campaign of 2002 – some 13 percent of the public had gone online for political information, compared to 66 percent who identified television as their primary source of news. We noted that the numbers were sure to grow. Six years later, Pew reported that during the 2008 campaign some 40 percent of the public turned to the Internet for much of their political news, including 66 percent of young people. The Internet audience had more than tripled in six years. During the last election cycle it surpassed the audience for newspapers – and for young people it was equal to television.

We also knew that there would be technological breakthroughs that would provide new opportunities for journalists, activists and political campaigns. As a result, we were confident that our work would need to be updated and reexamined. I am therefore delighted that the FPPC is taking a fresh look at the subjects we started to explore.

If I may, I would like to quote from the preface to our report. We said:

The authors of the law [that created the Bipartisan Commission] anticipated that during ensuing elections candidates and others would “explore and develop new uses of the Internet for political purposes in California” and that “political activity on the Internet will increase exponentially.” How right they were!

The subject of our study is a moving target. In each election cycle, candidates and campaigns develop new uses for emerging technologies; government agencies find new issues to consider; citizens and citizen groups discover new ways to use the Internet to become involved in the political process; and news providers (from traditional news organizations to individual bloggers) become increasingly successful in using the Internet to provide new and different information about candidates and elections. Each of these new activities raises questions about benefits and costs, interpretation and implementation of legal limitations, the rise of new actors in the political debate, and the relationship of new political techniques to core political freedoms. There is no reason to expect a slowdown in the evolution in technology, the ways in which it will be used, or the questions it raises for policymakers.

We wrote those words at the end of 2003. A little more than a year later, two employees of PayPal created YouTube – inspired, according to one legend, by their difficulty sharing video from a dinner party. In the following election cycle, YouTube changed the face of American politics when Senator George Allen mocked a campaign worker for a rival campaign by calling him “macaca” – and the incident was posted on YouTube for all to see. During the primaries, YouTube and CNN partnered for the nation’s first-ever debates in which citizens nationwide asked questions of the candidates by video. Rolling Stone called it “the First YouTube Election.”

Although Facebook was launched in 2003, it did not become open to general membership until late 2006. Along with other Internet sites and software devices, it proceeded to dominate the election of 2008, helping to propel Barack Obama into the White House. The Students for Barack Obama Facebook group had 3.2 million members. US News and World Report marked the election results with a headline that said “Barack Obama and the Facebook Election.”

Jack Dorsey started work on Twitter in the spring of 2006, and had what amounted to a coming out party at the 2007 South by Southwest Festival in Austin. In a sense, Twitter’s defining moment (or defining moment to this date) came in the aftermath of the elections in Iran last summer – leading Time Magazine to call Twitter “the Medium of the Movement.”

A great many observers have raised alarms about the accuracy of rapidly spreading information on the web. They have good reason to be concerned. During the 2008 campaign, false claims spread like wildfire about all of the candidates including Sarah Palin and especially Barack Obama. But such rumors can and do spread without new technology – and before the advent of the Internet there was often no way to find out about or rebut such lies. While the Internet spreads false information at a dizzying pace, it tends to be discovered and often debunked thanks to powerful fact-checking tools like factcheck.org. So far, the internet has shown itself to be as much a medium of truth as of lies.

As impactful as they have been, YouTube, Facebook and Twitter are almost certain to be joined if not superseded by a raft of new technologies and applications in

the years ahead – quite possibly by at least one major innovation in each election cycle. While we can safely predict that there will be innovations, we cannot predict what those innovations will be.

Even while new technologies continue to change the political landscape, I think that the essential finding of our report remains valid today. After struggling with various regulatory options, our commission concluded that it made more sense to propose a framework that is largely libertarian.

In an era of political partisanship and rancor, it may seem quaint to report that, despite the sharp political differences on our bipartisan panel, our findings were unanimous. The evolution of my own thinking may be of some interest. I was and am a strong Democrat and I was appointed to the commission by Governor Gray Davis. For many years, I had been the chair of California Common Cause; like Commissioner Garrett, I had served on the national board of Common Cause; and I chaired the commission that wrote the very strong ethics and campaign finance laws that were adopted by the people of Los Angeles twenty years ago in a hotly contested initiative battle. I think it is fair to say that I have a healthy appreciation for the need for some forms of government regulation in the political realm.

Our commission consisted of people who spanned the political spectrum. But as we conducted hearings across the state, heard from expert witnesses, and explored the experiences of political actors and regulators elsewhere, we found ourselves moving toward a consensus.

We expressed that view as follows:

Our Commission believes that the Internet and associated new technologies, if allowed to flourish, increasingly will be used in ways that improve the quality of campaigns and elections. Therefore, despite widely differing views on the wisdom of other aspects of politics and political reform, our Commission believes that the advantages of enabling Internet political activity currently do, and for the foreseeable future will, far outweigh the benefits of restricting its potential through heavy handed regulation.

For that reason, we urge the legislature, the FPPC, and all others with interpretive or enforcement power to resist the temptation to adopt laws or regulations that, no matter how well intended, would have the practical effect of reducing the remarkable ability of new technology to empower candidates and voters. In particular, we think that the government should resist calls for excessive requirements that could unnecessarily, and perhaps unintentionally, inhibit or criminalize citizen participation in politics via the Internet.

We went on to urge the legislature and regulators “to be cautious about calls for special regulations aimed at restricting Internet activity by citizens.” We said that “The Commission believes that the regulatory cure may often be worse than the disease, and that Internet campaigning is a field in which problems, while real, will be largely self-correcting if given the time to play out naturally.”

During the course of your hearings and research, you may find that our essential views were wrong. But based on what we knew then – and what I as an observer can ascertain today – I think that our basic hands-off principle still represents the wisest course of action.

We did, however, feel that there were some important ways in which the government could improve the use of the Internet in political campaigns. We listed three areas for possible action:

1. The government should look for ways to expand access to the Internet for those who lack it – for example, through libraries, schools and technology centers;
2. The government should explore ways to improve access to meaningful campaign finance information by increasing the interoperability of campaign finance sites throughout the state; and
3. The FPPC could commission a study of the role of web portals and search engines.

Since these three areas may well remain important, it may be useful to say a few more words about each of them.

First, while the number of people with access to the Internet continues to increase, access is far from universal. A study released last month by the National

Telecommunication and Information Administration and the U. S. Census Bureau reported that about a third of California homes still don't have Internet access. Yet the importance of the Internet as a source of political information and campaigning has continued to grow. If the figures released by the Pew Center and the NTIA are both accurate, the need for greater Internet access seems clear. The FPPC should explore ways to address the needs of those Californians who still lack easy Internet access.

Second, the FPPC is committed to collecting and increasing access to campaign finance information. Yet in California as in other states, crucial information is collected at the local as well as the state level. In many cases, for example, a candidate for state office will also be collecting money for a local campaign or through a local committee. Voters, reporters, activists and rival campaigns all have an interest in understanding the implications of donations at every level. But as of the time we wrote our report in late 2003, it was very difficult to locate or collect all of that data from diverse government entities. To achieve the goals of the Act, the FPPC should look at ways to allow that information to be easily accessed and aggregated.

Third, we were concerned about the ways in which the algorithms used by web portals and search engines could, perhaps unintentionally, affect access to information about candidates and campaigns. According to a Pew study, the number of people using search engines increased from one-third in 2002 to one-half in 2008; they are becoming indispensable gateways—or roadblocks—to information on the net. The effort to manipulate what search engines turn up has become big business (and the subject of lawsuits) in the corporate world. So a study of this area by the FPPC might be extremely useful.

At this point, with the Commission's permission, I would like to highlight a couple of points from the testimony submitted by Deirdre Mulligan who was unable to be here in person. You have copies of her comments, I believe.

Professor Mulligan explains the contents and context of our Commission's work, stressing some vital points which I urge you to review. Importantly, she underlines our belief that the PRA is designed, in important part, to encourage greater political participation, that the Internet has created a remarkable vehicle for such participation, and that the FPPC should be careful not to adopt rules that discourage or criminalize

that activity. As a corollary, the participation of such individuals and groups provides voters with a much greater range of information about candidates and issues. She goes on to discuss ways in which YouTube and Facebook have been used by activists and advocacy groups as well as by political organizations. And she encourages the Commission to adopt proposals that the FPPC staff has advanced that would clarify the regulations that apply to such sites.

In sum, I am delighted that the FPPC is taking a fresh look at this area, hope that our report still provides some useful guidance, and urge you to read Professor Mulligan's testimony as you move forward.