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REGULATING THE POLITICAL WILD WEST: STATE EFFORTS TO DISCLOSE SOURCES OF ONLINE POLITICAL ADVERTISING

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Cover Page Footnote

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REGULATING THE POLITICAL WILD WEST: STATE EFFORTS TO DISCLOSE SOURCES OF ONLINE POLITICAL ADVERTISING

Victoria Smith Ekstrand* & Ashley Fox**

The problem of disinformation in online political advertising is growing, with ongoing and potential threats to campaigns coming from both within and outside the United States. Most scholarship in this area has focused on either disclosures and disclaimers under the proposed Honest Ads Act or other fixes aimed at a gridlocked Federal Election Commission (“FEC”). With federal reform at a standstill, states have jumped into the void. Between the 2016 presidential election and early 2020, eight states passed legislation to expressly regulate online political advertising for state candidates and ballot measures, including Maryland, whose state law was declared unconstitutional as applied to a group of media plaintiffs by a federal appellate court. This Article examines these state laws as well as the one federal appellate court opinion as a springboard for thinking about efforts at the national level to address the problem. We raise important considerations for future legislation in light of the appellate court decision. We propose that a law establishing independent record-keeping bodies, similar to those the state of New York has established for independent expenditure committees, is more likely to pass First Amendment scrutiny than a law requiring record-keeping of platforms or websites.

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INTRODUCTION

On February 16, 2018, U.S. Special Counsel Robert Mueller indicted thirteen Russians and three Russian organizations for interfering with the U.S. political and electoral process, including the 2016 presidential election.¹ The indictment spelled out “in exhaustive detail the breadth and systematic nature of this conspiracy, dating back to 2014, as well as the multiple ways in which Russian actors misused online platforms to carry out their clandestine operations.”² Part of the Russian disinformation campaign included “expenditures to carry out those activities,

¹ *Exposing Russia’s Effort to Sow Discord Online: The Internet Research Agency and Advertisements*, U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTEL., <https://intelligence.house.gov/social-media-content/> (last visited Dec. 28, 2020).

² *Id.*

including buying political advertisements on social media in the names of U.S. persons and entities.”³ The Russians purchased numerous ads on social media that promoted the accounts of disinformation groups on the newsfeeds of U.S. audience members as well as ads that attacked the Clinton campaign and promoted the Trump campaign.⁴ For example, the Russians promoted an account “Black Matters” calling for a “flash mob” of U.S. persons to “take a photo with #HillaryClintonForPrison2016 or #noHillary2016.”⁵ They also created ads for an Instagram account “Tea Party News,” asking U.S. persons to help them “make a patriotic team of young Trump supporters” by uploading photos with the hashtag “#KIDS4TRUMP.”⁶ The Mueller investigation and subsequent report prompted questions around a largely unregulated online political advertising landscape.

The problem of online political ads pushing disinformation is growing, according to experts, with ongoing and potential threats to campaigns from both within and outside the United States. From a First Amendment perspective, the problem is compounded by the emerging difficulty of distinguishing traditional, regulated political advertising from general, largely unregulated political content. In November 2019, the *New York Times* reported that a search for videos of Senator Kamala Harris revealed dozens of videos claiming Senator Harris is not an American citizen.⁷ Should such content be treated as traditional political advertising or as political content? Is pointing out the falsehoods enough in a growing environment of fake bots and trolls? The constitutionality of any potential regulation of online political ads begins with both defining the environment and the harms. But that task is difficult, as the lines between traditional political advertising and general political content continue to blur.

Furthermore, the threats posed by mis- and disinformation are increasingly coming from within the United States, according to researchers.⁸ That is in part because online political advertising is dominated by two American platforms: Google (37.2%) and Facebook (19.6%) “make up a majority of the online ad

³ Indictment at 4, *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018) (No. 18-cr-0032-2 (DLF)), <https://www.justice.gov/file/1035477/download>.

⁴ *Id.* at 18–19, 21–22, 25–27, 30.

⁵ SPECIAL COUNSEL ROBERT S. MUELLER, III, I REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 25 (2019).

⁶ *Id.*

⁷ Jonathan Martin et al., *How Kamala Harris’s Campaign Unraveled*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/us/politics/kamala-harris-2020.html>.

⁸ According to Paul Barrett, deputy director of New York University’s Stern Center for Business and Human Rights and author of a report showing an increasing threat from within the United States, “[i]t’s likely that there will be a high volume of misinformation and disinformation pegged to the 2020 election, with the majority of it being generated right here in the United States, as opposed to coming from overseas.” Alexandra S. Levine et al., *Why the Fight Against Disinformation, Sham Accounts and Trolls Won’t Be Any Easier in 2020*, POLITICO (Dec. 1, 2019, 6:49 AM), <https://www.politico.com/news/2019/12/01/fight-against-disinformation-2020-election-074422>; see also Sonam Sheth, “The Country is in a State of Trauma;” COVID-19 Has Made the US a Breeding Ground for Propoganda and a Goldmine for Foreign Spies, BUS. INSIDER (Apr. 24, 2020, 11:25 AM), <https://www.businessinsider.com/coronavirus-trump-us-disinformation-foreign-interference-2020-4> (reporting that Barrett “told Insider he’s seen an explosion of domestically sourced dis- and misinformation related to the [Covid-19] outbreak”).

market” in the United States and “accounted for 99% of the industry’s revenue growth” in 2016.⁹ According to one estimate in November 2019, more than \$67 million had been spent by the 2020 presidential candidates on Facebook, \$32 million on Google, and \$5.2 million on Twitter—all since the platforms and social media sites began tracking such purchases themselves in 2018 (see Figure One).¹⁰

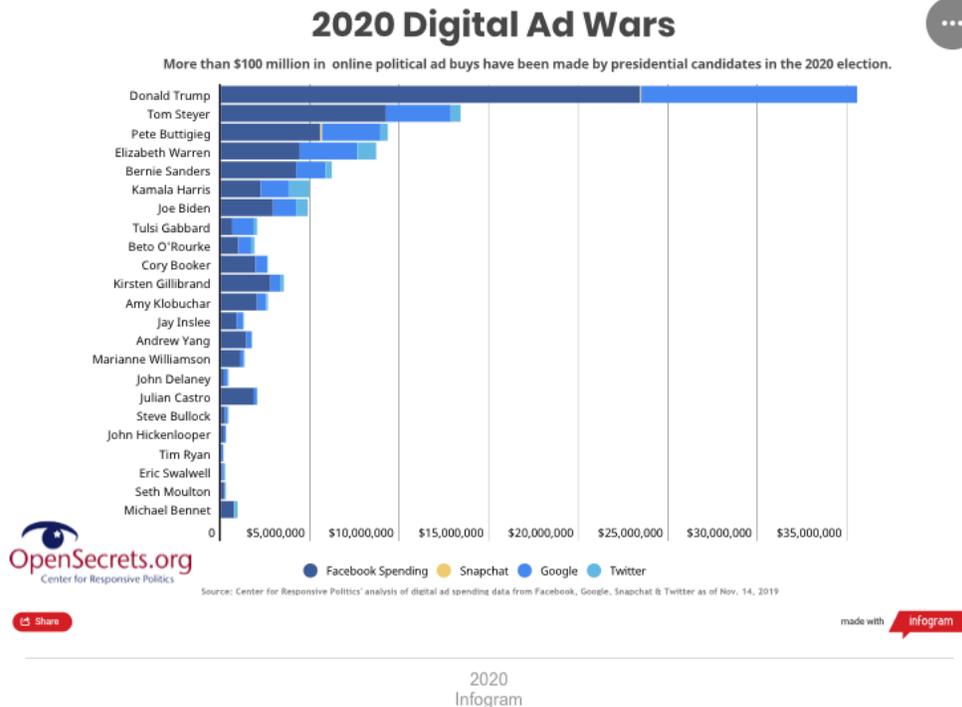


Figure One: 2020 Digital Ad Wars¹¹

With such explosive and unregulated growth in the online political ad market, the potential effect on future elections is both immediate and alarming.

Reaction to such threats has been swift, but actual movement to address the problem is slow and uncertain, due primarily to the scale of the problem, political gridlock, and debate about how best to address the problem. The platforms, particularly under fire since the Mueller investigation, have announced immediate changes. Twitter announced in fall 2019 it will reject all political advertising,¹²

⁹ Katherine Haenschen & Jordan Wolf, *Disclaiming Responsibility: How Platforms Deadlocked the Federal Election Commission's Efforts to Regulate Digital Political Advertising*, TELECOMM. POL'Y, Sept. 2019, at 1, <https://www.sciencedirect.com/science/article/pii/S0308596118304105>.

¹⁰ Anna Massoglia & Karl Evers-Hillstrom, *2020 Presidential Candidates Top \$100M in Digital Ad Spending as Twitter Goes Dark*, OPEN SECRETS (Nov. 14, 2019, 2:08 PM), <https://www.opensecrets.org/news/2019/11/digital-ad-spending-2020-presidential-candidates-top-100m/>.

¹¹ *Id.*

¹² Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), <https://twitter.com/jack/status/1189634360472829952>.

prompting criticism about exactly how political advertising will be defined.¹³ Facebook announced it will not fact-check political ads because of its commitment to free expression and an open marketplace of ideas.¹⁴ Facebook and Google announced plans to instead limit microtargeting, the process by which campaigns and interest groups send messages to small and highly selective groups of people.¹⁵ Critics say microtargeting contributes to voter manipulation, invasions of privacy, and voter exclusion.¹⁶ More broadly, the practice has been criticized for fragmenting a democratic commitment to the marketplace of ideas.¹⁷ Other platforms have made self-regulatory moves, but the industry-led moves change regularly with each new problem encountered (see Figure Two). The needs are immediate, but the potential solutions are too complicated to be effectively and immediately implemented by any one new platform, policy, or law.

¹³ Shannon C. McGregor, *Why Twitter's Ban On Political Ads Isn't as Good as it Sounds*, THE GUARDIAN (Nov. 4, 2019), <https://www.theguardian.com/commentisfree/2019/nov/04/twitters-political-ads-ban>.

¹⁴ Cecilia Kang & Mike Isaac, *Defiant Zuckerberg Says Facebook Won't Police Political Speech*, N.Y. TIMES (Oct. 17, 2019), <https://www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html>; see also Tony Romm, *Zuckerberg: Standing for Voice and Free Expression*, WASH. POST (Oct. 17 2019, 4:22 PM), <https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/>.

¹⁵ Alex Hern, *Facebook to Curb Microtargeting in Political Advertising*, THE GUARDIAN (Nov. 22, 2019, 1:50 PM), <https://www.theguardian.com/technology/2019/nov/22/facebook-to-curb-microtargeting-in-political-advertising>.

¹⁶ Frederik J. Zuiderveen Borgesius et al., *Online Political Microtargeting: Promises and Threats for Democracy*, 14 UTRECHT L. REV. 82, 87 (2018).

¹⁷ *Id.* at 89.

Platform political ad policies (US)
 Social networks and other online services take different approaches to political ads

Name	Allows political ads	Fact-checks ads	Has public ad database	Discloses ad buyer	Allows microtargeting	Verification of ad buyer	Public information on ad targeting or audience
Twitter	No						
Facebook	Yes	No (for politicians)	Yes	Yes	Yes	Government ID, residential address	Ad audience information
Snapchat	Yes	Yes	Yes	Yes	Yes	Seemingly no extra verification	Targeting information
Google	Yes	No	Yes	Yes	Starting in 2020, it will be limited	Government ID/SSN/FEC registration	Limited targeting information
TikTok	No						
Reddit	Yes (federal)	Yes	No	Yes	No (except subreddits)	FEC registration	No
Hulu	Yes	Yes	No	No	Yes	Yes	
Spotify	Yes	did not respond	No	did not respond	did not respond	did not respond	did not respond
Pandora	Yes	declined to comment	No	declined to comment	declined to comment	declined to comment	declined to comment
Pinterest	No						
LinkedIn	No						

Quartz | qz.com | Data: Quartz

Figure Two: Platform Political Ad Policies¹⁸

While political communication scholars have been actively writing about the problem of online political advertising for several years, legal scholars have just begun to focus on the issue.¹⁹ Most of the legal scholarship has been focused on the federal level, addressing either the proposed Honest Ads Act²⁰ or other fixes aimed at a gridlocked Federal Election Commission (“FEC”).²¹ With federal reform at a standstill, states have jumped into the void. Between the 2016 presidential election and early 2020, eight states passed legislation to expressly regulate online political advertising for state candidates and ballot measures,²² including Maryland, whose state law was declared unconstitutional as applied to a group of media plaintiffs by a federal appellate court.²³ The purpose of this Article is to examine these recent state

¹⁸ Hanna Kozłowska, *Each Platform’s Approach to Political Ads in One Table*, QUARTZ (Dec. 13, 2019), <https://qz.com/1767145/how-facebook-twitter-and-others-approach-political-advertising/>.

¹⁹ Scholarship about online political advertising in political communication is at least seven years old. See, e.g., Lisa Barnard & Daniel Kreiss, *A Research Agenda for Online Political Advertising: Surveying Campaign Practices, 2000–2012*, 7 INT’L J. COMM’N 2046, 2047 (2013). Scholarship in the legal literature about online political advertising is much more recent. See sources cited *infra* notes 64–76.

²⁰ S. 1989, 115th Cong. (2017); see also S. 1356, 116th Cong. (2019).

²¹ See Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421 (2018).

²² See *infra* Part II.

²³ Wash. Post v. McManus, 944 F.3d 506, 520–22 (4th Cir. 2019).

laws as well as the one federal appellate court opinion as a springboard for thinking about efforts at the national level to address the problem. We raise important considerations for future legislation in light of the appellate court decision.

This Article is divided into four parts. Part I briefly addresses the landscape of political advertising regulation and the new and growing literature on online political advertising. It assesses what other scholars have suggested about potential regulatory approaches. Part II analyzes the eight state laws designed to regulate online political advertising. Part III outlines the U.S. Court of Appeals for the Fourth Circuit decision addressing the constitutionality of Maryland's regulation. Part IV compares states' regulatory efforts and raises a series of questions that must be answered if online political ad regulation is to survive First Amendment scrutiny. Part V concludes with a few observations about this regulatory moment in campaign finance law in light of the Fourth Circuit's ruling and makes recommendations for future legislation.

I. THE LANDSCAPE OF POLITICAL ADVERTISING REGULATION

Political communication scholars have spent the last decade or more studying the growth of digital political advertising, electioneering, and campaign and issue-group microtargeting online. Legal scholars have only more recently focused on the new harms caused by the lack of online political advertising and electioneering oversight.²⁴ Scholars in both disciplines describe the landscape and nature of the problems, as well as the potential for expanding campaign finance regulation and/or industry self-regulation. An interdisciplinary approach to online political advertising will be critical to any regulatory effort. We maintain that such an approach is needed to effectively: (1) define the scope of online political advertising; (2) identify the specific harms that regulation might address; and (3) propose potential solutions that will pass constitutional muster and actually address the harms.

This Section proceeds as follows: First, it reviews important background material on federal campaign finance regulation and the nature and scope of online political advertising as defined by scholars. Any new rules for online ads will have to fit within a complicated, and already existing, campaign finance framework. Then, we address a discussion of the scholarly support for expanding campaign finance regulation to include online political advertising. Legal and political communication scholars mostly agree that such regulation should be considered; any disagreement is mostly about how to execute such a change and to what degree the platforms can self-regulate.

²⁴ See sources cited *infra* notes 64–76 and accompanying text.

A. DEFINITIONAL ISSUES, LEGAL TESTS, AND CAMPAIGN FINANCE LAW

The difference between protected political speech and regulated political advertising is one of the most difficult First Amendment needles scholars and regulators have attempted to thread over the last half-century. An unregulated marketplace of ideas for political advertising invites corrupt actors to spend limitless dollars and spread lies to the electorate, but an overly regulated one threatens core First Amendment values protecting political speech. Such core values encourage marketplace participants to debate about issues and candidates—precisely what the Framers had in mind. Under that model, lies about candidates and issues are debunked by effective counterspeech. The counterspeech doctrine is based on Justice Brandeis’ call to “expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education”²⁵ Here, “the remedy to be applied is more speech, not enforced silence.”²⁶

Scholars and observers, however, are increasingly skeptical of the counterspeech doctrine’s ability to expose mis- and disinformation online. Philip Napoli identifies several reasons for the diminished efficacy of counterspeech and the rise of mis- and disinformation, including: the death of local news; the low barriers and cheap costs of producing “fake news”; the rise of self-publishing, microtargeting, and echo chambers; and the speed and volume of online information.²⁷ Tim Wu argues that, “[w]hen listeners have highly limited bandwidth to devote to any given issue, they will rarely dig deeply, and they are less likely to hear dissenting opinions. In such an environment, [information] flooding can be just as effective as more traditional forms of censorship.”²⁸ Increasing discursive practices including online cancel culture,²⁹ in which speakers remove their support for others in response to objectionable behaviors or opinions, and the heckler’s veto,³⁰ by which speakers severely and substantially disrupt a speech or proceeding, also place pressure on the success of counterspeech.³¹

Against this backdrop is a decades-long struggle in the U.S. to define and regulate political advertising at large. This struggle largely begins with the Federal Election Campaign Act (“FECA”), passed in 1971, and amended in 1974.³² Together, FECA and its subsequent amendments created limits on campaign contributions and independent expenditures in an attempt to thwart corrosive influences.³³ FECA

²⁵ *Whitney v. California*, 274 U.S. 357, 377 (1927).

²⁶ *Id.*

²⁷ Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 *FED. COMM. COMM. L.J.* 57, 69–70, 85–86 (2018).

²⁸ Tim Wu, *Is the First Amendment Obsolete?*, *KNIGHT FIRST AMEND. INST.* (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>.

²⁹ *What It Means to Get ‘Canceled,’* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/cancel-culture-words-were-watching> (last visited Dec. 10, 2020).

³⁰ Zach Greenberg, *Rejecting the ‘Heckler’s Veto,’* *FIRE* (June 14, 2017), <https://www.thefire.org/rejecting-the-hecklers-veto/>.

³¹ Sanam Yar & Jonah Engel Bromwich, *Tales From the Teenage Cancel Culture*, *N.Y. TIMES* (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/style/cancel-culture.html>.

³² Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–30146).

³³ *See id.*

defines “federal election activity” to include a “public communication” (i.e., a broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank communication made to the general public) or “[a]ny other general public political advertising.”³⁴ Although political communication is generally protected by the First Amendment, the spending of money with “express advocacy”—the words “vote for,” “elect,” or “support”—may be limited under FECA.³⁵

Many groups, following FECA, found it easy to advocate for candidates without using these words. In 2002, the Bipartisan Campaign Reform Act (“BCRA”) strengthened election law by requiring disclosures from groups that run “electioneering communications”—essentially closing the loophole that groups had discovered after FECA.³⁶ An electioneering communication is “any broadcast, cable or satellite communication which refers to a clearly identified candidate for Federal office” and is made within either, thirty days of a primary election, or sixty days of a general election.³⁷ This widened the law to exclude the express advocacy requirement.

In 1976, the Supreme Court ruled on the constitutionality of FECA in *Buckley v. Valeo*.³⁸ While the Court upheld campaign contribution limits, it struck down limits on individual and interest-group expenditures, ruling that the limits would not thwart corruption and that spending was equivalent to speech, so the limits violated the First Amendment.³⁹ Importantly for our purposes, the Court also upheld FECA’s reporting and disclosure requirements, which required political committees to register with the FEC and keep records of expenditures and contributions.⁴⁰ The Court acknowledged that disclosure might infringe on First Amendment rights but applied an “exacting scrutiny” test that required the government to prove that its interest in regulating bear a “substantial relation” to the information disclosed.⁴¹

In *Buckley*, the Court identified three compelling state interests that justify campaign finance disclosure requirements, including (1) the information that disclosure provides to voters; (2) the deterrence of corruption and the “appearance of corruption”; and (3) the enforcement of campaign finance laws.⁴² The Supreme Court has continuously upheld this exacting scrutiny test in subsequent cases challenging BCRA disclosure requirements, such as in *McConnell v. FEC*⁴³ and *Citizens United*

³⁴ 52 U.S.C. § 30101(20), (22).

³⁵ *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976) (“This construction would restrict the application of [section] 608(e)(1) [of FECA] to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

³⁶ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(a), § 304, 116 Stat. 81, 89 (2002) (codified as amended at 52 U.S.C. § 30104(f)(3)).

³⁷ *Id.* § 304(f)(3).

³⁸ *Buckley*, 424 U.S. at 1.

³⁹ *Id.* at 44–49.

⁴⁰ *Id.* at 83.

⁴¹ *Id.* at 64.

⁴² *Id.* at 67–68.

⁴³ *McConnell v. FEC*, 540 U.S. 93 (2003).

v. FEC.⁴⁴ The broader topic of campaign finance disclosure typically encompasses what Abby Wood describes as two separate acts: disclosures and sponsorship disclaimers.⁴⁵ While disclosures often involve submitting finance reports to regulators, sponsorship disclaimers appear on political advertisements to identify the person or group who paid for the ads.⁴⁶ State and federal laws vary in the terminology that they use to describe sponsorship disclaimers. Various laws often refer to these “paid for by” statements as a “disclosure”⁴⁷ a “disclaimer,”⁴⁸ a “statement,”⁴⁹ an “identification requirement,”⁵⁰ or an “authority line.”⁵¹ To maintain consistency with previous scholarship and throughout this article, we use the term “sponsorship disclaimer,” to describe “paid for by” statements on political ads.

B. ONLINE POLITICAL ADVERTISING: HISTORY, DEFINITIONS, AND CALLS FOR REGULATION

The Bipartisan Campaign Reform Act (“BCRA”) did not include the internet as a form of “public communication” under federal campaign finance law,⁵² and it did not address the growth of “dark money” groups.⁵³ Nevertheless, the FEC required disclaimers for “(1) unsolicited emails that political committees sen[t] to more than 500 people[;] and (2) websites that political committees ma[d]e available to the public.”⁵⁴ In 2004, in *Shays v. FEC*,⁵⁵ a U.S. district court found the FEC’s exclusion of online political communication from “public communication” impermissible.⁵⁶ Following *Shays*, the FEC amended the definition of “public communication” to include paid internet advertising on someone else’s website.⁵⁷ But two subsequent FEC administrative orders and two Advanced Notice of Proposed Rulemaking (“ANPRM”) sessions in 2011 and 2016 did little to shed light on growing questions and concerns regarding online political advertising. With very few comments in

⁴⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴⁵ Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 13 (2018).

⁴⁶ *Id.*

⁴⁷ See, e.g., WYO. STAT. ANN. § 22-25-110 (West, Westlaw through Ch. 1-3 of 2020 Special Legis. Sess.).

⁴⁸ See, e.g., 11 C.F.R. § 100.11; COLO. REV. STAT. §§ 1-45-107.5(5), 1-45-108.3 (2019).

⁴⁹ See, e.g., 52 U.S.C. § 30120; N.J. STAT. ANN. § 19:44A-22.3 (West, Westlaw through L.2020, c. 127 and J.R. No. 2).

⁵⁰ See, e.g., VT. STAT. ANN. tit. 17, § 2972(a) (LEXIS through Act 150 of the 2019 (Adj. Sess.) and Municipal Act M-11 of the 2019 (Adj. Sess.)).

⁵¹ See, e.g., MD. CODE ANN., ELEC. LAW § 13-401 (West, Westlaw through all legislation from the 2020 Regular Session of the General Assembly).

⁵² Brian Beyersdorf, Note, *Regulating the “Most Accessible Marketplace of Ideas in History”: Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1074 (2019).

⁵³ See generally Wood, *supra* note 45.

⁵⁴ Beyersdorf, *supra* note 52, at 1074 (citing Internet Communications, 71 Fed. Reg. 18,600 (Apr. 12, 2006) (to be codified at 11 C.F.R. pt. 100, 110, 114)).

⁵⁵ *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004).

⁵⁶ *Id.* at 79 (“[T]he Court finds that . . . Congress intended all other forms of ‘general public political advertising’ to be covered by the term ‘public communication.’ What constitutes ‘general public political advertising’ in the world of the Internet is a matter for the FEC to determine.”).

⁵⁷ Beyersdorf, *supra* note 52, at 1075 (citing Public Communication, 11 C.F.R. § 100.26 (2018)).

either rulemaking session, the FEC did not issue a new rule, despite increasing concerns.⁵⁸

As Daniel Kreiss and Lisa Barnard point out, “the lines around what constitutes an online [political] ‘advertisement’ have continually shifted.”⁵⁹ It is not surprising, given this legal history, that there has been “considerable confusion in the literature around the terminology scholars use to describe online [political] advertising.”⁶⁰ While some legal and political communication scholars have called for a broad definition, others have seen value in defining the “distinctive aspects of online advertising: the ability to narrowly target voters and track the effectiveness of ads in meeting strategic electoral goals.”⁶¹ Indeed, Kreiss and Barnard define online political ads as “that which: (1) campaigns or other political actors produce as discrete components of wider strategic communications efforts[;] (2) involves systematically evaluating progress toward defined goals through data[;] and (3) is conducted by a group of specialists recognized as such by their peers.”⁶² They base this definition on the ways that practitioners themselves describe online ad practices.⁶³

Abby Wood and Ann Ravel, however, argue for a broader conception of online political advertising in the wake of problems surrounding the 2016 election.⁶⁴ They explain that online political advertising is a “problem of native political advertising and that the phenomenon benefits from a lack of campaign finance transparency online.”⁶⁵ These scholars detail the myriad of harms caused by bad actors leading up to the 2016 election. They describe studies of Facebook that concluded that 86% of groups running paid ads in the last six weeks before the election were suspicious groups (53%), astroturf movement groups (17.1%), and questionable news outlets (15.8%).⁶⁶ In defining online political advertising broadly, they called for regulators to:

[S]ave and post every version of every political communication placed online, whether video, print, or image, and whether placed “for a fee” or not. The communications should be placed on a dedicated and easy-to-locate page on the campaign's or group's website or user page on the platform, as well as on a dedicated page created by the platform. The communications should be stored in their entirety, and they should be posted along with a uniform set of data stored in a uniform format for easy analysis and comparison across campaigns, across platforms, and over time. The FEC should also retain this data, for longer term storage, and to ensure that it exists even when platforms change or cease to operate. In addition to the communication itself, the online political advertising repository should contain the

⁵⁸ *Id.* at 1080–81.

⁵⁹ Barnard & Kreiss, *supra* note 19, at 2047.

⁶⁰ *Id.* at 2048.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1228 (2018).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1230.

following data: when the communications ran; how much they cost to place and promote; candidates to which the communications refer; contested seat/issues mentioned; targeting criteria used; number of people targeted; and a platform-provided Audience [sic] identifier (“Audience ID”).⁶⁷

Wood and Ravel did not address either the practical or questionable legal feasibility of their idea, but such a proposal would require significant monitoring and oversight. The platforms themselves, as previously mentioned, have begun some of this monitoring on their own. Beyond the platforms, it is not clear how and who would be responsible for collecting such data, although the authors do propose that the U.S. Treasury’s Financial Crimes Enforcement Network would be a better fit than the FEC.⁶⁸ Other scholars have similarly detailed the incompetency of the FEC in recent years and called for a major overhaul of that administrative body.⁶⁹

Wood and Ravel are joined by a few other legal commentators in their call for new regulation. Millicent Usoro argued that despite anti-regulatory First Amendment jurisprudence in recent years, the First Amendment is not an automatic shield against regulation of a new medium.⁷⁰ She argued that throughout history, the Court has extended new rules to new media, particularly to protect national security and electoral interests.⁷¹ Irina Dykhne argued that online political ads should always have links to sponsorship disclaimers or “rollovers”⁷²—and that advertisers should be allowed to propose other technological ways to disclaim.⁷³ Additionally, Dykhne argued that ads containing 200 characters or more should be considered online ads and should not be eligible for FEC rules excluding small and impracticable items from disclaimer requirements.⁷⁴

Brian Beyersdorf wrote that platform self-policing will not be enough and supports the Honest Ads Act (“HHA”), which expands the definition of “public communication,” requires disclaimers and records for online ads, and prohibits foreign meddling.⁷⁵ Pichaya Winichakul wrote that the problem of online political advertising is primarily structural. She criticized the FEC for failing to:

[I]nitiate an enforcement action against the [Russian] Internet Research Agency for not disclosing \$100,000 spent on digital advertisements that did not carry a disclaimer, activities that existing FEC rules currently reach. Nor does the [HHA] address the FEC's nonenforcement of a provision well within the FEC's powers that prohibits the involvement of non-U.S. citizens in electoral activities. In other words,

⁶⁷ *Id.* at 1256.

⁶⁸ *Id.* at 1275.

⁶⁹ *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, *supra* note 21; see also Pichaya P. Winichakul, Note, *The Missing Structural Debate: Reforming Disclosure of Online Political Communications*, 93 N.Y.U. L. REV. 1387 (2018).

⁷⁰ Millicent Usoro, Note, *A Medium-Specific First Amendment Analysis on Controlled Campaign Finance Disclosure on the Internet*, 71 FED. COMM’NS L.J. 299 (2019).

⁷¹ *Id.* at 320–23.

⁷² A “rollover” disclaimer is a disclaimer statement that appears for a set period of time when a user holds their computer cursor over the advertisement. See Irina Dykhne, Note, *Persuasive or Deceptive? Native Advertising in Political Campaigns*, 91 S. CAL. L. REV. 339, 371 (2018).

⁷³ Dykhne, *supra* note 72, at 370–71.

⁷⁴ *Id.* at 370.

⁷⁵ Beyersdorf, *supra* note 52, at 1090.

it is already within the FEC's power to require the Internet Research Agency to disclose information about its funding sources and to punish the Internet Research Agency for failing to disclose.⁷⁶

While scholars and federal regulators disagree about responsibility and solutions, states have not waited to regulate.⁷⁷ Eight states now have statutes addressing sponsorship disclaimer and record-keeping requirements for online political advertising.⁷⁸ In a recent Fourth Circuit decision, one state's law has already been declared unconstitutional as applied to specific plaintiffs.⁷⁹

II. STATE EFFORTS TO REGULATE ONLINE POLITICAL ADVERTISING

Between the 2016 presidential election and early 2020, several states enacted new legislation or amended existing legislation on political advertising to regulate online political advertising for state candidates and ballot measures.⁸⁰ These legislative efforts primarily fall into two categories: (1) state laws that establish only sponsorship disclaimer requirements; and (2) state laws that establish both disclaimer requirements and additional record-keeping requirements that often include maintaining digital archives.⁸¹

A. STATES THAT ONLY HAVE SPONSORSHIP DISCLAIMER REQUIREMENTS

1. Colorado

In 2019, the Colorado General Assembly amended existing campaign finance legislation to include sponsorship disclaimers for “electioneering communications”⁸² and “independent expenditures”⁸³ that appear on a “website,

⁷⁶ Winichakul, *supra* note 69, at 1396 (alteration in original) (footnotes omitted).

⁷⁷ Kelly Born, *How States Are Experimenting with Digital Political Advertising Regulation: Interview with Campaign Legal Center's Erin Chlopak*, HEWLETT FOUND. (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/>.

⁷⁸ *See infra* Part II.

⁷⁹ Wash. Post v. McManus, 944 F.3d 506, 510 (4th Cir. 2019).

⁸⁰ Born, *supra* note 77.

⁸¹ *Id.*

⁸² Colorado law defines an “electioneering communication” as:

Any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that: (I) [u]nambiguously refers to a candidate; (II) [i]s broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and (III) [i]s broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

COLO. CONST. art. XXVIII, § 2(7)(a).

⁸³ Colorado law defines an “independent expenditure” as “an expenditure that is not controlled by or coordinated with any candidate or agent of such candidate.” *Id.* § 2(9).

streaming media service, or online forum.”⁸⁴ These disclaimers must state the purchaser’s name or the name of the purchaser’s “registered agent” (if the purchaser is not a “natural person”), using the language “paid for by.”⁸⁵ The statute provides an exception for when these disclaimers are not practical, stating that rules promulgated by the Secretary of State must require a hyperlink to a webpage containing the disclaimer.⁸⁶

2. Vermont

Vermont’s sponsorship disclaimer requirements for online political advertising apply to “electioneering communication[s].”⁸⁷ In May 2018, the Vermont General Assembly amended its existing political advertising laws to specifically include “mass electronic or digital communications” within the broader definition of “electioneering communication.”⁸⁸ Electioneering communications disseminated online must clearly state the name and, for all non-audio ads, the address of the candidate, person, or group that paid for the ads or the candidate, person, or group on whose behalf they were purchased.⁸⁹ Ads purchased by or on behalf of a political committee or political party must also list on the ad the names of donors who have contributed more than \$2,000 or 25% of the group’s total donations since the start of the current two-year election cycle.⁹⁰ Vermont includes one exception to these requirements: if following the disclaimer requirements would be impractical, the communication can instead hyperlink to a separate page containing the disclaimers.⁹¹

3. Wyoming

Wyoming’s online political advertising regulations only include sponsorship disclaimer requirements.⁹² In 2019, the Wyoming State Legislature amended the forms of political advertising that require disclaimers to include internet and electronic communications.⁹³ Political advertising distributed online and paid for by a candidate, candidate campaign committee, political action committee (“PAC”), political party committee, or other organization that makes electioneering communications or independent expenditures must state the name of the purchaser.⁹⁴ Wyoming also provides an exception for when incorporating disclaimers may be

⁸⁴ COLO. REV. STAT. §§ 1-45-107.5(5), 1-45-108.3 (2019).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ VT. STAT. ANN. tit. 17, § 2972(a). Vermont law defines an “electioneering communication” as “any communication [including digital communications] that refers to a clearly identified candidate for public office and that promotes or supports a candidate for that office or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate.” *Id.* § 2901(6).

⁸⁸ *Id.*

⁸⁹ *Id.* § 2972(a)–(b).

⁹⁰ *Id.* § 2972(c)(1).

⁹¹ *Id.* § 2972(d).

⁹² WYO. STAT. ANN. § 22-25-110.

⁹³ *Id.*

⁹⁴ *Id.* § 22-25-110(a).

unworkable because of the advertisement’s size or text restrictions by stating that the disclaimer may instead be given via a hyperlink to a separate webpage.⁹⁵

B. STATES WITH BOTH SPONSORSHIP DISCLAIMER REQUIREMENTS AND RECORD-KEEPING REQUIREMENTS

1. California

California updated its laws on online political advertising in October 2019.⁹⁶ California regulates online political ads under a somewhat complex statutory scheme and discusses advertising using the terms “electronic media advertisements” and “online platform disclosed advertisements.”⁹⁷ Although California does not seem to define “electronic media advertisement,” the state defines an “online platform disclosed advertisement” as either (1) “[a] paid electronic media advertisement on an online platform” that allows for user-generated content, “unless all advertisements on the platform are video advertisements that can comply” with the sponsorship disclaimer requirements for videos; or (2) “[a] paid electronic media advertisement on an online platform that is not . . . [a] graphic, image, animated graphic, or animated image” that can link to a separate website containing the required disclaimer or a “[v]ideo, audio, or email.”⁹⁸ Disclaimer requirements for online political advertising in California vary slightly based on who paid for the ad, whether the ad discusses a candidate or a ballot measure, and the medium of the ad.⁹⁹ Although the statutory language of California’s political advertising laws is fairly complex, the California Fair Political Practices Commission provides numerous compliance resources for parties purchasing political ads, including online political ads that are not “online platform disclosed advertisements.”¹⁰⁰

First, candidate committees are not required to include disclaimers on all electronic media advertisements they disseminate for that candidate’s own election.¹⁰¹ However, the California Fair Political Practices Commission recommends that candidate committees state the committee’s name and committee ID number and notes that a “paid for by” disclaimer is required for paid social media ads.¹⁰²

⁹⁵ *Id.* § 22-25-110(a)(iv).

⁹⁶ 2019 Cal. Legis. Serv. ch. 558 (A.B. 864) (West) (codified at CAL. GOV’T CODE §§ 84305, 84501–84503, 84504.2–84504.6, 84511, 85704 (West, Westlaw through ch. 372 of 2020 Reg. Sess.)).

⁹⁷ CAL. GOV’T CODE § 84504.6(a).

⁹⁸ *Id.* § 84504.6(a)(2)(A).

⁹⁹ *Id.* § 84504.3.

¹⁰⁰ *Campaign Advertising - Requirements & Restrictions*, CAL. FAIR POL. PRACS. COMM’N, <http://www.fppc.ca.gov/learn/campaign-rules/campaign-advertising-requirements-restrictions.html> (last visited Dec. 30, 2020).

¹⁰¹ CAL. FAIR POL. PRACS. COMM’N, POLITICAL ADVERTISING DISCLOSURES: COMMUNICATIONS BY CANDIDATE COMMITTEES FOR THEIR OWN ELECTION (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_1_Final%20V.1.pdf.

¹⁰² *Id.* at 3.

Committees other than candidate or political party committees that purchase non-video electronic media ads with graphic elements or animation must state the name of the committee and link to a separate webpage that states the committee's top donors and is available for thirty days after the election.¹⁰³ Disclaimers for independent expenditures that support or oppose a candidate must include a statement indicating that no candidate or candidate committee authorized the ad.¹⁰⁴

Candidate and political party committees that purchase non-video electronic media ads with graphic elements or animation and support or oppose a ballot measure must state the committee's name.¹⁰⁵ If the ad also qualifies as an independent expenditure, it must link to a separate webpage that includes the committee's name.¹⁰⁶ This page must be available for thirty days after the election.¹⁰⁷ If the ad was purchased by an independent expenditure supports or opposes a candidate, it must include a statement indicating that no candidate or candidate committee authorized the ad.¹⁰⁸

Those purchasing audio and video electronic media ads are directed to follow separate, but analogous, disclaimer requirements in place for all audio and video ads.¹⁰⁹ Audio ads purchased by a candidate committee or political party committee must state the name of the committee.¹¹⁰ Committees, other than candidate

¹⁰³ CAL. GOV'T CODE §§ 84503, 84504.3(a)(1)–(b), 84504.3(e); *see also* CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURES: ALL NON-INDEPENDENT EXPENDITURE ADS (EXCEPT ADS BY CANDIDATES AND POLITICAL PARTY COMMITTEES) (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_6_Final%20V.1.pdf; CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURE: INDEPENDENT EXPENDITURE ADS ON BALLOT MEASURES (EXCEPT ADS BY CANDIDATES AND POLITICAL PARTY COMMITTEES) (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_3_Final%20V.1.pdf; CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURES: INDEPENDENT EXPENDITURE ADS ON CANDIDATES (EXCEPT ADS BY CANDIDATES AND POLITICAL PARTY COMMITTEES) (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_2_Final%20V.1.pdf.

¹⁰⁴ CAL. GOV'T CODE § 84504.3(a)–(b), 84506.5.

¹⁰⁵ *Id.* § 84504.3(a)(2)–(b); *see also* CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURES: ALL NON-INDEPENDENT EXPENDITURE ADS BY CANDIDATES AND POLITICAL PARTY COMMITTEES (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_7_Final%20V.1.pdf; CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURES: INDEPENDENT EXPENDITURE ADS ON BALLOT MEASURES BY CANDIDATES AND POLITICAL PARTY COMMITTEES (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_4_Final%20V.1.pdf [hereinafter ADS ON BALLOT MEASURES BY CANDIDATES AND POLITICAL PARTY COMMITTEES]; CAL. FAIR POL. PRACS. COMM'N, POLITICAL ADVERTISING DISCLOSURES: INDEPENDENT EXPENDITURE ADS ON CANDIDATES BY CANDIDATES AND POLITICAL PARTY COMMITTEES (2020), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/2020%20Disclaimers_5_Final%20V.1.pdf.

¹⁰⁶ CAL. GOV'T CODE § 84504.3(b)(2); *see also* ADS ON BALLOT MEASURES BY CANDIDATES AND POLITICAL PARTY COMMITTEES, *supra* note 105.

¹⁰⁷ CAL. GOV'T CODE § 84504.3(e).

¹⁰⁸ *Id.* §§ 84504.3(a)(2)(A)–(b)(2), 84506.5.

¹⁰⁹ *Id.* § 84504.3(f)–(g).

¹¹⁰ *Id.* §§ 84502(a)(2), 84504(a), 84504.3(f).

committees and political party committees, who purchase audio electronic media ads must follow these same requirements, in addition to stating the committee's top contributors.¹¹¹ If the ad is also an independent expenditure supporting a candidate, it must state that a candidate or candidate committee did not authorize the ad.¹¹² The disclaimers required for video electronic media ads are largely the same as those required for audio ads.¹¹³

California imposes separate requirements for platforms hosting "online platform disclosed advertisements."¹¹⁴ In California, platforms subject to these requirements include any "public-facing internet website, web application, or digital application . . . that sells advertisements directly to advertisers" unless the website or application "displays advertisements that are sold directly to advertisers through another online platform."¹¹⁵ First, platforms are required to either place a disclaimer next to the ad with the name of the committee that paid for it or link to a webpage with the committee's name using a separate button.¹¹⁶ Second, when a committee has spent more than \$500 on ad space from that platform in the past year, the platform is required to keep publicly accessible records about ads from that committee.¹¹⁷ These records must include copies of the ad, the number of impressions the ad received, the date and time the ad was first displayed, the date and time the ad was last displayed, the cost of the ad, the candidate or ballot measure that is the subject of the ad, and the name and ID number of the purchasing committee.¹¹⁸ These records must be kept by the platform for four years.¹¹⁹

2. New Jersey

The New Jersey Legislature amended the state's political advertising laws in 2019 to apply to "internet and digital" political advertising purchased by any person or group.¹²⁰ Under the law, internet and digital ads (1) "promoting the nomination, election or defeat of any candidate or providing political information on any candidate"; (2) promoting "the passage or defeat of any public question or providing political information on any public question"; or (3) promoting "the passage or defeat of legislation or regulation in the case of an independent expenditure committee" must state the name and address of the ad's purchaser.¹²¹ Additionally, ads that are not

¹¹¹ *Id.* §§ 84503(a), 84504, 84504.3(f).

¹¹² *Id.* §§ 84504(a)–(b), 84506.5.

¹¹³ *See id.* §§ 84502(a)(1)–(2), 84503(a), 84504.1(a)–(c), 84504.5.

¹¹⁴ *Id.* § 84504.6.

¹¹⁵ *Id.* § 84504.6(a)(1).

¹¹⁶ *Id.* § 84504.6(c).

¹¹⁷ *Id.* § 84504.6(d)(1).

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 84504.6(d)(2).

¹²⁰ N.J. STAT. ANN. §§ 19:44A-22.3(a)–(b), 19:44A-22.3(e).

¹²¹ *Id.* § 19:44A-22.3(a)–(b).

made in coordination with a candidate or someone acting on a candidate's behalf must state that independent status on the ad itself.¹²²

In New Jersey, parties that are paid to disseminate political advertising must keep a copy of the ad and the name and address of the ad's purchaser, as well as either "the number of copies made or the dates and times" the ad was distributed.¹²³ These records must be publicly available for two years, but there is no requirement that these records be made available online.¹²⁴

3. New York

In 2018, New York enacted the Democracy Protection Act to incorporate online political advertising into the state's definition of regulated political communication.¹²⁵ The New York State Assembly further amended the law in November 2019, and these amended requirements became effective starting in January 2020.¹²⁶ Under the amended law, digital political communications purchased by a political committee must state that the ad was "paid for by" that committee.¹²⁷ New York's sponsorship disclaimer requirement also includes an exception¹²⁸: If the ad is too small to include the disclaimer, the required information may be provided by a hyperlink to a separate webpage.¹²⁹ In addition to stating the name of the ad's purchaser using the "paid for by" language, internet and digital advertisements that also qualify as an independent expenditure must state that the ad was not "expressly authorized or requested" by a candidate.¹³⁰

Although New York imposes record-keeping requirements for online political advertisements made by independent expenditure committees, New York is unique in that the responsibility for maintaining publicly accessible databases falls to the New York State Board of Elections rather than online platforms disseminating political ads.¹³¹ In this database, the Board maintains copies of the ad, scripts of any audio or video elements, descriptions of any visual elements, screenshots of ads without audio or video elements, and individual images for ads with animated elements.¹³² These records are maintained for five years.¹³³

¹²² *Id.* § 19:44A-22.3(b)–(c).

¹²³ *Id.* § 19:44A-22.3(d).

¹²⁴ *Id.*

¹²⁵ N.Y. ELEC. LAW §§ 14-106, 14-107 (McKinney, Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 347).

¹²⁶ 2019 N.Y. Sess. Laws ch. 454 (A. 4668) (codified at N.Y. ELEC. LAW §§ 14-106, 14-107, 14-126 (McKinney, Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 347)).

¹²⁷ N.Y. ELEC. LAW § 14-106(2).

¹²⁸ *Id.* § 14-106(4).

¹²⁹ *Id.*

¹³⁰ *Id.* § 14-107(2).

¹³¹ *Id.* § 14-107(5-a).

¹³² N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.11(c) (Westlaw through amendments included in the New York State Register, Volume XXII, Issue 52 dated December 30, 2020).

¹³³ ELEC. § 14-107(5-a).

4. Washington

Washington amended its laws regulating political advertising in 2018.¹³⁴ The laws apply to three categories of advertising: political advertising,¹³⁵ electioneering communications,¹³⁶ and independent expenditures.¹³⁷ Each of these categories includes digital communications.¹³⁸ Online political advertisements must state the purchaser's name and address.¹³⁹ If political advertising or a series of political ads is paid for by a committee, supports or opposes a ballot measure, and costs \$1,000 or more, the ad must also state the committee's top five contributors and, if a top contributor is a separate PAC, the top three contributors to that PAC.¹⁴⁰ Additionally, if a candidate in a partisan election associates himself with a political party in a declaration of candidacy, that party designation must also be included in the disclaimer.¹⁴¹

Online political ads that also qualify as electioneering communications or independent expenditures and are purchased by someone other than a political party are required to make additional disclaimers.¹⁴² First, these ads must state that “[n]o candidate authorized this ad” and include the address of the purchaser in addition to the purchaser's name.¹⁴³ If the ad was paid for by a political committee, it must also state the person or entity that established, controls, or maintains the committee as well as the committee's top five contributors and top three donors to PAC contributors, no matter the cost of the advertising.¹⁴⁴

Washington requires “commercial advertiser[s]” that place ads to maintain publicly accessible records about those ads and to provide records related to the ads to the Washington State Public Disclosure Commission upon request.¹⁴⁵ The state

¹³⁴ WASH. REV. CODE § 42.17A.005 (2019) (West, Westlaw through all legislation from the 2020 Regular Session of the Washington Legislature).

¹³⁵ Washington defines “political advertising” as “any advertising displays [including digital] used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.” *Id.* § 42.17A.005(40).

¹³⁶ Washington defines “electioneering communication” as including any digital communication that “clearly identifies a candidate for a state, local, or judicial office,” is distributed “within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election,” and “has a fair market value or cost of one thousand dollars or more.” *Id.* § 42.17A.005(21).

¹³⁷ Washington defines “independent expenditure” as including political advertising “made in support or opposition to a candidate for office by a person who is not [a] candidate for that office, [a]n authorized committee of that candidate for that office, [or] [a] person who has received the candidate's encouragement or approval to make the expenditure.” *Id.* § 42.17A.005(30)(i). The expenditure must also be made without collaboration with the candidate it supports or opposes, specifically name the candidate or otherwise clearly identify them, and either alone or combined with other expenditures purchased by the same person, cost \$1,000 or more. *Id.* § 42.17A.005(30)(ii)–(iv).

¹³⁸ *Id.* §§ 42.17A.005(21), 42.17A.005(29), 42.17A.005(40).

¹³⁹ *Id.* § 42.17A.320(1).

¹⁴⁰ *Id.* §§ 41.17A.320(6), 42.17A.350.

¹⁴¹ *Id.* § 41.17A.320(1).

¹⁴² *Id.* § 41.17A.320(2).

¹⁴³ *Id.* § 41.17A.320(2)(a).

¹⁴⁴ *Id.* §§ 41.17A.320(2)(b)–(c); 42.17A.350(1)–(2).

¹⁴⁵ *Id.* § 41.17A.345(1)–(2).

broadly defines “commercial advertiser” as “any person that sells the service of communicating messages.”¹⁴⁶ The records must include the names and addresses of ad purchasers, the “exact nature and extent of the services” provided to ad purchasers by the platform, and the cost of the platform’s services.¹⁴⁷ However, there is no requirement that these records be available online.¹⁴⁸

5. Maryland

In 2018, the Online Electioneering Transparency and Accountability Act amended Maryland’s existing political advertising laws to include “qualifying paid digital communication[s]”¹⁴⁹ within the definition of regulated “campaign material[s].”¹⁵⁰ Maryland requires qualifying paid digital communications that are distributed by a “campaign finance entity” to state the name and address of the entity’s treasurer and all entities for which that person is serving as treasurer.¹⁵¹ Other parties that pay for qualifying political ads must state that party’s name and address.¹⁵² However, under both of these scenarios, ads may omit addresses that are already filed with the State or a local board of elections.¹⁵³ Qualifying paid digital communications that are not authorized by a candidate must also state that fact.¹⁵⁴

Maryland law also imposes record-keeping requirements on platforms who disseminate qualifying paid digital communications.¹⁵⁵ Under the law, platforms are required to maintain publicly accessible, online databases containing different information about the ads depending on who purchased them.¹⁵⁶ For ads bought by a political committee, platforms must record the purchaser’s name and contact information, the committee’s treasurer, and the amount paid.¹⁵⁷ For ads bought by an ad network, platforms must record the network’s contact information and include a hyperlink to the contact page of the network’s website.¹⁵⁸ For ads bought by someone other than a political committee or an ad network, platforms must record the purchaser’s name and contact information, the amount paid, and the name of anyone

¹⁴⁶ *Id.* § 42.17A.005(10).

¹⁴⁷ *Id.* § 41.17A.345(1).

¹⁴⁸ *Id.* § 41.17A.345.

¹⁴⁹ Maryland defines “qualifying paid digital communication” as “any electronic communication that: (1) is campaign material; (2) is placed or promoted for a fee on an online platform; (3) is disseminated to 500 or more individuals; and (4) does not propose a commercial transaction.” MD. CODE ANN., ELEC. LAW § 1-101(II-1) (West, Westlaw through all legislation from the 2020 Regular Session of the General Assembly).

¹⁵⁰ *Id.* § 13-405. Maryland defines “campaign material” as “any material [including qualifying paid digital communications] that (i) contains text, graphics, or other images; (ii) relates to a candidate, a prospective candidate, or the approval or rejection of a question or a prospective question; and (iii) is published, distributed, or disseminated.” *Id.* § 1-101(k)(1)–(2).

¹⁵¹ *Id.* § 13-401(a)(1)(i).

¹⁵² *Id.* § 13-401(a)(1)(ii).

¹⁵³ *Id.* § 13-401(a)(2).

¹⁵⁴ *Id.* § 13-401(b).

¹⁵⁵ *Id.* § 13-405(b).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* § 13-405(b)(6)(i).

¹⁵⁸ *Id.* § 13-405(b)(6)(iii).

that controls the purchaser, like a CEO.¹⁵⁹ These records should be collected within forty-eight hours of the ad's purchase and kept for one year following the next general election.¹⁶⁰ If the ad has not yet been paid for, platforms can request a waiver from the Maryland State Board of Elections to expand the two-day collection period to seven days.¹⁶¹ However, platforms seeking a waiver must explain why compliance would present an "unreasonable burden" and note how the platform will comply in the future.¹⁶² Platforms cannot apply for more than one waiver or apply for a waiver within thirty days of an election.¹⁶³

In addition to these record-keeping requirements, platforms disseminating qualifying paid digital communications are required to provide the State Board of Elections with information about the candidate or ballot issue discussed in the ad, whether the ad "support[ed] or oppos[ed] that candidate or ballot issue," the first date and time the ad was distributed, the last date and time the ad was distributed, a copy of the ad, the geographic location and audience targeted, and the number of times the ad was viewed.¹⁶⁴ Similar to platforms' other record-keeping requirements, this information should be available to the State Board within forty-eight hours of when the ad is distributed and kept by the platform for one year following the next general election.¹⁶⁵

What qualifies as a platform subject to the law's record-keeping requirements is broad. Under the Act, a "platform" is a "public-facing website, web application, or digital application, including a social network, ad network, or search engine, that (1) has 100,000 or more unique monthly United States visitors or users for a majority of months during the [past year]; and (2) receives payment for qualifying paid digital communications."¹⁶⁶ In December 2019, the Fourth Circuit concluded that Maryland's requirements for platforms that disseminate online political advertising were unconstitutional as applied to a group of media plaintiffs.¹⁶⁷

III. FIRST AMENDMENT CHALLENGE TO MARYLAND'S LEGISLATIVE EFFORTS

In December 2019, the U.S. Court of Appeals for the Fourth Circuit ruled that the responsibilities Maryland's online political advertising law imposed on online platforms were unconstitutional as applied to a group of media plaintiffs, including the *Washington Post* and the *Baltimore Sun*, among others.¹⁶⁸ Although the Fourth Circuit determined that Maryland had significant interests in preventing foreign election interference, encouraging an informed public, and discouraging corruption,

¹⁵⁹ *Id.* § 13-405(b)(6)(ii).

¹⁶⁰ *Id.* § 13-405(b)(3).

¹⁶¹ *Id.* § 13-405(b)(5)(i)–(v).

¹⁶² *Id.*

¹⁶³ *Id.* § 13-405(b)(5)(iii).

¹⁶⁴ *Id.* § 13-405(c)(3).

¹⁶⁵ *Id.* § 13-405(c)(2).

¹⁶⁶ *Id.* § 1-101(dd-1).

¹⁶⁷ *Wash. Post v. McManus*, 944 F.3d 506, 510 (4th Cir. 2019).

¹⁶⁸ *Id.*

the law's requirements for online platforms were not sufficiently tailored to pass either strict or exacting constitutional scrutiny.¹⁶⁹

The Fourth Circuit characterized the law's requirements for online platforms as falling into two separate categories.¹⁷⁰ First, the law imposed a "publication requirement" that obligated plaintiffs to create and maintain publicly accessible online databases with information about the ads that they run on their platforms.¹⁷¹ Second, the law imposed an "inspection requirement" that obligated plaintiffs to make records of ad purchasers available to the Maryland Board of Elections.¹⁷² The Maryland Attorney General can seek injunctive relief to have the ad pulled from the platform if the platform does not follow either of these provisions.¹⁷³ Platforms may also face criminal penalties, including a \$250 fine or up to thirty days in prison, for failing to comply with an injunction that orders an ad's removal.¹⁷⁴

According to the Fourth Circuit, the two provisions implicated the First Amendment's protection against compelled speech.¹⁷⁵ The Fourth Circuit concluded that both the publication and inspection requirements compelled political speech for two reasons.¹⁷⁶ First, by requiring the plaintiffs to make certain information available to the public and to state regulators, the provisions "forc[ed] elements of civil society to speak when they otherwise would have refrained," thereby contradicting the long-standing First Amendment tradition that "freedom of speech 'includ[ed] both the right to speak freely and the right to refrain from speaking at all.'"¹⁷⁷ Second, the Fourth Circuit concluded that these provisions implicated the plaintiffs' First Amendment right against compelled speech, which, for these particular media plaintiffs, also implicated the right to anonymous speech by compelling these plaintiffs to identify an ad purchaser.¹⁷⁸ Overall, the court concluded that both provisions "pose[] a real risk of either chilling speech or manipulating the marketplace of ideas."¹⁷⁹

While the Supreme Court has repeatedly upheld disclosure requirements placed on the ad purchasers themselves, the Fourth Circuit concluded that Maryland's requirements for platforms were fundamentally different because they burdened the speech of third parties rather than political actors that are "direct participants in the political process."¹⁸⁰ Specifically, requirements placed directly on ad purchasers burden speech without preventing speech entirely because direct purchasers are incentivized to keep advertising as a tool for reaching voters in an election.¹⁸¹ In contrast, online platforms, like the plaintiffs here, do not have that same incentive,

¹⁶⁹ *Id.* at 520, 523.

¹⁷⁰ *Id.* at 511.

¹⁷¹ *Id.* at 512.

¹⁷² *Id.*

¹⁷³ *Id.* at 514.

¹⁷⁴ MD. CODE ANN., ELEC. LAW §§ 13-405.1(b)(4), 13-605(b) (West, Westlaw through all legislation from the 2020 Regular Session of the General Assembly).

¹⁷⁵ *McManus*, 944 F.3d at 514–15.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (quoting *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2463 (2018)).

¹⁷⁸ *Id.* at 515.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 516.

¹⁸¹ *Id.*

and, as a result, the burdens imposed by these requirements could lead platforms to simply not accept political advertising for Maryland candidates and ballot measures.¹⁸² According to the court, this self-censorship results because Maryland's requirements place a financial burden on platforms: They could make a higher profit selling other types of advertising that do not require record-keeping, and the requirements open platforms up to legal liability.¹⁸³ Consequently, political advertising may be shut out of the online marketplace of ideas, which could hurt candidates seeking election.¹⁸⁴ For instance, one candidate for Maryland's House of Delegates noted that his campaign was hindered by Google's policy of not accepting political advertising for Maryland candidates and ballot measures.¹⁸⁵

The Fourth Circuit also explained that by compelling disclosure of this information about ads and ad purchasers through the publication requirement, the law "intru[des] into the function of editors and forces news publishers to speak in a way they would not otherwise."¹⁸⁶ Additionally, the court found that the inspection requirement compelling plaintiffs to make this information available to the state government created an "unhealthy entanglement" between the state and news organizations.¹⁸⁷ Thus, in the court's view, the inspection requirement "lack[ed] any readily discernable limits on the ability of government to supervise the operations of the newsroom."¹⁸⁸ The Fourth Circuit rejected Maryland's argument that plaintiffs may simply "opt-out" of the obligations imposed by the provisions by refusing to accept regulated advertisements, stating "when a private entity, let alone a newspaper, decides to host political speech, its First Amendment protections are at their apex. To contend that news outlets forgo some of their free speech rights by accepting political speech turns the First Amendment on its head."¹⁸⁹

The parties disagreed over whether the law should be subject to strict or exacting scrutiny, and the Fourth Circuit declined to reach a conclusion on that point.¹⁹⁰ While strict scrutiny requires a law to be "narrowly tailored" to serve a "compelling" government interest,¹⁹¹ the slightly lower standard of exacting scrutiny requires that compelled disclosures have a "substantial relation" between the governmental interest and the information required to be disclosed.¹⁹² Although the Fourth Circuit did not determine whether strict or exacting scrutiny applied here, the court concluded

¹⁸² *Id.* at 516–17.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 517.

¹⁸⁶ *Id.* at 518 (alteration in original) (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 518–19.

¹⁸⁹ *Id.* at 518.

¹⁹⁰ *Id.* at 520.

¹⁹¹ *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

¹⁹² *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (footnote omitted) (quoting *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963)) (citing *Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968)).

that the law was insufficiently tailored to meet the lower standard of exacting scrutiny for two reasons.¹⁹³ First, Maryland failed to show that foreign election interference occurred on news sites like those operated by the plaintiffs.¹⁹⁴ Second, Maryland similarly failed to recognize that different-sized platforms had varying levels of vulnerability to foreign election interference, and the court specifically noted that while platforms like Facebook were more susceptible to interference, there was insufficient evidence to show that large platforms like Facebook and smaller platforms operated by the plaintiffs needed the same level of regulatory oversight.¹⁹⁵ Ultimately, the Fourth Circuit was clear in limiting its holding to the specific facts and plaintiffs of this case.¹⁹⁶ However, the decision raises numerous questions regarding how states should craft and justify legislation seeking to regulate online political advertising.

IV. ONLINE POLITICAL ADVERTISING AND RESPONSIBILITY FOR DISCLOSURE AND TRANSPARENCY

Currently, political advertising that occurs online is often described as “the political equivalent of the Wild West without sheriffs.”¹⁹⁷ Although candidates regularly use online media to distribute political advertising, numerous loopholes exist in federal law that allow online political advertising to go unregulated.¹⁹⁸ In response to Russian interference in the 2016 presidential election, the proposed Honest Ads Act seeks to close this regulatory gap at the federal level by expanding the scope of political ads that require disclaimers to include online political ads.¹⁹⁹ The bill also requires that platforms hosting online political ads maintain publicly accessible databases containing records of the ads and their purchasers when an ad purchaser spends more than \$500 on ad space during the calendar year.²⁰⁰ Despite being introduced in the U.S. Senate twice in the past three years, no action has been taken on the proposed legislation.²⁰¹

While federal legislative action remains at a stalemate, several states have taken action since the 2016 presidential elections to increase disclosure and transparency in online political advertising for state candidates and ballot measures.²⁰² Although each state defines the types of political advertising that are covered slightly differently, in general these state statutes include either disclaimer requirements, or both disclaimer requirements and additional record-keeping requirements that

¹⁹³ Wash. Post v. McManus, 944 F.3d 506, 520–21 (4th Cir. 2019).

¹⁹⁴ *Id.* at 521–22.

¹⁹⁵ *Id.* at 522.

¹⁹⁶ *Id.* at 513.

¹⁹⁷ Beyersdorf, *supra* note 52, at 1064.

¹⁹⁸ See Wood & Ravel, *supra* note 64, at 1227.

¹⁹⁹ S. 1356, 116th Cong. §§ 5–6 (2019).

²⁰⁰ *Id.* § 8.

²⁰¹ See *Actions Overview S. 1989 – 115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1989/actions> (last visited Jan. 7, 2021); *Actions Overview S. 1356 – 116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1356/actions> (last visited Jan. 7, 2021).

²⁰² Born, *supra* note 77.

typically fall on the platform hosting the ads.²⁰³ Of the eight states that have directly addressed online political advertising, five have established both disclaimer and record-keeping requirements, with Colorado, Vermont, and Wyoming opting to only implement disclaimer requirements.²⁰⁴ These state laws are designed to increase transparency surrounding online political advertising, and, although the state laws are quite similar, the nuanced differences among them, along with the Fourth Circuit's decision in *McManus*, highlight unanswered questions about what that transparency should look like and who is responsible for creating it.

The disclaimer requirements for online political ads are fairly similar across all eight states, and, generally, they require that the ad state the name and, sometimes, address of the ad's purchaser.²⁰⁵ This largely fits within our traditional conception of what political advertising sponsorship disclaimers look like, and, in many cases, applying these disclaimer requirements to online political advertising was a simple matter of state legislatures extending the requirements that were already in place for other types of political ads.²⁰⁶ In some cases, these requirements go beyond what is typically required for political advertising on traditional media at the federal level. For example, federal law requires political ads to clearly state the ad's purchaser and, if applicable, indicate that the ad was not authorized by a candidate.²⁰⁷ Here, some of these state laws require that online political advertising purchased by certain political committees also list the purchasing committee's top contributors.²⁰⁸

Additionally, five states established record-keeping requirements for online political ads in addition to the disclaimer requirements.²⁰⁹ In each state, the laws establish some form of publicly accessible record-containing information about online political ads and their purchasers.²¹⁰ These records often include the types of information various scholars contend should be maintained to increase transparency of political ads online. For instance, Wood and Ravel called for the FEC to maintain data on a number of different points, including "when the communications ran; how much they cost to place and promote; candidates to which the communications refer; [and] contested seat/issues mentioned."²¹¹ California, New Jersey, Washington,

²⁰³ See *supra* Part II.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ For example, state legislatures in New Jersey, Vermont, Washington, and Wyoming simply amended existing legislation to include online political advertising. See N.J. STAT. ANN. § 19:44A-22.3(e); VT. STAT. ANN. tit. 17, § 2901(6) (LEXIS through Act 150 of the 2019 (Adj. Sess.) and Municipal Act M-11 of the 2019 (Adj. Sess.); WASH. REV. CODE § 42.17A.005; WYO. STAT. ANN. § 22-25-110.

²⁰⁷ Wood & Ravel, *supra* note 64, at 1249–50.

²⁰⁸ See, e.g., CAL. GOV'T CODE § 84503; VT. STAT. ANN. tit. 17, § 2972(c)(1); WASH. REV. CODE ANN. § 42.17A.320(6).

²⁰⁹ See CAL. GOV'T CODE § 84504.6(d); MD. CODE ANN., ELEC. LAW § 13-405(b)–(c); N.J. STAT. ANN. § 19:44A-22.3(d); N.Y. ELEC. LAW § 14-107(5a); WASH. REV. CODE ANN. § 42.17A.345.

²¹⁰ See *supra* Part II.B.

²¹¹ Wood & Ravel, *supra* note 64, at 1256.

Maryland, and New York all require that at least some of these data points be maintained in public records.²¹²

Although these five states have each created record-keeping requirements, they differ in where they place the responsibility for maintaining those records. In California, Maryland, New Jersey, and Washington, the online platforms that host the advertisements are required to maintain these records.²¹³ In Maryland specifically, online platforms must make these records publicly available online.²¹⁴ In that regard, Maryland's statutory scheme is very similar to that of the proposed Honest Ads Act, which also calls for platforms to maintain public databases on online political ads.²¹⁵ In contrast to these four states and the federal proposal, in New York, the state government has the responsibility of maintaining these records.²¹⁶

States that place this record-keeping responsibility on platforms hosting political ads define who qualifies as a platform quite broadly. For instance, Maryland defines an "online platform" as a website or application that sells advertising space and has at least 100,000 monthly users for most of the past year.²¹⁷ In Washington, California, and New Jersey, what qualifies as a platform is seemingly even broader. Washington places this requirement on all "commercial advertisers," a term that is defined as "any person that sells the service of communicating messages," including online advertisements.²¹⁸ Similarly, California defines an "online platform" as any "public-facing internet website, web application, or digital application . . . that sells advertisements directly to advertisers," unless that website or application "displays advertisements that are sold directly to advertisers through another online platform."²¹⁹ New Jersey simply states that "any person who accepts compensation" for disseminating political advertising must keep records of the transaction and the ad itself.²²⁰ While the proposed Honest Ads Act places a \$500 threshold on purchased ad space before the record-keeping requirements placed on platforms take effect, only one state, California, expressly provides a similar dollar threshold.²²¹

Overall, these record-keeping requirements are generally consistent with the goals of traditional campaign finance regulations because they increase transparency and better allow voters to evaluate the information they receive through these ads.²²² Although the Supreme Court has invalidated campaign finance regulations that seek to prohibit certain types of speech, the Court has consistently upheld disclosure

²¹² See CAL. GOV'T CODE § 84504.6(d)(2)–(3); N.J. STAT. ANN. § 19:44A-22.3(d); WASH. REV. CODE ANN. § 42.17A.345(1); MD. CODE ANN., ELEC. LAW § 13-405(b)(6); N.Y. ELEC. LAW § 14-107(5a).

²¹³ See CAL. GOV'T CODE § 84504.6(d); MD. CODE ANN., ELEC. LAW § 13-405(b); N.J. STAT. ANN. § 19:44A-22.3(d); WASH. REV. CODE ANN. § 42.17A.345(1).

²¹⁴ MD. CODE ANN., ELEC. LAW § 13-405(b).

²¹⁵ Compare Honest Ad Act, S. 1356, 116th Cong. § 8 (2019), with CAL. GOV'T CODE § 84504.6(d), and MD. CODE ANN., ELEC. LAW § 13-405(b), and N.J. STAT. ANN. § 19:44A-22.3(d), and WASH. REV. CODE ANN. § 42.17A.345(1).

²¹⁶ N.Y. ELEC. LAW § 14-107(5a).

²¹⁷ MD. CODE ANN., ELEC. LAW § 1-101(dd-1) (West, Westlaw through 2020 Sess.).

²¹⁸ WASH. REV. CODE § 42.17A.005(10).

²¹⁹ CAL. GOV'T CODE § 84504.6

²²⁰ N.J. STAT. ANN. § 19:44A-22.3(d).

²²¹ Compare S. 1356, 116th Cong. § 8 (2019), with CAL. GOV'T CODE § 84504.6(d).

²²² See Wood & Ravel, *supra* note 64, at 1256–57.

requirements for political ads.²²³ For example, in *McConnell v. FEC*, the Court agreed with the district court's determination that the "argument for striking down [the] disclosure provision does not reinforce the precious First Amendment values that Plaintiffs argue are trampled [by the provision], but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."²²⁴ Likewise, while the Court in *Citizens United v. FEC* struck down the Bipartisan Campaign Reform Act's ban on independent expenditures for express advocacy and electioneering communications financed by corporate treasury funds, the Court upheld the disclosure requirements, finding that while "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they . . . 'do not prevent anyone from speaking.'"²²⁵

In *Buckley v. Valeo*, the Supreme Court noted three main government interests in compelled disclosures.²²⁶ First, disclosures allow the electorate to better evaluate candidates for elected office because by knowing the source of campaign funding, voters can learn about a candidate's interests and "place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."²²⁷ Second, disclosures prevent both corruption and the "appearance of corruption."²²⁸ Third, disclosure and record-keeping requirements can be used to detect violations of contribution limits.²²⁹ In addition to these interests in instituting disclosure requirements, courts have more generally concluded that the government has a compelling interest in "[p]reserving fair and honest elections and preventing foreign influence."²³⁰

The Fourth Circuit's recent decision in *McManus* suggests that the traditionally asserted state interests that have historically justified disclosure requirements imposed on ad purchasers may be insufficient to justify those requirements for third parties that host political ads, absent some additional evidence of a clear problem or harm to electoral integrity.²³¹ In *McManus*, the Fourth Circuit determined that Maryland's interests in deterring foreign interference in state elections, providing voters with information to make informed decisions, preventing corruption, and enforcing other campaign finance laws were all "sufficiently

²²³ *Id.* at 1238.

²²⁴ *McConnell v. FEC*, 540 U.S. 93, 197 (2003).

²²⁵ *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (citation omitted) (quoting *McConnell*, 540 U.S. at 201).

²²⁶ *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976).

²²⁷ *Id.* at 66–67.

²²⁸ *Id.* at 67.

²²⁹ *Id.* at 67–68.

²³⁰ *Wood & Ravel*, *supra* note 64, at 1238 (first citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 589 U.S. 214, 231–32 (1989); and then citing *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd mem.*, 565 U.S. 1104 (2012)).

²³¹ *See Wash. Post v. McManus*, 944 F.3d 506, 521–22 (4th Cir. 2019) (declaring Maryland's requirements unconstitutional as applied to specific media platforms, focusing on Maryland's asserted interest on preventing foreign interference in the state's elections, and largely ignoring the traditional interests in campaign finance disclosure articulated in *Buckley*).

important” to justify traditional campaign finance regulations.²³² However, the court determined that imposing these requirements on third-party platforms was more problematic than imposing disclosure requirements on ad purchasers themselves, and, for these plaintiffs specifically, the law was not narrowly tailored to further Maryland’s interests.²³³ Specifically, Maryland failed to produce sufficient evidence to show that the specific platforms operated by the plaintiffs were used to facilitate foreign interference in Maryland elections.²³⁴ Additionally the Fourth Circuit noted how the platforms operated by the plaintiffs here stood in contrast to platforms like Facebook, where there was evidence of interference, and Maryland failed to justify why both sets of platforms required the same regulation.²³⁵ Accordingly, the Fourth Circuit’s opinion suggests that in order to impose record-keeping requirements broadly on a wide range of platforms that host online political advertising, states should have some concrete evidence, more than speculation, of an electoral harm present in political advertising on that specific platform, and that regulating that platform would address that harm.

Furthermore, the Fourth Circuit explained how placing Maryland’s record-keeping responsibility on these specific plaintiffs as news organizations is particularly problematic.²³⁶ According to the court, Maryland’s law “intrud[es] into the function of editors’ and forces news publishers to speak in a way they would not otherwise.”²³⁷ Here, the Fourth Circuit rejected Maryland’s argument that the responsibility for transparency in online political advertising partially rests on the platforms that disseminate it just as similar responsibilities exist for broadcast stations who must keep and give records to the Federal Communications Commission (“FCC”) for public disclosure in the political files.²³⁸ Instead, the Fourth Circuit noted that the rationale of spectrum scarcity, which justifies regulating broadcast stations, simply does not apply to the internet.²³⁹ Accordingly, the Fourth Circuit’s decision seemingly sets the stage for a scenario in which broadcast news stations have an obligation of disclosure while, despite the increasing use of online political advertising, media organizations that operate online do not have that same responsibility. As a result, news organizations that operate online may have a competitive advantage over their broadcasting counterparts who face potential legal liability for failing to comply with disclosure regulations.

²³² *Id.* at 520.

²³³ *Id.* at 516–17, 521–22.

²³⁴ *Id.* at 521 (“In fact, the state ‘has not been able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time.’” (quoting *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 301 (D. Md. 2019), *aff’d*, 944 F.3d 506 (4th Cir. 2019))).

²³⁵ *Id.* at 522.

²³⁶ *Id.* at 517–19.

²³⁷ *Id.* at 518 (alteration in original) (quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

²³⁸ *Id.* at 519.

²³⁹ *Id.* (“[B]ecause broadcast licensees are given a federal grant to operate one of these limited channels, the Court has given the government wider latitude in regulating what is said on them. . . . This justification, however, is inapposite for the virtually limitless canvas of the internet.” (citation omitted) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399–400 (1969))).

Finally, despite its sweeping language, the *McManus* case is narrow in that it deals only with an as-applied challenge brought by a group of media organizations.²⁴⁰ Ultimately, given the unique position of the plaintiffs in this case, it is currently unclear how far this opinion will extend, if at all, to online political advertising laws that target large platforms like Facebook. Nonetheless, *McManus* suggests that governments will likely be unable to take a wide-approach by imposing record-keeping requirements on all or nearly all third parties that distribute online political advertising.

CONCLUSION

The Mueller report, which was produced after an investigation into foreign interference in the 2016 presidential election, and more recent reports about the growth of online political advertising have set the stage for ongoing debate about who should regulate the online political ad market, as well as what regulatory parameters would survive constitutional scrutiny. With movement on the federal Honest Ads Act stalled in Congress, we assessed the efforts of eight states to regulate online political advertising for state races and one federal appellate court case. Overall, these state efforts fall within two categories: states that have implemented only disclaimer requirements for online political advertising and states that have implemented both disclaimer requirements and some form of record-keeping requirement that is often placed on the platforms hosting the ads. However, the Fourth Circuit's recent decision on Maryland's requirements for online platforms hosting political ads raises numerous unanswered questions regarding the constitutionality of these laws and whether the traditionally asserted justifications for campaign finance regulations will extend to justify record-keeping requirements on third party platforms.

Scholars have demonstrated that the platforms themselves have not consistently and transparently maintained policies about online political advertising, much less a clear database, so state and federal regulation in this area appears inevitable.²⁴¹ That said, the *McManus* decision—and the state statutes themselves—offer some guidance to regulators about where the responsibilities for transparency should ultimately lie. Burdening websites, particularly news websites, with such record-keeping raises valid First Amendment problems regarding compelled speech. However, a lack of transparency burdens equally important values regarding informed decision-making by the electorate. This clash of values signals the need, in our view, for an independent record-keeping body along the lines that New York has established for independent expenditure committees. In New York, record-keeping for online political advertising is done by the bipartisan New York State Board of Elections rather than the online platforms disseminating political ads.²⁴² Just as independent

²⁴⁰ *Id.* at 513.

²⁴¹ See BRIDGET BARRETT, DANIEL KREISS, ASHLEY FOX & VICTORIA SMITH EKSTRAND, POLITICAL ADVERTISING ON PLATFORMS IN THE UNITED STATES: A BRIEF PRIMER (2020), https://citapdigitalpolitics.com/wp-content/uploads/2020/01/PlatformAdvertisingPrimer_CITAP.pdf.

²⁴² N.Y. ELEC. LAW § 14-107(5a).

expenditure committees are required to submit weekly reports detailing contributions over \$1,000, expenditures over \$5,000, and expenditures for online advertising over \$500 to the Board, New York law requires independent expenditure committees to submit copies “of all political communications paid for by the independent expenditure committee.”²⁴³ For online advertising specifically, the Board maintains a publicly accessible online database that includes copies of the ad, scripts of any audio or video elements, descriptions of any visual elements, screenshots of ads without audio or video elements, and individual images for ads with animated elements.²⁴⁴ These records are maintained for five years.²⁴⁵

We propose that it would be the responsibility of the advertiser to report their ad buys to a state election board. The state election board would maintain such information and make it publicly available. At the federal level, as opposed to placing a record-keeping responsibility on online platforms as the Honest Ads Act suggests,²⁴⁶ this responsibility should be placed with the FEC. Establishing a record-keeping system for online political advertising that places the responsibility of maintaining public records with a government agency as opposed to online platforms would seemingly avoid the constitutional problems outlined by the Fourth Circuit in *McManus*. Unlike Maryland’s requirements for online platforms, a system similar to New York’s looks more like traditional campaign finance regulations, where there is a regulatory relationship between government agencies and “direct participants in the political process”²⁴⁷ as opposed to third parties. These records should contain key information to promote transparency around online political advertising, including information like copies of the ad, the ad purchaser’s identity, the cost of the ad, and information about the audience targeted. However, as Wood notes about disclosure more generally, we must continue to examine our assumptions about disclosure,²⁴⁸ and this may mean engaging in further research to determine what types of disclosures about online political advertising are most effective. In addition, these revisions to state law and the Honest Ads Act should include support for the technical infrastructure required to track online political advertising, which is likely to be sizeable. These laws should also be revised to make such data easily available to the public. Finally, these revised provisions should create opportunities for congressional review of the law’s disclosure mechanisms and for regular stakeholders to comment.

The problems posed by online political advertising are not insurmountable. Even the Wild West was eventually conquered and settled. But such change requires focused attention and investment—and a committed effort from candidates, committees, platforms, election boards, commissions and lawmakers—to address the harms, both real and potential, in future state and federal election cycles. As the

²⁴³ *Id.* § 14-107(4)–(5a).

²⁴⁴ N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.11(c) (Westlaw through amendments included in the New York State Register, Volume XXLII, Issue 52 dated December 30, 2020).

²⁴⁵ ELEC. § 14-107(5a).

²⁴⁶ S. 1356, 116th Cong. § 8 (2019).

²⁴⁷ *Wash. Post v. McManus*, 944 F.3d 506, 516 (4th Cir. 2019).

²⁴⁸ Wood, *supra* note 45, at 11.

problems uncovered by the Mueller report have demonstrated, nothing less than the integrity of the voting process depends on it.