Regulating the Political Wild West: State Efforts to Address Online Political Advertising

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On February 16, 2018, U.S. Special Counsel Robert Mueller indicted 13 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, 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 "flashmob" 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.

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[1] U.S. House of Representatives Select Committee on Intelligence, *Exposing Russia's Efforts to Sow Discord: The Internet Research Agency and Advertisements,* https://intelligence.house.gov/social-media-content/.
[2] *Id.*
[3] U.S. v. Internet Research Agency, Case 1:18-cr-00032-DLF, (D.D.C. 2019), available at https://www.justice.gov/file/1035477/download.
[4] *Id.* at 18-19, 21-22, 25-27, 30.
[5] U.S. House of Representatives Select Committee on Intelligence, *HPSCI Minority Open Hearing Exhibits*, https://intelligence.house.gov/hpsci-11-1/hpsci-minority-open-hearing-exhibits.htm.
[6] *Id.*

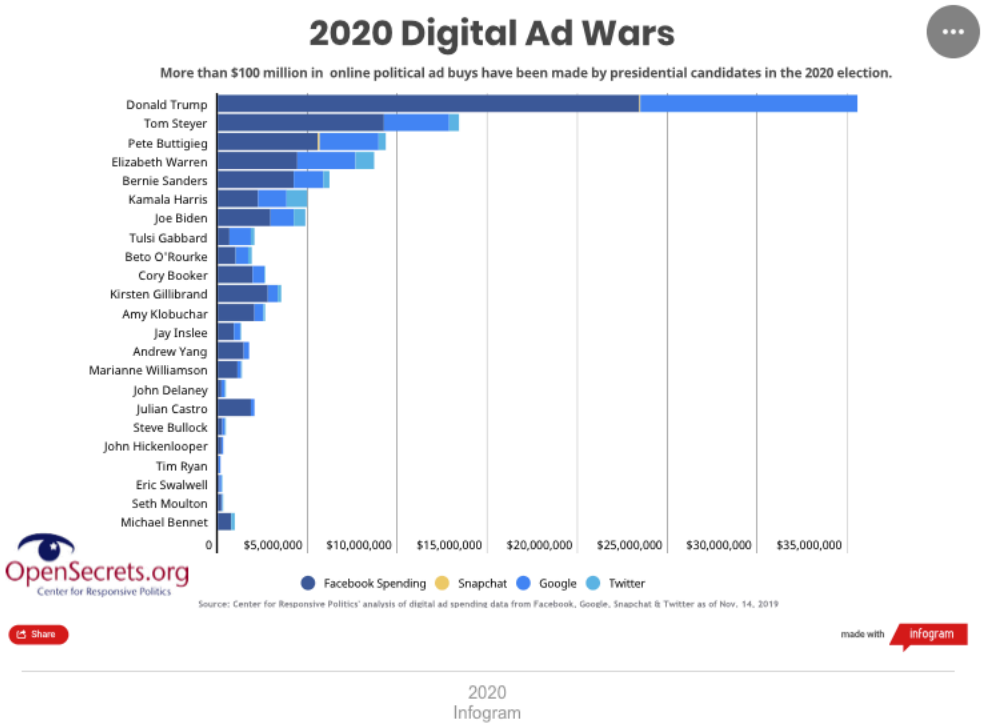
The problem of online political ads pushing disinformation is growing, according to experts, with ongoing and potential threats to campaigns from both within and outside the United States. From a First Amendment perspective, the problem is compounded by the emerging difficulty of distinguishing traditional and regulated political advertising from general and 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 Sen. Harris isn't 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 for 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. "It'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," said 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.[8] That's 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 market" in the United States and "accounted for 99% of the

[7] Jonathan Martin, Astead Herndon, & Alexander Burns, *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] Alexandra S. Levine, Nancy Scola, Steven Overly & Cristiano Lima, *Why the Fight Against Disinformation, Sham Accounts and Trolls Won't Be Any Easier in 2020*, POLITICO (Dec. 1, 2019), https://www.politico.com/news/2019/12/01/fight-against-disinformation-2020-election-074422.

industry's revenue growth" in 2016.[9] According to one recent estimate, more than $67 million has already 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 Wars (Source: OpenSecrets.org)



With such explosive and unregulated growth in the online political ad market, the potential effect on the 2020 election is both immediate and alarming.

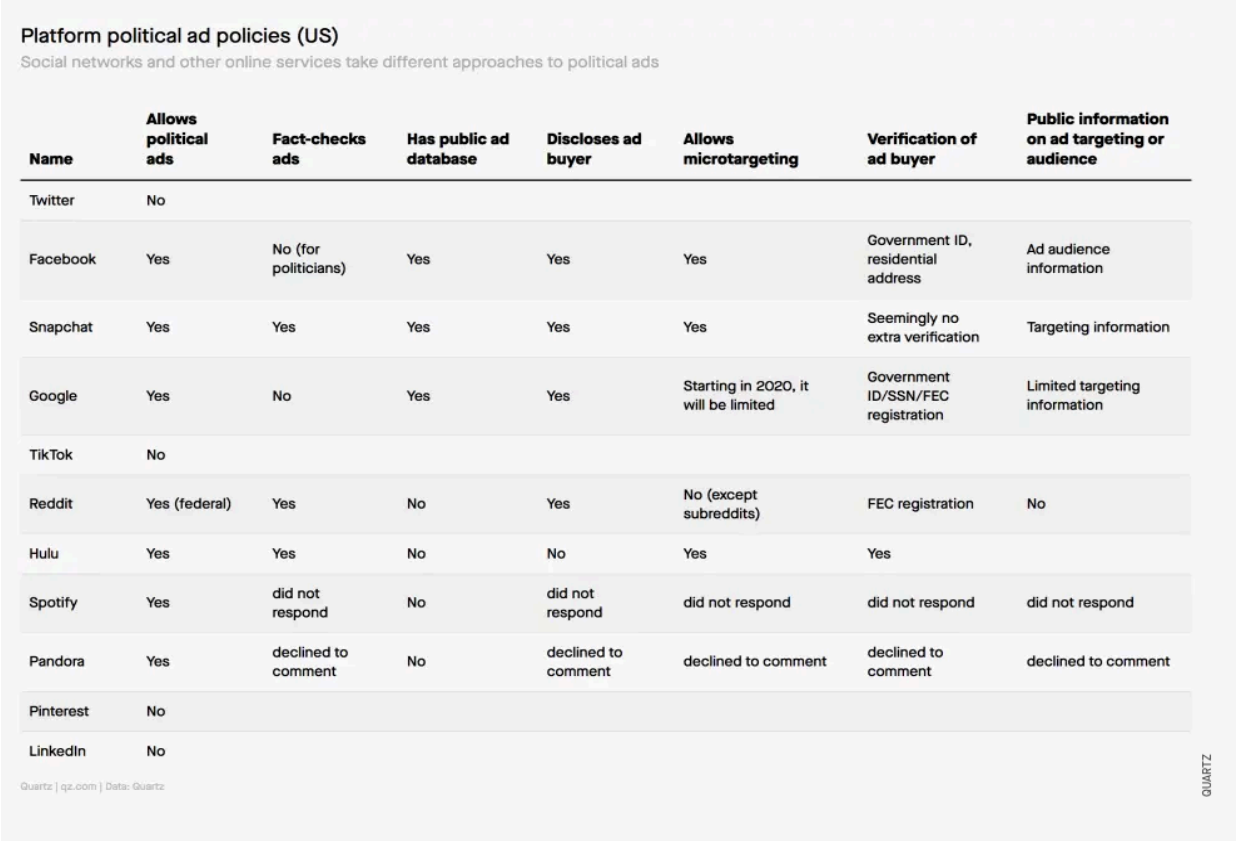
[9] Katherine Haenschen and Jordan Wolf, *Disclaiming Responsibility: How Platforms Deadlocked the Federal Election Commission's Efforts to Regulate Digital Political Advertising*, 43 TELECOMM. POL'Y (2019), available at https://doi.org/10.1016/j.telpol.2019.04.008.

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

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,[11] prompting criticism about exactly how political advertising will be defined.[12] Facebook announced it will not fact-check political ads because of its commitment to free expression and an open marketplace of ideas,[13] but Facebook and Google announced plans they will instead limit microtargeting, the process by which campaigns and interest groups send messages to small and highly selective groups.[14] Critics say microtargeting contributes to voter manipulation, invasions of privacy and voter exclusion.[15] More broadly, the practice has been criticized for fragmenting a democratic commitment to the "marketplace of ideas."[16] Other platforms have made self-regulatory moves, but the moves change regularly with each new problem encountered (see Figure Two). In this presidential election year, the needs are immediate, but the potential solutions are more complicated than any one new platform policy or law might effectively and immediately address.

[11] @jack, Twitter (Oct. 30, 2019), https://twitter.com/jack/status/1189634360472829952.
[12] 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.
[13] 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; Tony Romm, *Zuckerberg: Standing for Voice and Free Expression*, WASH. POST (Oct. 17 2019), https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/.
[14] Alex Hern, *Facebook to Curb Microtargeting in Political Advertising*, THE GUARDIAN (Nov. 22, 2019), https://www.theguardian.com/technology/2019/nov/22/facebook-to-curb-microtargeting-in-political-advertising.
[15] Frederik J. Zuiderveen Borgesius, Judith Moller, Sanne Kruikemeier, Ronan O Fathaigh, Kristina Irion, Tom Dobber Balazs Bodo, Claes de Vreese, *Online Political Microtargeting: Promises and Threats for Democracy*, 14 UTRECT L. REV. 82, 87 (2018), available at https://www.ivir.nl/publicaties/download/UtrechtLawReview.pdf.
[16] *Id.* at 89.

Figure Two: Platform Political Ad Policies (Source: Quartz)[17]



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

QUARTZ

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. Most of that focus has been at the federal level, addressing either the proposed Honest Ads Act[18] or other fixes aimed at a gridlocked Federal Election Commission (FEC).[19] With federal reform at a standstill, states have jumped into the void. Seven states have passed legislation to address concerns about online political advertising for state candidates and ballot measures since 2016.[20] The purpose of this paper is to examine these recent state efforts as well as one federal appeals

[17] Hannah Kozlowska, *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/
[18] S. 1989 115th Cong. (2017); *see also* S.1356, 116th Cong. (2019).
[19] *Eliminating the FEC: The Best Hope for Campaign Finance Regulation*? 131 HARV. L. REV. 1421 (2018).
[20] *See infra*, notes 59-139 and accompanying text.

court opinion that struck down one state's effort to regulate online political ads. We use this analysis as a springboard to begin thinking about efforts at the national level to address the problem.

The paper is divided into four parts. Part One briefly addresses the history of political advertising regulation and the new and growing literature on online political advertising. It assesses what that literature suggests about potential regulatory approaches. Part Two analyzes the seven state laws designed to regulate online political advertising. Part Three outlines a recent case from the Fourth Circuit addressing the constitutionality of Maryland's regulation. Part Four 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 Five concludes with a few observations about this regulatory moment in campaign finance law.

I. Background and Literature Review

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 presented by the lack of online political advertising and electioneering oversight. Both bodies of literature 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 literature review 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, a discussion of scholar support for expanding campaign finance regulation to include online political advertising is addressed. Legal and political communication scholars mostly agree that such regulation should be considered; disagreement is mostly about how to execute such a change and to what degree the platforms can self-regulate.

A. Definitional Issues, Legal Tests & 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 issues and candidates and those who support or oppose them – 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."[21] Here, "the remedy to be applied is more speech, not enforced silence."[22]

Scholars and observers, however, are increasingly skeptical of the counterspeech doctrine's ability to expose mis- and disinformation online. Phil Napoli identifies several reasons for

[21] Whitney v. California, 274 U.S. 357, 377 (1927).
[22] *Id.*

diminished 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.[23] 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."[24] Increasing discursive practices of online cancel culture and the heckler's veto also place pressure on the success of counterspeech.[25]

Against this backdrop is a decades-long struggle in the U.S. to define and regulate political advertising writ large. This struggle largely begins with the Federal Election Campaign Act (FECA), passed in 1971, with amendments in 1974.[26] Together, FECA created limits on campaign contributions and independent expenditures in an attempt to thwart corrosive influences.[27] It defined "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 "any other form of general public political advertising."[28] Although political communication is generally protected by the First Amendment,

[23] 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. L.J. 55 (2018), available at http://www.fclj.org/wp-content/uploads/2018/04/70.1-Napoli.pdf.
[24] Tim Wu, *Knight First Amendment Institute, Emerging Threats: Is the First Amendment Obsolete?* KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete.
[25] Sanam Yar & Jonah Engel Bromwich, *Tales From Teenage Cancel Culture*, N.Y. TIMES (Oct. 31, 2019), https://www.nytimes.com/2019/10/31/style/cancel-culture.html.
[26] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).
[27] *See id.*
[28] Press Release, Federal Elections Commission, Public Communications, available at https://www.fec.gov/press/resources-journalists/public-communications/.

the spending of money with "express advocacy" – the words "vote for," "elect," or "support" – may be limited under FECA.[29]

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 disclosure from groups that run "electioneering communications" – essentially closing the loophole that groups had discovered after FECA.[30] An electioneering communication is "any broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office and is made within 30 days of a primary and 60 days of a general election."[31] This widened the law to exclude the express advocacy requirement.

In 1976, the U.S. Supreme Court ruled on the constitutionality of FECA in *Buckley v. Valeo*.[32] 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, which violated the First Amendment.[33] Importantly, for our purposes, it also upheld FECA's reporting and disclosure requirements, which required political committees to register with the Federal Election Commission (FEC) and keep records of expenditures and contributions.[34] The Court acknowledged that disclosure might infringe on First Amendment rights, but applied an "exacting scrutiny" test that required the government's interest to regulate be in "substantial relation" to the information disclosed.[35] In *Buckley*, the court identified three compelling state interests including: (1) the information that disclosure provides

[29] *Id.*
[30] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 201(a), § 304, 116 Stat. 81, 89 (codified as amended at 52 U.S.C. § 30104(f)(3) (2015)).
[31] *Id.* § 304(f)(3).
[32] 424 U.S. 1 (1976).
[33] *Id.* at 44-49.
[34] *Id.* at 83.
[35] *Id.* at 64.

to voters; (2) the deterrence of corruption and the "appearance of corruption"; and (3) enforcement of campaign finance laws.[36] The U.S. Supreme Court has continuously supported this exacting scrutiny test in subsequent cases challenging BCRA, in *McConnell v. FEC*[37] and *Citizens United v. FEC*.[38]

B. Online Political Advertising: History, Definitions & 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, and it does not address the growth of "dark money" groups.[39] Nevertheless, the FEC required disclaimers for "(1) unsolicited emails that political committees sent to more than 500 people and (2) websites that political committees made available to the public."[40] In 2004, in *Shays v. Federal Election Commission*,[41] a U.S District Court found the FEC's exclusion of online political communication from "public communication" impermissible. Following *Shays*, the FEC amended the definition of "public communication" to include paid Internet advertising on someone else's website.[42] 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 either rulemaking session, the FEC did not issue a new rule, despite increasing concerns.[43]

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[36] *Id.* at 67-68.
[37] 540 U.S. 93 (2003).
[38] 558 U.S. 319 (2010).
[39] *See generally* Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11 (2018).
[40] Brian Breyersdorf, *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) (citing Internet Communications, 71 Fed. Reg. at 18,600).
[41] 337 F. Supp. 2d 28 (D.D.C. 2004).
[42] Breyersdorf, *supra* note 40 at 1075.
[43] *Id.* at 1080-81.

As Kreiss and Barnard point out, "the lines around what constitutes an online (political) advertisement have continually shifted." 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."[44] 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."[45] 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) involve systematically evaluating progress toward defined goals through data; and (3) is conducted by a group of specialists as such by their peers."[46] They base this definition on how practitioners themselves describe online ad practices.[47]

Scholars Wood and Ravel, however, argued for a broader conception of online political advertising in the wake of problems surrounding the 2016 election.[48] They write that online political advertising is a "problem of native political advertising and that the phenomenon benefits from a lack of campaign finance transparency online."[49] These scholars detail the myriad harms caused by bad actors leading up to the 2016 election, including studies of Facebook that concluded 86% of groups running paid ads in the last six week before the election were suspicious groups (86%), astroturf movement groups (17.1%), and questionable news outlets (15.8%).[50] In defining online political advertising broadly they call for regulators to:

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[44] Lisa Barnard and Daniel Kreiss, *A Research Agenda for Online Political Advertising: Surveying Campaign Practices, 2000-2012*, 7 INT'L J. OF COMM. 2046, 2047 (2013).
[45] *Id.* at 2048.
[46] *Id.*
[47] *Id.*
[48] Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating Fake News and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1228 (2018).
[49] *Id.*
[50] *Id.* at 1230.

> …save and post *every version* (emphasis added) 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 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 identifier ("Audience ID").[51]

Wood and Ravel do 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 to collect 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 for such a proposal.[52] Other scholars have similarly detailed the incompetency of the FEC in recent years and called for a major overhaul to that administrative body.[53]

Wood and Ravel are joined by a few other legal scholars in their call for new regulation. Usoro argues that despite anti-regulatory First Amendment jurisprudence in recent years, the First Amendment is not an automatic shield against regulation of a new medium.[54] She argues that throughout history, the Court has extended new rules to new media, particularly to protect national security and electoral interests.[55] Dykhne argues that online political ads should always have links

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[51] *Id.* at 1256.
[52] *Id.* at 1275.
[53] *Eliminating the FEC, supra* note 19. *See also* Pichaya P. Winichakul, *The Missing Structural Debate: Reforming Disclosure of Online Political Communications*, 93 N.Y.U. L. REV. 1387 (2018).
[54] Millicent Usoro, *A Medium-Specific First Amendment Analysis On Controlled Campaign Finance Disclosure on the Internet*, 71 FED. COMM. L.J. 299 (2019).
[55] *Id.* at 320-322.

to disclaimers or "rollovers" – and advertisers should be allowed to propose other technological ways to disclaim.[56] Additionally, Dykhne argues 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 disclaimers.[57]

Beyersdorf argues 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.[58] Winichakul writes that the problem of online political advertising is primarily structural. She criticizes the FEC for failing to:

> …initiate 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, 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.[59]

While scholars and federal regulators disagree about responsibility and solutions, states have not waited to regulate.[60] Seven states now have statutes addressing disclaimer and disclosure requirements for online political advertising.[61] In a recent decision from the Fourth Circuit, one state's law has already been declared unconstitutional as applied to specific plaintiffs.[62] No scholarship yet analyzes these efforts to define online political advertising or address its harms. We turn next to fill that gap in the literature.

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[56] Irina Dykhne, *Persuasive or Deceptive? Native Advertising in Political Campaigns*, 91 S. CAL. L. REV. 339 (2018).
[57] *Id.* at 370.
[58] Beyersdorf, *supra* note 40, at 1090.
[59] Winichakul, *supra* note 53, at 1396.
[60] Kelly Born, *How States are Experimenting with Digitial Political Advertising Regulation: Interview with Campaign Legal Center's Erin Chlopak*, HEWLTT FOUNDATION, May 28, 2019, https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/.
[61] *See infra*, notes 59-139 and accompanying text.
[62] Wash. Post Co. v. McManus, No. 19-1132, 2019 WL 6647336, at *1 (4th Cir. Dec. 6, 2019).

II. State Efforts to Regulate Online Political Advertising

Following the 2016 presidential election, several states have enacted new legislation or amended existing legislation on political advertising to regulate online political advertising for state candidates and ballot measures.[63] 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.[64]

A. States that only have disclaimer requirements

(i) Vermont

Vermont's disclaimer requirements for online political advertising apply to "electioneering communication[s]."[65] 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."[66] 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 it or the candidate, person, or group on whose behalf it was purchased.[67] Ads purchased by or on behalf of a political committee or political party must also list 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.[68] Vermont includes one exception to these

[63] Born, *supra* note 60.
[64] *Id.*
[65] *See* VT. STAT. ANN. tit. 17 § 2972(a) (2019). 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).
[66] *Id.* § 2901(6).
[67] *Id.* §§ 2972(a)-(b).
[68] *Id.* § 2972(c)(1).

requirements; if following the disclaimer requirements would be impractical, the communication can instead hyperlink to a separate page containing the disclaimers.[69]

(ii) Wyoming

Like Vermont, Wyoming's online political advertising regulations only include disclaimer requirements.[70] In 2019, the Wyoming State Legislature amended the forms of political advertising that require disclaimers to include Internet and electronic communications.[71] Political advertising distributed online and paid for by a candidate, candidate campaign committee, political action committee, political party committee, or other organization that makes electioneering communications or independent expenditures must state the name of the purchaser.[72] Wyoming also provides an exception for when incorporating disclaimers may be 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.[73]

B. States with both disclaimer requirements and record-keeping requirements

(i) California

California updated its laws on online political advertising in October 2019.[74] 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."[75] Although California does not seem to define "electronic media advertisement,"

[69] *Id.* § 2972(d).
[70] *Compare id.* § 2972, *with* WYO. STAT. ANN. § 22-25-110 (2019).
[71] WYO. STAT. ANN. § 22-20-110.
[72] *Id.* § 22-20-110(a)(iv).
[73] *Id.*
[74] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 (West).
[75] *Id.* § 84504.6(a).

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 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."[76] 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.[77] 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.[78]

First, candidate committees are not required to include disclaimers on electronic media advertisements they disseminate for that candidate's own election.[79] However, the California Fair Political Practices Commission recommends that candidate committees state the committee's name and committee ID number.[80]

Committees other than candidate or 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 name of the committee and link to a separate webpage that states the committee's top donors and is available for 30 days after the election.[81] These same disclaimer requirements

[76] *Id.* § 84504.6(a)(2)(a).
[77] *Id.* § 84504.3.
[78] *Campaign Advertising - Requirements & Restrictions*, Cal. Fair Prac. Commission (Dec. 18, 2019, 4:30 PM), http://www.fppc.ca.gov/learn/campaign-rules/campaign-advertising-requirements-restrictions.html.
[79] *Political Advertising Disclaimers: Communications by Candidate Committees for their own Election*, Cal. Fair Prac. Commission, (Dec. 18, 2019, 4:30 PM), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/CampaignAdvertisementDisclosure/Disclaimers_1.pdf.
[80] *Id.*
[81] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, §§ 84503(a), 84504.3(a)-(b), 84504.3(e).

apply if the ad also qualifies as an independent expenditure and supports or opposes either a ballot measure or a candidate.[82] Disclaimers for independent expenditures that support or oppose a candidate must include a statement indicating that no candidate or candidate committee authorized the ad.[83]

Candidate 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.[84] If the ad also qualifies as an independent expenditure it must link to a separate webpage that includes the committee's name.[85] This page must be available for 30 days after the election.[86] If the independent expenditure supports or opposes a candidate it must include a statement indicating that no candidate or candidate committee authorized the ad.[87]

Those purchasing audio and video electronic media ads are directed to follow separate, but seemingly identical, disclaimer requirements in place for all audio and video ads.[88] Audio ads purchased by a candidate committee or political party committee must state the name of the committee.[89] Committees other than candidate 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.[90] If the ad is also an independent expenditure supporting a candidate, it must also state that a candidate or candidate committee did not authorize the ad.[91] The

[82] *Id.* §§ 84503(a), 84504.3(a)-(b), 84504.3(e).
[83] *Id.* §§ 84504.3(a)-(b); CAL. GOV'T CODE § 84506.5 (West 2020).
[84] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, §§ 84504.3(a)-(b).
[85] *Id.* § 84504.3(b).
[86] *Id.* § 84504.3(e).
[87] *Id.* §§ 84504.3(a)-(b); CAL. GOV'T CODE § 84506.5.
[88] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, §§ 84504.3(f)-(g).
[89] *Id.* § 84502(a); CAL. GOV'T CODE § 8404(a).
[90] CAL. GOV'T CODE § 84504; 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, § 84503(a).
[91] CAL. GOV'T CODE §§ 8404(a), 84506.5.

disclaimers required for video electronic media ads are largely the same as those required for audio ads.[92]

In addition to these disclaimer requirements, California imposes requirements on online platforms that directly sell advertising space for online platform disclosed advertisements.[93] 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."[94] 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.[95] 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 certain records about ads from that committee.[96] 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.[97] These records must be kept in a publicly accessible database for four years.[98]

[92] *See* CAL. GOV'T CODE §§ 84504.1(a)-(c), 84506.5; *See also* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, §§ 84502(a)(1)-(2), 84503(a), 84504.5.
[93] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864. § 84504.6.
[94] *Id.* § 84504.6(1).
[95] *Id.* § 84504.6(c).
[96] *Id.* § 84504.6(d)(1).
[97] *Id.*
[98] *Id.* §§ 84504.6(d)(2)-(3).

(ii) New Jersey

The New Jersey Legislature amended the state's political advertising laws to apply to "Internet and digital" political advertising purchased by any person or group.[99] 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.[100] Additionally, ads that are not made in coordination with a candidate or someone acting on a candidate's behalf must state that independent status.[101]

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.[102] These records must be publicly available for two years, but there is no requirement that these records be made available online.[103]

(iii) 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.[104] The New York State Assembly further amended the law in November 2019, and these amended requirements will be effective starting in January 2020.[105] Under the amended law, digital political communications

[99] N.J. STAT. ANN. §§ 19:44A-22.3(a)-(b), 19:44A-22.3(e) (West 2019).
[100] *Id.* §§ 19:44A-22.3(a)-(b).
[101] N.J. STAT. ANN. §§ 19:44A-22.3(b)-(c).
[102] *Id.* § 19:44A-22.3(d).
[103] *Id.*
[104] N.Y. ELEC. LAW §§ 14-106, 14-107 (McKinney 2019).
[105] 2019 N.Y. Sess. Laws Ch. 454 A. 4668 (McKinney).

purchased by a political committee must state that the ad was "paid for by" that committee.[106] New York's disclaimer requirement also includes an exception.[107] If the ad is too small to include the disclaimer, the required information may be provided by a hyperlink to a separate webpage.[108] 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 also state that the ad was not "expressly authorized or requested" by a candidate.[109]

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.[110] 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.[111] These records are maintained for five years.[112]

(iv) Washington

Washington amended its laws regulating political advertising in 2018.[113] The law applies to three categories of advertising: political advertising,[114] electioneering communications,[115] and

[106] *Id.* § 14-106(2).
[107] *Id.* § 14-106(4).
[108] *Id.*
[109] *Id.* § 14-107(2).
[110] N.Y. ELEC. LAW § 14-107(5a).
[111] N.Y. ELEC. LAW APP. § 6200.11(c).
[112] N.Y. ELEC. LAW § 14-107(5a).
[113] WASH. REV. CODE § 42.17A.005 (2019).
[114] 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.* § 2.17A.005(39).
[115] 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

independent expenditures.[116] Each of these categories includes digital communications.[117] Online political advertisements must state the purchaser's name and address.[118] 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 applicable, top three donors to contributors that are PACs.[119] 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.[120]

Online political ads that also qualify as electioneering communications or independent expenditures and are purchased by someone other than a political committee are required to make additional disclaimers.[121] First, these ads must state "[n]o candidate authorized this ad" and include the address of the purchaser in addition to the purchaser's name.[122] 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.[123]

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

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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).

[116] 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(29)(i). The expenditure must also be made without collaboration with the candidate it supports or opposes, specifically name the candidate, and either alone or combined with other expenditures purchased by the same person, cost $1,000 or more. *Id.* §§ 42.17A.005(29)(ii)-(iv).

[117] *Id.* §§ 42.17A.005(21), 42.17A.005(29), 42.17A.005(39).

[118] *Id.* § 42.17A.320(1).

[119] *Id.* §§ 41.17A.320(6); 42.17A.350.

[120] *Id.* § 41.17A.320(1).

[121] *Id.* § 41.17A.320(2).

[122] *Id.* § 41.17A.320(2)(a).

[123] *Id.* §§ 41.17A.320(2)(b)-(c); 42.17A.350(1)-(2),

Public Disclosure Commission upon request.[124] The state broadly defines "commercial advertiser" as "any person that sells the service of communicating messages."[125] 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.[126] However, there is no requirement that these records be available online.[127]

(v) Maryland

In 2018, the Online Electioneering Transparency and Accountability Act amended Maryland's existing political advertising laws to include "qualifying paid digital communication[s]"[128] within the definition of regulated "campaign material[s]."[129] 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.[130] Other parties that pay for qualifying political ads must state that party's name and address.[131] However, under both of these scenarios, communications may omit addresses that are already filed with the State or a local board of elections.[132] Qualifying paid digital communications that are not authorized by candidate must also state that fact.[133]

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[124] *Id.* §§ 41.17A.345(1)-(2).
[125] *Id.* § 42.17A.005(10).
[126] *Id.* § 41.17A.345(1).
[127] *Id.* § 41.17A.345.
[128] Maryland defines "qualifying paid digital communication" as "any electronic communication that: (1) is a campaign material, (2) is placed or promoted for a fee on an online platform, (3) is disseminated to 500 or more individuals, and does not propose a commercial transaction." MD. CODE ANN., ELEC. LAW § 1-101(ll-1) (West 2019).
[129] *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).
[130] *Id.* § 13-401(a)(1)(i).
[131] *Id.* § 13-401(a)(1)(ii).
[132] *Id.* § 13-401(a)(2).
[133] *Id.* § 13-401(b).

The act also imposes record-keeping requirements on platforms who disseminate qualifying paid digital communications.[134] Under the law, platforms are required to maintain publicly accessible, online databases containing different information about the ads depending on who purchased them.[135] 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.[136] 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.[137] 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 that controls the purchaser, like a CEO.[138] These records should be collected within 48 hours of the communication's purchase and kept for one year following the next general election.[139] If the communication has not yet been paid for, platforms can request a waiver from the State Board to expand the two-day collection period to seven days.[140] However, platforms seeking a waiver must explain why compliance would present an "unreasonable burden" and note how the platform will comply in the future.[141] Platforms cannot apply for more than one waiver or apply for a waiver within 30 days of an election.[142]

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

[134] *Id.* § 13-405(b).
[135] *Id.*
[136] *Id.* § 13-405(b)(6)(i).
[137] *Id.* § 13-405(b)(6)(iii).
[138] *Id.* § 13-405(b)(6)(ii).
[139] *Id.* § 13-405(b)(3).
[140] *Id.* §§ 13-405(b)(5)(i)-(v).
[141] *Id.*
[142] *Id.* § 13-405(b)(5)(iii).

ad was distributed, a copy of the ad, the geographic location and audience targeted, and the number of times the ad was viewed.[143] Similar to platforms' other record-keeping requirements, this information should be available to the State Board within 48 hours of when the communication is distributed and kept for one year following the next general election.[144]

Who 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."[145] In December 2019, the Fourth Circuit concluded Maryland's requirements for platforms that disseminate online political advertising were unconstitutional as applied to a group of media plaintiffs.[146]

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 was unconstitutional as applied to a group of media plaintiffs, including The Washington Post and the Baltimore Sun, among others.[147] Although the Fourth Circuit determined that Maryland had significant interests preventing foreign election interference, encouraging an informed public, and discouraging corruption, the law's requirements for online platforms were not sufficiently tailored to pass either strict or exacting constitutional scrutiny.[148]

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[143] *Id.* § 13-405(c)(3).
[144] *Id.* § 13-405(c)(2).
[145] *Id.* § 1-101(dd-1).
[146] Wash. Post Co. v. McManus, No. 19-1132, 2019 WL 6647336, at *1 (4th Cir. Dec. 6, 2019).
[147] *Id.*
[148] *Id.* at *9.

The Fourth Circuit characterized the law's requirements for online platforms as falling into two separate categories.[149] 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.[150] Second, the law imposed an "inspection requirement" that obligated plaintiffs to make records of ad purchasers available to the Maryland Board of Elections.[151] 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.[152] Platforms may also face criminal penalties, including a $250 fine or up to 30 days in prison, for failing to comply an injunction that orders an ad's removal.[153]

According to the Fourth Circuit, the two provisions implicated the First Amendment's protection against compelled speech.[154] The Fourth Circuit concluded that both the publication and inspection requirements compelled political speech for two reasons.[155] 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 'included both the right to speak freely and the right to refrain from speaking at all.'"[156]

The court determined that the second way these provisions implicated the First Amendment's right against compelled speech for these particular plaintiffs involves anonymous speech where the press is involved in identifying an ad purchaser.[157] The court noted that, while

[149] *Id.* at *1-2.
[150] *Id.* at *2.
[151] *Id.*
[152] *Id.* at *4.
[153] MD. CODE ANN., ELEC. LAW §§ 13-405.1(b)(4), 13-605(b) (West 2019).
[154] *McManus*, 2019 WL 6647336, at *4-5.
[155] *Id.* at *4.
[156] *Id.*
[157] *Id.* at *5.

protections for anonymous speech are not absolute, "when the government enlists the press to state the sources of political speech, thus potentially exposing those speakers to identification and harassment, First Amendment protections and values come into play."[158] Overall, the court concluded that both provisions "pose[] a real risk of either chilling speech or manipulating the marketplace of ideas."[159]

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."[160] 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.[161] In contrast, online platforms like the plaintiffs here do not have that same incentive, 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.[162] 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.[163] Consequently, political advertising may be shut out of the online marketplace of ideas, which could hurt candidates seeking election.[164] For instance, one candidate for Maryland's House of Delegates noted that his campaign was hindered

[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at *5-6.
[163] *Id.* at *6.
[164] *Id.*

by Google's policy of not accepting political advertising for Maryland candidates and ballot measures.[165]

Although the Fourth Circuit did not determine whether strict or exacting scrutiny applied here, the court concluded that the law was insufficiently tailored to meet the lower standard of exacting scrutiny for two reasons.[166] First, Maryland failed to show that foreign election interference occurred on news sites like those operated by the plaintiffs.[167] Similarly, second, Maryland 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 for 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.[168] Ultimately, the Fourth Circuit was clear in limiting its holding to the specific facts and plaintiffs of this case.[169] However, the decision raises numerous questions regarding how states should craft and justify legislation seeking to regulate online political advertising.

IV. Discussion

Currently, political advertising that occurs online is often described as "the political equivalent of the Wild West without sheriffs."[170] Although candidates regularly use online mediums to distribute political advertising, numerous loopholes exist in federal law that allow online political advertising to go unregulated.[171] In response to Russian interference in the 2016 presidential election, the proposed Honest Ads Act sought to close this regulatory gap at the federal

[165] *Id.*
[166] *Id.* at *9.
[167] *Id.* at *10.
[168] *Id.* at *11.
[169] *Id.* at *3.
[170] Beyersdorf, *supra* note 40, at 1064.
[171] *See* Wood & Ravel, *supra* note 48, at 1227.

level by expanding the scope of political ads that require disclaimers to include online political ads.[172] The act also sought to require 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.[173] Despite being introduced in the U.S. Senate twice in the past three years, no action has been taken on the proposed legislation.[174]

While legislative efforts to address online political advertising in federal elections remains at a stalemate, several states have expanded existing legislation or enacted new legislation to regulate online political advertising for state candidate and ballot measures.[175] Although each state defines which types of political advertising is covered slightly differently, in general these state statutes include either disclaimer requirements or both disclaimer requirements and additional record-keeping requirements that typically fall on the platform hosting the ads.[176] Of the seven states that have directly addressed online political advertising, five have established both disclaimer and record-keeping requirements, with just Vermont and Wyoming opting to only implement disclaimer requirements.[177]

The disclaimer requirements for online political ads are fairly similar across all seven states, and, generally, they require that the ad state the name and, sometimes, address of the ad's purchaser.[178] This fits within our traditional conception of political advertising disclaimers, and, in many cases, applying these disclaimers requirements to online political advertising was a simple matter of state legislatures extending the requirements that were already in place for other types of

[172] S.1356, 116th Cong. §§ 5-6 (2019).
[173] *Id.* § 8.
[174] *Id.*; *see also* S.1989 115th Cong. (2017).
[175] Born, *supra* note 60.
[176] *See supra* notes 65-145 and accompanying text.
[177] *See id.*
[178] *See id.*

political ads.[179] In some cases, these requirements go beyond what is typically required for political advertising on traditional mediums at the federal level. For example, federal law typically requires political ads to clearly state the ad's purchaser and, if applicable, indicate that the ad was not authorized by a candidate.[180] Here, some of these state laws require that online political advertising purchased by certain political committees also list the purchasing committee's top contributors.[181]

Five states established record-keeping requirements for online political ads in addition to the disclaimer requirements.[182] In each state, the laws establish some form of publicly accessible record containing information about online political ads and their purchasers.[183] 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" among others.[184] California, New Jersey, Washington, and Maryland all require that at least some of these data points be maintained in public records.[185] In New York, the state government has the responsibility of maintaining these records.[186] In contrast, in California, Maryland, New Jersey, and Washington, the online platforms that host the advertisements are

[179] 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) (West 2019); VT. STAT. ANN. tit. 17 § 2901(6) (2019); WASH. REV. CODE § 42.17A.005 (2019); WYO. STAT. ANN. § 22-20-110 (2019).
[180] Wood & Ravel, *supra* note 48, at 1249-1250.
[181] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, § 24503 (West); VT. STAT. ANN. tit. 17 § 2972(c)(1); WASH. REV. CODE § 41.17A.320(6).
[182] *See* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 84504.6(d); *see also* MD. CODE ANN., ELEC. LAW §§ 13-405(b)-(c) (West 2019); N.J. STAT. ANN. § 19:44A-22.3(d); N.Y. ELEC. LAW § 14-107(5a) (McKinney 2019); WASH. REV. CODE § 41.17A.345.
[183] *See* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 84504.6(d); *see also* MD. CODE ANN., ELEC. LAW § 13-405(b); N.J. STAT. ANN. § 19:44A-22.3(d); N.Y. ELEC. LAW § 14-107(5a); WASH. REV. CODE § 41.17A.345(1).
[184] Wood & Ravel, *supra* note 48, at 1256.
[185] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 84504.6(d)(2)-(3); *see also* N.J. STAT. ANN. § 19:44A-22.3(d); WASH. REV. CODE § 41.17A.345(1); MD. CODE ANN., ELEC. LAW § 13-405(b)(6).
[186] N.Y. ELEC. LAW § 14-107(5a).

required to maintain these records.[187] In that regard, the statutory scheme of these four states is somewhat similar to that of the proposed Honest Ads Act, which also calls for platforms to maintain public databases on online political ads.[188]

States that place this record-keeping requirement 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.[189] In Washington, California, and New Jersey, who qualifies as a platform is seemingly even broader. Washington places this requirement on all "commercial advertisers" which is defined as "any person that sells the service of communicating messages," including online advertisements.[190] 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."[191] New Jersey simply states that "any person who accepts compensation" for disseminating political advertising must keep records about the transaction and the ad itself.[192] 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.[193]

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[187] *See* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 84504.6(d); *see also* MD. CODE ANN., ELEC. LAW § 13-405(b); N.J. STAT. ANN. § 19:44A-22.3(d); WASH. REV. CODE § 41.17A.345(1).
[188] *Compare* S.1356, 116th Cong. § 8 (2019), *with* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 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 § 41.17A.345(1)..
[189] MD. CODE. ANN. ELEC. LAW § 1-101(dd-1) (West 2019).
[190] WASH. REV. CODE § 42.17A.005(10) (2019).
[191] 2019 Cal. Legis. Serv. Ch. 558 A.B. 864, § 84504.6.
[192] N.J. STAT. ANN. § 19:44A-22.3(d).
[193] *Compare* S.1356, 116th Cong. § 8 (2019), *with* 2019 Cal. Legis. Serv. Ch. 558 A.B. 864 § 84504.6(d).

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.[194] Although the Supreme Court has invalidated campaign finance regulations that seek to prohibit certain types of speech, the Court has consistently upheld disclosure requirements for political ads.[195] 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."[196] 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 act's disclosure requirements, finding that while "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they . . . 'do not prevent anyone from speaking."[197]

In *Buckley v. Valeo*, the Supreme Court noted three main government interests in compelled disclosures.[198] 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."[199] Second, disclosures prevent both corruption and the "appearance of corruption."[200] Third, disclosure and record-

[194] *See* Wood & Ravel, *supra* note 48, at 1256-57.
[195] *Id.* at 1238.
[196] McConnell v. FEC, 540 U.S. 93, 197 (2003).
[197] Citizens United v. FEC, 558 U.S. 310, 366-67 (citing McConnell, 540 U.S. at 201).
[198] Buckley v. Valeo, 424 U.S. 1, 64-68 (1976).
[199] *Id.* at 66-67.
[200] *Id.* at 67.

keeping requirements can be used to detect violations of contribution limits.[201] 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."[202]

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.[203] 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 important" to justify traditional campaign finance regulations.[204] 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 meet Maryland's interests.[205] Specifically, Maryland failed to produce sufficient evidence to show that the specific platforms operated by the plaintiffs were used in foreign interference in Maryland elections.[206] This finding 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

[201] *Id.* at 67-68.
[202] Wood v. Ravel, *supra* note 48, at 1238 (citing Eu v. S.F. Cty. Democratic Cent. Comm., 589 U.S. 214, 231-32 (1989); Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011)).
[203] *See* The Wash. Post Co. v. McManus, No. 19-1132, 2019 WL 6647336, at *12 (4th Cir. Dec. 6, 2019) (invalidating Maryland's requirements on platforms hosting online political advertising despite the state's "admirable goals" in preventing foriegn interference in the state's elections).
[204] *Id.* at *9.
[205] *Id.* at *5-6, *9-10.
[206] *Id.* at *10 ("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.'").

evidence of an electoral harm present in political advertising on that specific platform and that regulating that platform would address that harm.

Additionally, the Fourth Circuit noted that the plaintiffs in *McManus* were news organizations that operate smaller platforms than larger corporations like Facebook, which operates what we often think of today when we hear the word "platform."[207] The court explained that while "clear" foreign interference occurred on platforms like Facebook, given the lack of evidence of similar foreign interference on platforms operated by the plaintiffs here, Maryland failed to justify why both classes of platforms should be regulated in the same way.[208] This discussion from the Fourth Circuit further supports the conclusion that governments should think carefully about how they determine which platforms are subject to record-keeping requirements. For instance, legislators may need to distinguish between different types of platforms rather than broadly imposing requirements on all or nearly all platforms.

Finally, despite its sweeping language, the *McManus* case is somewhat narrow in that it deals only with an "as applied" challenge brought by a group of news organizations.[209] In addition to differentiating the plaintiffs from large platforms like Facebook,[210] the Fourth Circuit discussed how the fact that these plaintiffs are news organizations presents its own set of challenges for the statute.[211] 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."[212] 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,

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[207] *See id.* at *11.
[208] *Id.*
[209] *Id.* at *3.
[210] *Id.* at *11.
[211] *Id.* at *7-9.
[212] *Id.* at *7 (citing Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

it suggests that governments will likely be unable to take wide-sweeping approach to imposing record-keeping requirements on all or nearly all third parties that distribute online political advertising. Similarly, it calls into question the extent to which traditional justifications for campaign finance regulations can be used to expand disclosure requirements designed to increase transparency to these third-party platforms.

V. Conclusion

The Mueller Report's 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 seven states to regulate online political advertising for state races and one federal appeals 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.