

Before the
FEDERAL ELECTIONS COMMISSION
Washington, DC 20463

In the Matter of)	
)	
)	
Notice of Proposed Rulemaking, Internet)	Notice 2018-06
Communication Disclaimers and Definition)	
of “Public Communication”)	

**COMMENTS OF ASIAN AMERICANS ADVANCING JUSTICE | AAJC,
COLOR OF CHANGE, AND NATIONAL HISPANIC MEDIA COALITION**

Chris M. Laughlin
Angela J. Campbell
Andrew Jay Schwartzman
James T. Graves
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
(202) 662-9535

*Counsel for Asian Americans Advancing
Justice | AAJC, Color of Change, and National
Hispanic Media Coalition*

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Asian Americans Advancing Justice | AAJC,¹ Color of Change,² and the National Hispanic Media Coalition³ (collectively, “Civil Rights Organizations”), by their counsel, the Institute for Public Representation, respectfully submit these comments⁴ in response to the Federal Election Commission (“FEC” or “Commission”)’s proposal to update its rules regarding disclosures for digital public communications.⁵

Civil Rights Organizations support the FEC’s effort to update its disclosure requirements in response to the dramatic changes in political advertising made possible by the internet and other digital technologies and devices. They have an especially strong interest in the development of effective disclosure rules. People of color, including their members, disproportionately take advantage of the benefits communicating on social media, especially via mobile devices. They have also been harmed by the dark side of digital communications; they have been the targets of malicious voter suppression efforts that take advantage of the fact that current FEC disclosure rules are obsolete

Civil Rights Organizations specifically support, with some modifications, the FEC’s proposed definition of “public communications.” They have proposed a few revisions to make

¹ AAJC is dedicated to civil and human rights for Asian Americans and to promoting a fair and equitable society for all. AAJC provides the growing Asian American community with multilingual resources, culturally appropriate community education, and public policy and civil rights advocacy. In the communications field, AAJC works to promote access to critical technology, services, and media for its communities.

² Color of Change is the nation’s largest online racial justice organization. Color of Change helps people respond effectively to injustice in the world around us. As a national online force driven by over one million members, Color of Change moves decision-makers in corporations and government to create a more human and less hostile world for Black people in America.

³ The National Hispanic Media Coalition is a media advocacy and civil rights organization for the advancement of Latinos.

⁴ Civil Rights Organizations also request that one or more representatives of their organizations have the opportunity to testify at the FEC’s public hearing on June 27, 2018.

⁵ *Internet Communications Disclaimers and Definition of “Public Communication,”* 83 Fed. Reg. 12864 (Mar. 26, 2018) (“NPRM”).

the meaning of the term even more clear. Most significantly, the definition should include not only communications placed for a fee but also those “promoted” for a fee.

Civil Rights Organizations generally support Alternative A’s proposal to apply the same disclosures that apply to radio and television to apply to the audio and video components of digital political ads. They also support using adapted disclosures, but only as a last resort. Further, the FEC should adopt criteria for adapted disclosures to minimize confusion and deter abuses. They urge the FEC to require the use of uniform indicators that explicitly state that the ad is a “Paid Political Ad.” Moreover, members of the public should be able to easily access the full disclosure with just one step. The FEC should also provide guidance on how to make disclosures “clear and conspicuous.”

Finally, Civil Rights Organizations appreciate that some parts of the advertising industry are taking steps to make political advertising more transparent and accountable. They stress, however, that these self-regulatory initiative do not reduce the need for the FCC to act promptly to revise its rules.

Background

In their prior comments, Civil Rights Organizations urged the FEC to promptly begin a rulemaking to promulgate effective, up-to-date disclosure regulations for digital communications.⁶ The comments discussed how the rules adopted in 2006 had not anticipated current digital advertising practices. They also pointed out how the lack of adequate disclosures has disproportionately affected people of color because African Americans, Hispanics, and Asian Americans are more likely to rely on smartphones to access the internet. They also showed that

⁶ Comments of Civil Rights Organizations on Advance Notice of Proposed Rulemaking, Internet Communications Disclaimers, Nov. 13, 2017 (“ANPRM Comments”).

during the 2016 election, social media was used to target people of color in efforts to suppress the vote.

Civil Rights Organizations thus are pleased that the FEC has issued a Notice of Proposed Rulemaking (“NPRM”) and appreciate its efforts to respond to the issues that the Civil Rights Organizations raised in their comments on the Advanced Notice of Proposed Rulemaking (“ANPRM”).⁷

For persons of color, the rapid emergence of online communications has provided valuable new opportunities for engaging in the electoral process. The internet has removed barriers to sharing ideas, disseminating messages, and reaching voters, thereby facilitating online spaces where historically disenfranchised voices can be heard in innovative and powerful ways. Persons of color are substantially more likely to engage with digital political communications using mobile devices⁸ and African Americans, Latinos, and Asian Americans are the most active users of social media for political information.⁹ Compared to others, Black and Latino users are around 10% more confident in social media’s ability to help people get involved with issues that matter to them.¹⁰

⁷ See, e.g., NPRM, 83 Fed. Reg. at 12868.

⁸ ANPRM Comments at 9-10.

⁹ Cathy J. Cohen & Matthew D. Luttig, *How social media helps young people — especially minorities and the poor — get politically engaged*, Washington Post (Sep. 9, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/09/how-social-media-helps-young-people-especially-minorities-and-the-poor-get-politically-engaged/?utm_term=.c5b239bcf900.

¹⁰ “Black and Latino users feel relatively strongly that social media help people get involved with issues that matter to them: 27% of blacks and 29% of Latinos feel this describes social media very well, compared with 18% of whites.” Maeve Duggan & Aaron Smith, *Social media and political engagement*, PEW Research Center (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/the-tone-of-social-media-discussions-around-politics/>.

For those seeking to influence political discourse and election outcomes, digital advertising enables political advertisers to target voters based on data that has been collected about those voters. Facebook, the largest social media platform, collects a variety of information from users, “including age, gender, education and income level, job title, relationship status, hobbies, political leanings, favorite TV shows and movies, what kind of car they drive and what kinds of products they buy.”¹¹ For example, using Facebook data obtained by Cambridge Analytica, a candidate for the Los Angeles County Board of Supervisors targeted ads about his record of support for off-road vehicles to persons predicted to be off-road enthusiasts.¹²

Unfortunately, the 2016 election demonstrated that Facebook and other social media can also be used to depress voter turnout by persons of color and to promote divisive racial, religious, and political themes.¹³ USA Today recently reviewed over 3,500 Facebook ads created by the Russian-based Internet Research Agency. It found that the Internet Research Agency

consistently promoted ads designed to inflame race-related tension. Some dealt with race directly; others dealt with issues fraught with racial and religious baggage such as ads focused on protest over policing, the debate over a wall on the U.S. border with Mexico and relationship with the Muslim community.¹⁴

¹¹ Elizabeth Weise, *Here’s how Russian manipulators were able to target Facebook users*, USA Today (May 10, 2018), <https://www.usatoday.com/story/tech/2018/05/10/how-russia-targeted-facebook-ads-disrupt-elections/596665002/>.

¹² Casey Tolan, *Two California Republicans in competitive congressional races contracted with Cambridge Analytica*, The Mercury News, Mar. 21, 2018. <https://www.mercurynews.com/2018/03/21/republican-running-for-congress-in-california-contracted-with-cambridge-analytica/>.

¹³ Adam Entous, Craig Timberg & Elizabeth Dwoskin, *Russian operatives used Facebook ads to exploit America’s racial and religious divisions*, Washington Post (Sep. 25, 2017), https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html.

¹⁴ Nick Penzenstadler, et al, *We read every one of the the 3.517 Facebook ads bought by Russians. Here’s what we found*, USA Today (May 11, 2018), <https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002/>.

These practices were effective in large part because those being targeted did not necessarily understand that what they were viewing were paid-for advertisements. Moreover, they did not know who was paying for the advertisements or why they were being targeted. Such information is essential for voters to evaluate the credibility of the information and to make informed decisions.

The risks associated with digital political ads will only get worse as digital advertising grows. In the upcoming 2018 midterm elections, digital political ad spending is expected to reach \$1.9 billion—22% of overall political ad spending.¹⁵ By comparison, digital advertisements made up less than 1% of political ad spending in 2014, marking a 2,539% growth in spending over the past four years.¹⁶ In the same time period, political ad spending on cable increased by 70 percent, while spending on broadcast and newspaper ads decreased.¹⁷ A large portion of the growth in digital ad spending has been driven by mobile advertising,¹⁸ which may not be covered by the Commission’s current definition of “political communications.” Thus, absent revision to the current rules, persons of color will continue to be disproportionately impacted by the harms associated with digital political ads. Given the dramatic increase in digital political advertising across various platforms and devices, comprehensive disclosure rules for these ads are essential to ensuring that members of the public can understand who is paying to influence their engagement in the electoral process.

¹⁵ Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, Open Secrets Blog (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Rani Molla, *Mobile is driving most ad spending growth worldwide*, Recode (Sep. 14, 2017), <https://www.recode.net/2017/9/14/16294450/mobile-ad-spending-growth-worldwide>.

I. The Definition of “Public Communication” Should be Revised

The term “disclaimers” as used by the FEC is a statement required by Section 30120(a) of the FECA that identifies who paid for the communication, and where relevant, whether the communication was authorized by a candidate. The Supreme Court has found that such disclosures “provide the electorate with information and ensure that the voters are fully informed about the person or group who is speaking” and that they enable members of the public “to evaluate the arguments to which they are being subjected.”¹⁹

In general, the FECA and FEC regulations require disclosures for any “public communication” by a political committee that expressly advocates the election or defeat of a clearly identified federal candidate or that solicit a contribution. Section 100.20 of the FEC’s rules defines the term “public communication.”²⁰

The NPRM proposes to amend Section 100.20 to include political advertising on the internet, including on social media such as Facebook, media sharing networks such as YouTube, streaming applications such as Netflix, and mobile devices and applications. It also seeks to cover political ads delivered using new technologies and devices such as wearables, virtual assistants such as Alexa, home devices such as Amazon Echo, and smart televisions.²¹ Civil Rights Organizations strongly support this goal. Given that these types of ads—which these comments will call “digital political advertising”—are increasing and even displacing some traditional advertising, the failure to revise the definition would leave the public without the information needed “to evaluate the arguments be which they are being subjected.”²²

¹⁹ *Citizens United v. Federal Election Commission*, 588 U.S. 310, 368 (2010).

²⁰ 11 CFR §100.20.

²¹ 83 Fed. Reg. at 12868.

²² *Citizens United*, 588 U.S. at 368.

At the same time, Civil Rights Organization believe that some modifications to the proposed language are necessary to achieve the intended goal. The FEC proposes to include digital political advertising by adding the italicized language to Rule 100.20.

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's *website or internet-enabled device or application*.

Civil Rights Organizations believe that the rule would be much clearer if it were revised as follows:

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *communications placed or promoted for a fee on another person's website or internet-enabled devices, applications or services*, or any other form of general public political advertising.

This proposed revision makes three changes to the FEC's proposed rule for the reasons explained below.

A. Eliminate the “exception to an exception” language

The current rule defines “public communication” broadly, but then exempts “communications over the Internet except for communications placed for a fee on another person's website.” The FEC has proposed to expand the exception to the exception to include internet-enabled devices and applications in addition to websites. While this is a step in the right direction, it would be much clearer to affirmatively include “communications placed or promoted for a fee on another person's website or internet-enabled devices, applications or services” within “public communication.”

B. Add the phrase “or services”

Civil Rights Organizations propose adding of the phrase “or services” after “internet-enabled devices” to ensure that disclosure rules apply not only to paid public communications on social media and mobile devices, but to all forms of digital political advertising currently in use or likely to be used in the future.

For example, it is not clear that the FEC proposal would include the practice of paying for the insertion of political advertising into video games. As far back as 2008, the Obama campaign bought ads in 18 popular video games.²³ For the 2014 midterm elections, Microsoft offered politicians the opportunity to place targeted ads on Xbox Live, Skype, MSN and other Microsoft platforms.²⁴ Ahead of the 2016 presidential race, game maker Zynga partnered with “Rubicon Project to develop native programmatic ads targeted at voters.”²⁵ They planned to work with campaigns to develop “sponsoredPLAY” mini-games that would appear when users are playing a mobile game. The ads would use data collected from players to target them based on location and to customize messaging on a state-by-state basis.²⁶

²³ Steve Gorman, *Obama Campaign Buys Ads in 18 Video Games*, Reuters (Oct. 15, 2008), <https://www.reuters.com/article/us-usa-politics-videogames/obama-buys-first-video-game-campaign-ads-idUSTRE49EAGL20081017>.

²⁴ Brian Fung, *Microsoft is using your data to target political ads on Xbox Live*, Washington post (Mar. 7, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/03/07/microsoft-is-using-your-data-to-target-political-ads-on-xbox-live/>. In 2014, the National Republican Senatorial Committee created Mission Majority, a game in which players go on a quest to gather volunteers and have to “dodge everything the Democrats throw at them.” The game even provided a way for players to contribute donate to the campaign. Will Mason, *How Virtual Reality Will Influence the 2016 Presidential Election*, Upload VR (Jul. 19, 2015) <https://uploadvr.com/virtual-reality-2016-presidential-election/>.

²⁵ Marty Swant, *Zynga Is Now Offering Native Political Gaming Ads for Presidential Campaigns*, Jan. 7, 2016, <https://www.adweek.com/digital/zynga-now-offering-native-political-gaming-ads-presidential-campaigns-168894/>

²⁶ *Id.* See also Sami Yenigun, *Presidential Campaigns Rock The Gamer Vote*, National Public Radio (Oct. 1, 2012) <https://www.npr.org/2012/10/01/162103528/presidential-campaigns-rock-the-gamer-vote>.

Similarly, Civil Rights Organizations want to be sure that the definition includes digital political advertising delivered by interactive billboards, smart televisions, Internet of Things (“IoT”) devices and other forms of digital marketing. Commercial advertisers are experimenting with a variety of new ways to advertise. One company has even created a smart liquor bottle that connects with a smartphone to enable consumers to record messages and the company to collect data and personalize marketing.²⁷ If these techniques prove successful in the commercial marketplace, political advertisers will use them as well. Thus, it is important that the definition of public communications clearly includes paid political ads regardless of whether they are viewed on a phone, television set, game console or electronic billboard. Adding “services” to the list clarifies the definition to ensure it applies to new types of digital ads.

C. Add “promoted for a fee”

Civil Rights Organizations urge that the FEC to modify its proposed definition to include “communications placed *or promoted* for a fee.” Many voters go online to learn about candidates and elections. As Google explained in a blog for advertisers, “[v]oter decisions used to be made in living rooms, in front of televisions. Today, they’re increasingly made in micro-moments, on mobile devices. Election micro-moments happen when voters turn to a device to learn about a candidate, event, or issue.”²⁸

Google’s research found that from April 2015 to March 2016, “people have watched more than 110 million hours of candidate- and issues-related content on YouTube. That’s 100X

²⁷ Marc Ambasca-Jones, *Five ways to bring advertising to life in the internet of things*, The Guardian (Jul. 28, 2015), <https://www.theguardian.com/media-network/2015/jul/28/internet-things-advertising-marketing>.

²⁸ Kate Stanford, *How Political Ads and Video Content Influence Voter Opinion*, Think with Google (March 2016), <https://www.thinkwithgoogle.com/marketing-resources/content-marketing/political-ads-video-content-influence-voter-opinion/>.

the amount of time it would take to watch all content ever aired on CNN, C-Span, MSNBC, and Fox News combined.”²⁹ Presumably, much of this content is not paid for or does not promote candidates, and so would not be considered public communications. However, Google reports that candidates increased their spending on YouTube by 294% between October 2015 and February 2016, heading into the primaries. It found that campaigns particularly liked Google’s TrueView ads, which are video ads that viewers may choose to keep watching or skip after five seconds.³⁰ With TrueView campaigns, advertisers only pay for ads watched, and thanks to the skip feature, “campaigns can get immediate feedback: Did viewers skip the ad, or *choose* to watch it? Based on that feedback, campaigns are able to adjust TrueView ads midflight.”³¹

In addition to paying for ads, it has become common for campaigns and committees to pay individuals or groups to create and posts videos or blogs. The agents are also paid to “share” content created by others, including news stories, personal posts, videos, and other content. There is typically no payment to the social media platform for the initial placement of this content. The use of these techniques exacerbated the harmful effects of undisclosed political ads on persons of color in the 2016 election, because they tend to place a higher level of trust on the content shared by their friends and family than on what they see on television.

Certain individuals have acquired a significant following on social media; indeed, in the case of Twitter, this audience is referred to as “followers.” On YouTube, certain content creators

²⁹ *Id.* See also *YouTube Trends Report 2016, The Presidential Elections on YouTube*, http://think.storage.googleapis.com/docs/The_Presidential_Elections_On_YouTube.pdf

³⁰ TrueView video discovery ads appear alongside other YouTube videos, in YouTube search pages, or on websites on the Google Display Network that match the advertiser’s target audience. TrueView, <https://www.thinkwithgoogle.com/products/youtube-trueview/>.

³¹ How Political Ads and Video Content Influence Voter Opinion, <https://www.thinkwithgoogle.com/marketing-resources/content-marketing/political-ads-video-content-influence-voter-opinion/>.

known as “YouTube celebrities” or “Influencers” have also attracted a large number of subscribers and views. Commercial advertisers have found that paying influencers to review or feature a product is a very effective means of advertising. Fourstarzz, a company that matches up brands with influencers, has urged political candidates to utilize influencer marketing tactics.

It explains that

targeted digital advertising has burst onto the scene and has been extremely effective, but what’s the next step, and how can local candidates who don’t have a 5 million dollar war chest make maximum marketing impact? The best and most logical option is Influencer Marketing. Influencer Marketing is best described as the endorsement through micro influencers, bloggers and even celebrities creating genuine messages from their personal accounts to a trusted follower base.³²

There are also well-known examples of bloggers paid to promote or oppose a candidate.³³ In addition to bloggers and influencers, political donors have been paying “a new group of partisan organizations that specialize in creating catchy, highly shareable messages for Facebook, Twitter and other social platforms.”³⁴

Another striking development during the 2016 elections was the practice of paying for bots to amplify political communications. According to a recent study, “Bots are social media accounts that automate interaction with other users, and political bots have been particularly

³² See *Jump on Twitter! The making of Political Super-Stars Through Influencer Marketing*, <https://fourstarzz.com/jump-on-twitter-the-making-of-political-super-stars-through-influencer-marketing/>.

³³ Douglas McAlarney, *Are Political Bloggers Weakening the Democratic Election Process by Being Paid to Give You Their “Unbiased” Opinions?*, 41 F.a. St. U. L. Rev, 511, 527-33 (Winter 2014).

³⁴ See Kevin Roose, *Political Donors Put Their Money Where Their Memes Are*, New York Times (Aug. 6, 2017) <https://www.nytimes.com/2017/08/06/business/media/political-donors-put-their-money-where-the-memes-are.html>.

active on public policy issues, political crises, and elections.”³⁵ Networks of bots, known as “botnets” are “often comprised of hundreds of unique accounts, can be controlled by one user operating from a single computer.” Botnets can generate fake user engagement, such as ‘likes’ and ‘retweets,’ that catapult content to the screens of millions of viewers. Bots can also be used to target users with specific characteristics or beliefs in ways that will better facilitate the wide dissemination of a particular communication.³⁶ Bots are an example of a modern communications technique where the advertiser may not pay for an ad to be placed, but pays an employee or third party for a statement to be promoted.

To serve the FECA’s purpose of requiring disclosure, it is important that the definition of public communication covers political communications promoted for a fee. Moreover, the FEC clearly has the authority to include it. When the Commission adopted the current definition of “public communication” which includes “*communications placed for a fee on another person's website*” it excluded communications made by individuals on their own websites. It noted that the

forms of mass communication enumerated in the definition of “public communication” in 2 U.S.C. 431(22), including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person. Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility

³⁵ Bence Kollanyi, Philip N. Howard, & Samuel C. Woolley, *Bots and Automation over Twitter during the U.S. Election*, Oxford, UK: Project on Computational Propaganda Data Memo (Nov. 17, 2016) <http://comprop.oii.ox.ac.uk/research/working-papers/bots-and-automation-over-twitter-during-the-u-s-election/>.

³⁶ Mark Buchanan, *Why Fake News Spreads So Fast on Facebook*, Bloomberg (Aug. 31, 2017), <https://www.bloomberg.com/view/articles/2017-08-31/why-fake-news-spreads-so-fast-on-facebook>.

owner) for access to the public through that form of media each time he or she wishes to make a communication.³⁷

The Commission found, however, that a “communication to the general public on one’s own website, by contrast, does not normally involve the payment of a fee to an intermediary for each communication.”³⁸ The Commission explained that

Communications placed for a fee on another person's website, however, are analogous to the forms of “public communication” enumerated by Congress in 2 U.S.C. 431(23), particularly in light of the growing popularity of Internet advertising. As the public has turned increasingly to the Internet for information and entertainment, advertisers have embraced the Internet and its new marketing opportunities. Internet advertising revenue increased by 33.9 percent between the third quarter of 2004 and the third quarter of 2005 and reached \$3.1 billion for the third quarter of 2005. The cost of advertising on the Internet distinguishes it from other forms of Internet communication, such as blogging or publishing one's own website, which are generally performed for free or at low cost.³⁹

Of course, today, the amount of spending on digital advertising is much higher. According to E-Marketer, digital ad spending in the U.S. grew by 15.9 in 2017, or “the equivalent of \$83 billion in revenue.” It projected that Facebook’s ad revenue would increase

³⁷ *Internet Communications*, 71 Fed. Reg. at 18589, 18589.

³⁸ *Id.* (footnote omitted).

³⁹ *Internet Communications*, 71 Fed. Reg. at 18593. The use of employees or agents to promote content without disclosure closely resembles using straw donors to hide the source of campaign contributions, a practice which is expressly prohibited by Section 30122 of FECA (“[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution....”).

32.1 percent; Google's by 14.8 percent.⁴⁰ According to another study, digital ad spending in 2017 exceeded the amount of spending on television advertising.⁴¹

Moreover, requiring disclosure when public communications are promoted for a fee would be consistent with the practice of the Federal Trade Commission. The FTC has clarified that its longstanding Endorsement Guides apply to social media. Specifically, it requires that bloggers, reviewers, influencers or others compensated by an advertisers for mentioning or promoting a products to disclose that they received compensation.⁴² It treats paid endorsements posted for free on social media as advertisements which must disclose that influencer was compensated for its action. The FEC should use the FTC's policies as a guide to requiring disclosure of paid political endorsements.

Civil Rights Organizations proposed revision also advances the Supreme Court's rationale in *Citizens United*. Writing for the majority, Justice Kennedy stated:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their

⁴⁰ Lauren Johnson, *U.S. Digital Advertising Will Make \$83 Billion this Year, Says EMarketer*, Adweek (Mar. 14, 2017), <https://www.adweek.com/digital/u-s-digital-advertising-will-make-83-billion-this-year-says-emarketer/>.

⁴¹ Peter Kafka and Rani Molla, *2017 was the year digital ad spending finally beat TV*, Recode (Dec. 4, 2017), <https://www.recode.net/2017/12/4/16733460/2017-digital-ad-spend-advertising-beat-tv>.

⁴² *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR Part 255. See also *The FTC's Endorsement Guides: What People Are Asking*, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>. The FTC explains that it "is only concerned about endorsements that are made on behalf of a sponsoring advertiser. For example, an endorsement would be covered by the FTC Act if an advertiser—or someone working for an advertiser—pays you or gives you something of value to mention a product. If you receive free products or other perks with the expectation that you'll promote or discuss the advertiser's products in your blog, you're covered. Bloggers who are part of network marketing programs, where they sign up to receive free product samples in exchange for writing about them, also are covered."

positions and supporters . . . and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.⁴³

If there is a monetary interest behind a political message and such interest will affect how voters evaluate the message, that connection should be disclosed. The proposed change requires just that.

II. The Commission should apply the full disclosure requirements that now apply to radio and television communications to digital public communications that have audio or video components

Civil Rights Organizations support Alternative A with respect to disclosure requirements for online video and audio communications. Alternative A would extend the full disclosure requirements—commonly known as Stand By Your Ad (“SBYA”) requirements—that apply to radio and television public communications to digital public communications with video and audio components.⁴⁴ In contrast, Alternative B would only require digital audio and video ads to follow the Commission’s general disclosure requirements, but not the SBYA requirements. It would also allow for its adapted disclosure proposal to apply to these types of ads.

The NPRM states that the premise for Alternative A is that digital public communications with video and audio components “are indistinguishable from offline advertisements that may be distributed on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution.”⁴⁵ Civil Rights Organizations agree. By requiring candidates to state

⁴³ *Citizens United*, 588 US at 370.

⁴⁴ NPRM, 83 Fed. Reg. at 12869-70. The SBYA rules require candidates or groups responsible for a video or audio political advertisement to identify themselves and state that they approve of the ad. 11 CFR §110.11(c)(3). Video ads also require that the candidate be in full-screen view when the statement is made and that there be a text-based statement with specific requirements to ensure that statement is clear and conspicuous. *Id.*

⁴⁵ NPRM, 83 Fed. Reg. at 12870.

that they approved the contents of the ad, Alternative A fulfills the Congressional objectives of BCRA.

Moreover, requiring a different disclosure for a campaign ad shown on television and on the internet would confuse and possibly mislead voters. Since BCRA required the SBYA disclosures, the public has come to expect the SBYA statement in political ads. A different disclosure requirement could incorrectly cause voters to believe the ad was not approved by the candidate.

Alternative A provides more information to the public and increases voters' ability to evaluate the source of political ads. Empirical studies show that "disclosure may help voters make better decisions by prompting them to formulate mental shortcuts or heuristics that assist them in making voting choices that align with their policy preferences, even if they are fairly uninformed about the issue or candidate."⁴⁶

Alternative A also properly points out that consistent disclosure requirements for public communications with audio and video components, regardless of the medium, is beneficial for advertisers. As the proposal points out, the persons paying for, authorizing, and distributing these communications are familiar with the requirement.⁴⁷ Indeed, advertisers have become accustomed to appending these disclosures to all video and audio ads. As the NPRM also states, consistent requirements are less burdensome for advertisers because they avoid a scenario where, an advertiser would prepare one disclosure for an ad shown on television and a separate disclosure for the same ad shown on YouTube. This also reduces the cost of producing ads.

⁴⁶ Irina Dykhne, *Persuasive or Deceptive? Native Advertising in Political Campaigns*, 91 S. Ca. L. Rev. 339, 350-52 (2014).

⁴⁷ 83 Fed. Reg. at 12870.

Requiring the same disclosure requirements for digital video and audio ads would also be consistent with the Commission’s prior findings that “it would be unsupportable to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite.”⁴⁸ Similarly, it would also be unsupportable to have different requirements for the same type of ad just because it was delivered over a digital medium.

It would likewise be inconsistent with precedent to permit online advertisements to replace full disclosure with an adapted disclosure. In a 2008 Advisory Opinion, the Commission rejected a request that 10- and 15-second television ads should only require a truncated disclosure.⁴⁹ The Commission concluded that there are no intrinsic physical or technological limitations to having a full disclosure for ads of this length.

The same is true for digital video and audio ads. If anything, online ads offer have audio and video communications do not have the same temporal and cost restrictions as radio and television ads; they can be as long or short as the advertiser desires with little change in cost.⁵⁰ In fact, YouTube advises advertisers that longer advertisements can be just as or even more

⁴⁸ *Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 Fed. Reg. 76962, 76963 (2002).

⁴⁹ *Advisory Opinion 2007-33*, FEC (July 29, 2008).

⁵⁰ For example, YouTube does not charge advertisers based on the length of the ad, but on the number of times that an ad is viewed. *About cost-per-view (CPV) bidding*, YouTube, <https://support.google.com/adwords/answer/2472735?hl=en> (last visited May 25, 2018). YouTube also suggests promoted advertisements for viewers to watch alongside its other suggested videos, so some users may choose to watch an entire ad and these ads may be much longer.

effective than shorter ads.⁵¹ Thus, there is no reason that the SBYA requirements should not apply to digital public communications with video and audio components.⁵²

III. Adapted Disclaimers Should Only Be Allowed as a Last Resort and Must Meet Certain Criteria to Minimize Confusion or Abuse

Civil Rights Organizations support the creation of an adapted disclosure exception, but emphasize that it should only be used where complete disclosures on the face of the ad is not possible. Because some people will not take the additional steps to view complete disclosures, the electorate is better served by complete disclosures in the ad itself.

The Commission should also set clear requirements for using adapted disclosures to maximize effectiveness and minimize possibilities for abuse, and unintended consequences. Any negative consequences of the exception may have a disproportionate impact on persons of color.. Because persons of color rely more on mobile devices and adopt newer technologies faster than others, these individuals may be more likely to see ads that would qualify for an adapted disclosure.

Accordingly, the FEC should adopt a modified version of Alternative A’s adapted disclosure exception and decline to adopt Alternative B’s percentage-based adapted disclosure exception.

⁵¹ See *Unskippable Labs: The Mobile Recut / YouTube Advertisers*, YouTube, <https://www.youtube.com/watch?v=6HHgzEGwil4> (Jun. 16, 2015) (stating that users viewing ads on mobile devices are willing to “engage longer”); see also *TrueView EXPLAINED While Being Bombarded With Puppies / YouTube Advertisers* (stating that ads can be of any length and that some of the most successful ads are longer than 3 minutes with user watching the entire ad).

⁵² The only conceivable problem would arise if the entire video ad were less than 4 seconds, as the rules require video ads include a text statement for 4 seconds. The same could, of course, be true for television ads. The solution is to amend §110.11(c)(3)(iii)(B) and §110.11(c)(4)(iii)(B) to read “The statement must be visible for a period of at least four (4) seconds *or the entirety of ads shorter than four (4) seconds.*”

A. The Commission should adopt a modified version of Alternative A’s proposal for digital text and graphic public communications

Civil Rights Organizations favor Alternative A. Alternative A would require an adaptive disclosure for any “public communication distributed over the internet with text or graphic components but without any video component that, due to external character or space constraints, cannot fit a required disclaimer.” In contrast, Alternative B would allow adopted disclosures if a full disclosure would constitute more than 10% of the ad.

While the stated rationale for Alternative B is that it creates a bright-line rule, it could lead to absurd results. A hypothetical example illustrates this problem. Using a 10% trigger, the following text-based ad designed for Twitter would require full disclosure if the disclosure read “Paid by Color of Change.”

Want to support the FEC’s efforts to modernize its digital political ads disclosure rules? You can submit a comment to express your support by going here:
<http://sers.fec.gov/fosers/rulemaking.htm?pid=74739>.

But if it instead said “Paid *for* by Color of Change,” it would only require an adapted disclosure.⁵³ In another scenario, a candidate with a longer name might be required to have a full disclosure, while a candidate with a short name would not.

Using a percentage-based trigger also allow advertisers to engage in manipulations to avoid full disclosure. For example, a political advertiser might increase or decrease the length of a text ad, or the size of a graphic ad, so that full disclosure would constitute more than 10%. Adopting a percentage-based trigger might also decrease incentives for the online community to develop mechanisms that would facilitate full disclosures.

⁵³ The hypothetical Tweet is 207 characters, including the period and spaces. “Paid by Color of Change” is 23 characters with spaces, while “Paid for by Color of Change” is 27 characters with spaces. For the first disclosure, $207+23=230$ and $23/230=10\%$, which does not *exceed* 10%. For the second disclosure, $207+27=234$ and $27/234=11.5\%$, which exceeds 10%.

Civil Rights Organizations prefer Alternative A because it provides for an objective determination based on factors outside of the advertisers' control and discretion. Nonetheless, the wording of the proposed rule may create unintentional ambiguity. Thus, Civil Rights Organizations suggest clarifying the rule to read: "A digital public communication with text or graphic components but without any video or audio components that, due to the character or space constraints intrinsic to the technological medium, cannot include a required disclaimer, must include an adapted disclaimer." This revision makes clear that "the character or space constraints intrinsic to the technological medium are intended to be the relevant consideration." It also focuses on the "digital" nature of the advertisement, not the technology used to deliver the ad.

B. The adapted disclosure rule should require an indicator that is the same for all ads that use the exception, that states "Paid Political Ad," and that leads to the complete disclosure

The adapted disclosure rule should provide clear, straightforward, and consistent requirements for presenting adapted disclosures. Accordingly, Civil Rights Organizations propose the following rule:

An adapted disclosure means an indicator stating "Paid Political Ad" that is presented in a clear and conspicuous manner on the face of the communication and uses a technological mechanism to show or allows a recipient to view the full disclosure with no more than one step. An indicator is not clear and conspicuous if it is difficult to see or read, or if the placement is easily overlooked. The disclosure must not be accompanied by another information, including additional information about the candidate or issue.

Civil Rights Organizations' proposed revision is the same as Alternatives A and B in the following ways:

- Both Alternatives and the proposed revision require that the adapted disclosure be placed on the face of the communication.

- Both Alternatives and the proposed revision state that the indicator be displayed in a clear and conspicuous manner and generally state that an indicator is not clear and conspicuous if it is difficult to see or read, or if the placement is easily overlooked.
- Both Alternatives and the proposed revision require that the indicator have a technological mechanism that shows or allows those receiving the ad to access the full disclosure.
- Alternative A and the proposed revision both require that those receiving the ad can access the full disclosure with no more than one step.
- The proposed revision is similar to Alternative B's tier 2 requirement in that it only requires an indicator.

Some of the other proposals, however, are unnecessary or counterproductive. So long as the Commission adopts rules that minimize the use of adapted disclosures, as discussed above, and adopts Civil Rights Organizations' proposed rule language for the indicator, or something substantially similar, it is not essential to include the name of the person that paid for the ad in the indicator. In some instances, requiring the name of the payer might mean that the adapted disclosure is not substantially more abbreviated than the full disclosure, which would negate the intent of the exception.

It is important however the meaning of the indicators is clear. Alternative A states that the indicator can be "any visible or audible element of an internet communication" and "may take any form including, but not limited to, words, images, sounds, symbols, and icons." Civil Rights Organizations believe the use of consistent indicators is needed to prevent confusion, and that the proposed language could result in the use of many different indicators. .

The Commission should encourage development of a uniform indicator that can be used for all digital graphic and text political ads that qualify for the exception. An ideal indicator would be a text box with a solid border, bright colored background, and an easy to read text stating the phrase "Paid Political Ad." The Digital Advertising Alliance (DAA) recently

launched an initiative to increase transparency and accountability in political ads that would that includes a new political ad icon.⁵⁴ This icon, however, does not convey the essential information that the ad was placed or promoted for compensation. Moreover, research shows that icons alone seldom convey the intended message⁵⁵ and that text accompanying an icon is essential to conveying what the icon means.⁵⁶ Merely adding the name of the payer would not be sufficient if the public does not know that the indicator is meant to convey that an ad is a paid political ad. Moreover, the public is unlikely to be familiar with candidates' names, especially if they are not an incumbent, or to know who is funding a committee with a generic name.

Similarly, the FEC should not allow an indicator to simply be a hyperlink. The FTC's endorsement guidelines specify that a hyperlink is not likely to be sufficient for disclosure purposes because "it does not convey the importance, nature, and relevance of the information to which it leads and it is likely that many consumers will not click on it and therefore will miss necessary disclosures."⁵⁷ Many people expect that clicking on a hyperlink will lead them to a website for the product, service, or in this case, candidate or issue that is being advertised, and thus would be unlikely to click on it.⁵⁸

⁵⁴ *DAA Releases New Guidance & "PoliticalAd" Icon Offering Info on Political Ads; ASRC and DMA to Enforce Program Across Industry*, Digital Advertising Alliance (May 22, 2018), <https://digitaladvertisingalliance.org/press-release/digital-advertising-alliance-launches-initiative-increase-transparency-accountability>.

⁵⁵ Katherine Haramundanis, *Why icons cannot stand alone*. ACM SIGDOC Asterisk J. Comp. Doc., 20(2):1–8 (May 1996); S.C. Huang and R. G. Bias. "Icons versus texts in accuracy and efficiency." iConference '12, 2012.

⁵⁶ See Pedro Giovanni Leon, Justin Cranshaw, Lorrie Faith Cranor, Jim Graves, Manoj Hastak, Blasé Ur & Guzi Xu, *What Do Online Behavioral Advertising Disclosure Communicate to Users?*, CMU-CyLab-12-008, at 9 ("CyLab Study") (stating that majority of users are less likely to click on disclosure icons without specific language about what the icon is conveying and incorrectly thought clicking the disclosure would indicate consent or proceed with a purchase).

⁵⁷ *The FTC's Endorsement Guides: What People Are Asking*, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>

⁵⁸ CyLab Study at 9.

Finally, as Civil Rights Organizations' proposed revision specifies, the Commission should prohibit technological mechanisms that include information other than just the disclosure. Without such a prohibition, an advertiser could use an indicator to direct a user to, for example, a landing page that is the home page for the candidate or issue. This would effectively allow political advertisers to use the adapted disclosure exception to further promote their candidate or issue. This would confuse users because it would not immediately indicate that they are meant to be viewing a disclosure, particularly if they have to scroll down the page or click another link to view the disclaimer.

Alternative B provides that a technological mechanism must allow the person receiving the ad to "locate" the full disclosure. Civil Rights Groups believe that the term "locate" is ambiguous and could allow advertisers to require multiple steps to view the full disclosure and thus discourage the public from accessing the full disclosure.

IV. The Commission Should Provide Additional Guidance on How to Make Disclosures "Clear and Conspicuous"

Both alternatives make clear that adapted disclosures must be "clear and conspicuous" for the purpose of giving "the reader, observer, or listener adequate notice that further disclaimer information is available by a technological mechanism." And both adapted disclosure alternatives state that "An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked." Neither of the FEC's alternatives, however, specifies that ads ineligible for the adapted disclosures must still have a clear and conspicuous disclosure.

The Commission should clarify that the "clear and conspicuous" requirement also applies to all disclosures. It should also provide more guidance on what it means by "clear and conspicuous." For example, current rules for printed communications specify that disclosures

must have “a reasonable degree of color contrast between the background and the printed statement”⁵⁹ and be “sufficient size to be clearly readable.”⁶⁰ There is no reason the Commission should not include similar specifications for digital political ads. Similarly, the FEC should clarify that when an ads is targeted to non-English speakers, the disclosure must be given each of the languages used in the advertisement to be “clear and conspicuous.”

The Commission should make clear that a disclosure is only “clear and conspicuous” when it is readable on all digital media. For example, a disclosure would not be clear and conspicuous if it were readable when viewed on a computer monitor but not on a smartphone. Similarly, an adapted disclosure that used a hover-over, roll-over, or mouse-over mechanism, as suggested by both Alternatives A and B, would be insufficient because these mechanism are not currently designed to work on smartphones. Political advertisers must comply with the Commission’s disclosure requirements regardless of the device used to view a political advertisement.

The Commission should look to the FTC’s Endorsement Guide and Frequently Asked Questions for suggestions on making online disclosures clear and conspicuous. The FTC’s enforcement guidelines are specifically crafted to ensure that digital advertisers do not unfairly or deceptively advertise to the public. Because of the increasing importance of social media, it has warned some 90 online influencers that merely “tagging” a product would not constitute sufficient disclosure, and that consumers should not have to take additional steps, such as clicking “view more,” to see a complete disclosure.⁶¹ The Commission has backed up these

⁵⁹ Federal Election Campaign Act of 1971, 52 U.S.C. § 30120 (c)(3), 11 C.F.R. § 110.11(c)(2)(iii).

⁶⁰ Federal Election Campaign Act of 1971, 52 U.S.C. § 30120 (c)(1), 11 C.F.R. § 110.11(c)(2)(i).

⁶¹ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship* (April 19, 2017),

policies with a number of aggressive enforcement actions against companies that fail to comply with the guidelines.⁶²

Finally, the Commission specify that when the additional disclosure may not contain any information beyond that required to be disclosed. Otherwise, an advertiser could use an indicator to direct a user to, for example, a landing page that is the home page for the candidate or issue. This would frustrate the purpose of disclosure by making it more difficult to find. Moreover, it would allow political advertisers to use the adapted disclosure exception to further promote their candidate or issue.

V. Recent Self-Regulatory Initiatives Do Not Reduce the Need for the FEC to Revise its Disclosure Rules

Some companies and trade associations have volunteered to do more to provide public disclosure regarding political advertisements. For example, Facebook announced the launch of new requirements for political ads on May 24, 2018, which require, among other things, that

- Starting today, all election-related and issue ads on Facebook and Instagram in the US must be clearly labeled – including a “Paid for by” disclosure from the advertiser at the top of the ad. This will help ensure that you can see who is paying for the ad – which is especially important when the Page name doesn’t match the name of the company or person funding the ad.
- When you click on the label, you’ll be taken to an archive with more information. For example, the campaign budget associated with an

<https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>; https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship/influencer_template.pdf (text).

⁶² See, e.g., *In the Matter of CSGOLotto, Inc.*, 2017 WL 6033201 (Nov. 28, 2017) (influencer with undisclosed financial interest in service being promoted); *In the Matter of Warner Bros. Home Entm't Inc.*, 2016 WL 6892613 (Nov. 17, 2016) (failure to disclose payments to YouTube influencers).

individual ad and how many people saw it – including their age, location and gender.⁶³

The Digital Advertising Alliance (DAA) announced an initiative to increase transparency and accountability for digital political ads. Under this initiative, political ads would display a new “PoliticalAd” icon. Clicking on the icon would provide the political advertiser’s name, contact information, contribution or expenditure records if applicable, and other information.⁶⁴

Google has also rolled out new policies to make political advertising more transparent.⁶⁵ Twitter, too, has announced that it would start labeling tweets from some US political candidates.⁶⁶

While Civil Rights Organizations welcome these initiatives, they are not, as some may argue, a substitute for FEC regulation as a matter of law. The Federal Campaign Act of 1971, as amended by BRCA, defines public communications to mean “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public*

⁶³ Rob Leathern, *Shining a Light on Ads with Political Content*, (May 24, 2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/>. See also *Hard Questions: Why Doesn’t Facebook Just Ban Political Ads?* (May 24, 2018), <https://newsroom.fb.com/news/2018/05/hard-questions-political-ads/> (“people in the US will be able to see who’s running a political ad, how much money was spent on it, how widely it was seen, and who the ad reached—for example age, gender and location. Advertisers will also have to share who paid for the ad. . . . Helping people to understand who’s trying to influence their vote will help us better defend against foreign interference and other abuse.”) <https://newsroom.fb.com/news/2018/05/hard-questions-political-ads/>.

⁶⁴ *DAA Releases New Guidance & “PoliticalAd” Icon Offering Info on Political Ads; ASRC and DMA to Enforce Program Across Industry*.

⁶⁵ Kent Walker, *Supporting election integrity through greater advertising transparency*, Google (May 4, 2018), <https://blog.google/topics/public-policy/supporting-election-integrity-through-greater-advertising-transparency/>.

⁶⁶ *Twitter to ad labels to US political Candidates*, CBS News (May 23, 2018), <https://www.cbsnews.com/news/twitter-to-add-labels-to-u-s-political-candidates/>.

*political advertising.*⁶⁷ The *Shays* court held that advertising on the internet was not excluded from this definition. It found that

under Chevron step one, 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.⁶⁸

It is clear that, at least as of the 2016 elections, targeted political advertising on social media has become a type of “general public political advertising.” Indeed, as more and more advertising in general shifts to digital, which offers advertisers the ability to better target and measure the effectiveness of their ads, political advertising will too. Thus, regardless of what third parties may do, the FEC has a legal obligation to enforce disclosure requirements set forth in 52 U.S.C. 30120 with respect to modern forms of general public political advertising using digital media.

Even if the FEC had no legal obligation to require disclosure, reliance on self-regulation would be insufficient to ensure that members of the public are adequately informed. While these self-regulatory proposals may indeed help to inform the public and offer insights into what information and methods of disclosure would work best, they offer no assurance that all paid political advertisements will disclose the fact that they are political advertisements and who is paying for them.

All political ads, regardless of the platform they appear on, must be subject to basic reporting requirements. Political ads are not limited to Facebook and Twitter. As Civil Rights Organizations discussed in their ANPRM comments, political ads may be placed on YouTube videos, in mobile apps, or on videogames. Even bloggers can be paid to write posts that support

⁶⁷ 52 U.S.C. 30101(a)(22) (emphasis added).

⁶⁸ *Shays v. FCC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004).

or oppose a political candidate or issue. In the near future, we can expect to see new forms of political advertising to the public. Moreover, not all digital advertisers participate in the Digital Advertising Alliance. It is inconceivable that all of the relevant actors would implement voluntary disclosure requirements. Thus, absent clear rules from the FEC, a self-regulatory regime could result in a patchwork of different self-regulatory schemes that would be very confusing to the public and would not provide the information the public needs to determine the source of a political ad.

Additionally, self-regulatory programs can only be effective if the guidelines provide meaningful disclosure. Since these proposals are so new, it is impossible to tell whether they require meaningful public disclosure. In fact, several objections have already been raised about shortcomings in Facebook's proposal.⁶⁹

Finally, self-regulatory programs cannot work if they are not enforced. Facebook and Twitter can decide not to enforce their guidelines or even to weaken or repeal them. Enforcement of voluntary guidelines by an organization funded by industry, such as the DAA, is also problematic. Strong enforcement may not be seen as in the members' interests, and members who object can withdraw their support or drop their membership. Thus, it is essential that the FEC adopt rules that require effective public disclosure of all general online political advertising and that it enforce those rules.

⁶⁹ Upturn, *Leveling the Platform: Real Transparency for Paid Message on Facebook* (May 2018), <https://www.teamupturn.org/reports/2018/facebook-ads/>; Letter from David Chavern, President and CEO News Media Alliance to Mark Zuckerberg, May 18, 2018, <https://www.newsmediaalliance.org/wp-content/uploads/2018/05/FB-Political-Ads-Letter-FINAL.pdf>.

Conclusion

Civil Rights Organizations encourage the Commission to revise its disclosure rules as discussed above to ensure all Americans will know when a digital communication is paid for and by whom.

Respectfully submitted,

/s/ Chris M. Laughlin

Chris M. Laughlin

Angela J. Campbell

Andrew Jay Schwartzman

James T. Graves

Institute for Public Representation

Georgetown University Law Center

600 New Jersey Avenue NW, Suite 312

Washington, DC 20001

(202) 662-9535

*Counsel for Asian Americans Advancing
Justice / AAJC, Color of Change, and
National Hispanic Media Coalition*

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