

UNITED STATES OF AMERICA
FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON
INTERNET COMMUNICATION DISCLAIMERS AND DEFINITION
OF "PUBLIC COMMUNICATION"

Washington, D.C.

Wednesday, June 27, 2018

1 PARTICIPANTS:

2 FEC Members:

3 CAROLINE C. HUNTER
Chair

4 ELLEN L. WEINTRAUB
5 Vice Chair

6 MATTHEW S. PETERSON
Commissioner

7 STEVEN T. WALTHER
8 Commissioner

9 FEC Staff:

10 ALEC PALMER
Staff Director

11 LISA J. STEVENSON
12 Acting General Counsel

13 Panel I:

14 ALLEN DICKERSON
Legal Director
15 Institute for Free Speech

16 BRENDAN FISCHER
Director, Federal Reform
17 Campaign Legal Center

18 PAUL S. RYAN
Vice President, Policy & Litigation
19 Common Cause

20 ILYA SHAPIRO
Senior Fellow, Constitutional Studies
21 Cato Institute

22

1 PARTICIPANTS (CONT'D):

2 Panel II:

3 DAVE GRIMALDI
4 Executive Vice President, Public Policy
Interactive Advertising Bureau

5 JOSEPH JEROME
6 Policy Counsel
Center for Democracy & Technology

7 YOUNG MIE KIM, Ph.D.
8 Professor, School of Journalism and Mass
Communication
9 University of Wisconsin

10 BERIN SZÓKA
11 President
TechFreedom

12 Panel III:

13 DAN BACKER
14 Counsel
Coolidge-Reagan Foundation

15 VICTOR E. BERNSON, JR.
16 Vice President and General Counsel
Americans for Prosperity

17 CRAIG HOLMAN, Ph.D.
18 Government Affairs Lobbyist
Public Citizen

19 IAN VANDEWALKER
20 Senior Counsel, Democracy Program
Brennan Center for Justice

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1 P R O C E E D I N G S

2 (9:35 a.m.)

3 CHAIRWOMAN HUNTER: I would like to
4 welcome everybody the Commissions hearing on June
5 27, 2018, to discuss issues pertaining to internet
6 that contain express advocacy, solicit
7 contributions or are made by political committees.
8 Both proposals would continue to require
9 disclaimers for certain internet communications
10 and both would allow certain internet
11 communications to provide disclaimers through
12 alternative technology. The proposals differ
13 however in their approach.

14 We also posted on the Commission's
15 website sample internet ads showing how the
16 proposed disclaimer rules would work in practice.
17 And we have copies of those; a hard copy at the
18 back table and we may reference them today at our
19 hearing.

20 Hi, good morning. I would like to thank
21 our staff and the Office of General Counsel for
22 their hard work on this rulemaking. Thank you to

1 all of you. And to all the people who took time
2 to comment on the proposed rules and especially
3 those who have come here today to give us the
4 benefit of their practical experience and
5 expertise on issues raised by the proposed rules.

6 I would like to describe briefly the
7 format that we will be following for the next two
8 days. We expect to have a total of 18 witnesses
9 who have been divided among five panels. We will
10 hear from three panels today and two panels
11 tomorrow. We have allotted one and a half hours
12 for each panel today and one and an hour and ten
13 minutes to each panel tomorrow. Each witness will
14 have five minutes to make an opening statement.
15 We have a light system at the witness table to
16 help you keep track of your time. The green light
17 will go on when you begin and when there is one
18 minute left, the yellow light will come on. When
19 the red light comes on, it's time to wrap up your
20 opening remarks.

21 The balance of the time will be reserved
22 for questioning from the Commission. And that

1 questioning will be a little bit - it won't be
2 formal. So we'll just kind of go with whoever has
3 questions whenever they do and we'll do our best
4 to allocate the time among all four of us. We
5 plan to break for lunch after the first panel.
6 And the hearing will resume with the second panel
7 beginning at one o'clock. Please keep in mind, if
8 you leave the room you have to go through security
9 again when you come back in.

10 I understand some of my colleagues may
11 have opening statements, so we'll do that in a
12 minute. And then as soon as we finish opening
13 statements, we'll begin with the first panel and
14 I'll introduce you after opening statements. Just
15 one thing I'd like to add at least just speaking
16 for myself today. I appreciate all of the
17 comments that we've received. They've been
18 incredibly helpful and very illuminating, and it's
19 certainly helped me in my thinking on how to move
20 forward on this important rulemaking. I know we
21 all share the desire to try to come up with a rule
22 in this case. And I know we'll work hard together

1 to try to do so. I'm looking for a clear
2 objective and administrable standard that's
3 platform neutral that can - tells advertisers how
4 to go from the requirement of a full disclaimer on
5 the face of the ad to an alternative disclaimer or
6 an indicator. When I say 'indicator', I mean
7 something that has some sort of symbol on the face
8 of the ad that lets the reader know that there's a
9 full disclaimer one easy click away.

10 So, I think that that administrable
11 standard is really important for determining how
12 to move forward. We proposed one in Alternative
13 B. We propose a 10 percent objective standard.
14 It wasn't well-received for a variety of reasons
15 because often when you put an ad on one platform
16 those numbers are different depending on what
17 platform. So, for that reason and others, it
18 wasn't as well-received as we had hoped. But my
19 goal at least is to try to come up with something
20 that is again, administrable, clear, and
21 objective. And if we're not able to do that, I
22 think that it means a different type of outcome.

1 But that's something that I'm certainly looking
2 forward to talking to all of the witnesses about
3 today.

4 Madame Vice Chair, do you have an
5 opening statement?

6 VICE CHAIR WEINTRAUB: I do. Thank you,
7 Madame Chair. I want to echo the Chair in
8 welcoming everybody here today. I know I'm all
9 excited to learn what everybody has to share with
10 us today. I want to thank so many people really
11 for their participation so far. 160,000 Americans
12 weighed in with us on the NPRM and that is really
13 quite a testament to how important Americans think
14 this issue is and I share their concern and their
15 enthusiasm. And I thank every single person who
16 took the time to do that. I also want to thank my
17 colleagues and particularly the Chair who has been
18 working very diligently and collegiately with me
19 on this. And I value that. And I also want to
20 thank the staff. I want to particularly thank
21 some of the folks in the Office of General Counsel
22 who have put in an enormous amount of time on

1 this; Jessica Selinkoff, Neven Stipanovich, and
2 particularly Erin Chlopak who is about to leave us
3 but agreed to stay through this week so that she
4 could help shepherd us through this hearing. We
5 are going to miss you, Erin. You have done
6 incredible service to this agency and our country
7 and we appreciate your hanging in there to get us
8 through this week. But I want to thank you for
9 everything that you have done getting us ready for
10 this hearing as well as all of your good work for
11 the Commission.

12 And a few words about the rulemaking.
13 Right now, the rules say that all public
14 communications are required to have a clear and
15 conspicuous disclaimer. So that's not a bad place
16 to start. Public communications includes
17 advertising on the internet. Now, some people
18 seem to be confused about how exactly to go about
19 that. So, I think we know what we're trying to
20 accomplish, and the question is, how is the best
21 way to get there, to get to a place where the
22 American people have the information they need to

1 evaluate the ads that they're seeing on whatever
2 platform they are viewing it on; on their phone,
3 on their desktop, on their laptop, on their
4 tablets. However, they are seeing information,
5 they're entitled to know where it's coming from.
6 So, making sure that the voters are fully informed
7 is one of my very strong priorities.

8 Advertising, political advertising in
9 particular, is moving to the internet in -- at an
10 astonishing clip. According to the Center for
11 Responsive Politics, in 2014 digital ads made up
12 less than one percent of political ad spending.
13 But by the 2018 mid-terms, it's expected to
14 constitute about 22 percent and a cost of
15 predicted -- a predicted cost of 1.9 billion
16 dollars. So, there's a lot of stuff going on
17 right now and it's important that people know
18 where it's coming from. I want to mention in
19 passing that, you know, one of the -- something
20 that is in the background in all of this is the
21 larger political picture out there. We saw a lot
22 of that placed in the last election by people who

1 are not legally entitled to do so, particularly by
2 foreign powers. And that is something that is
3 flat out illegal and one of the purposes as the
4 Supreme Court has taught us of disclosure rules is
5 not only to inform the public but also to deter
6 and detect bad conduct.

7 And I hope that this rulemaking will
8 help us in our efforts to do so. And of course,
9 we want to be able to provide clear guidance
10 because people need to know how to conform with
11 the rules and in the best of possible worlds, we
12 will write rules that are so wonderfully clear
13 that absolutely everyone will know how to comply
14 with them and will do so. And that will be great,
15 but we also need to enforce the rules. In order
16 to provide people with a little bit of motivation
17 for doing that there are some key issues we have
18 to address. I think the Chair flagged one of
19 them.

20 This issue of the trigger point, what is
21 it that triggers the move from the requirement to
22 have a full disclaimer on the face of the ad

1 versus having some kind of adapted disclaimer
2 where you'd have to follow a link or get to some
3 other jumping off place in order to find the
4 information. I think that is a key issue that we
5 need to address here.

6 It's also important to me that people
7 have easy access to this information. We've
8 received some testimony on the fairly low
9 percentage of people who also click on links. So,
10 I think getting -- having a rule that ensures that
11 the most information that's reasonable to provide
12 on the face of the ad that it is there, I think
13 that will also be important. And I also think
14 that it is important to get it right and it's also
15 important to do this efficiently. I still believe
16 that it is possible to get a rule in place this
17 year if we work diligently to do so. And I'm
18 personally committed to trying to do that. So,
19 having said that, I very much look forward to the
20 testimony that we're going to receive today.

21 CHAIRWOMAN HUNTER: Thank you, Madame
22 Vice Chair. Commissioner Petersen?

1 COMMISSIONER PETERSON: Thank you,
2 Madame Chair. I want to echo what the Chair and
3 the Vice Chair have said thus far about the
4 efforts of staff; the Office of General Counsel
5 has done a tremendous job moving us to this point
6 in the rulemaking process. I also want to thank
7 Ms. Chlopak for the excellent work that you've
8 done here at the Agency and you'll be greatly
9 missed when you leave. I want to thank the Chair
10 and the Vice Chair for their efforts to get us to
11 this point and for their collaborative efforts.
12 And I feel optimistic that at the end of the day,
13 we're going to be able to reach a result that will
14 update our rules to accommodate the new realities
15 of the way online communications have changed and
16 transformed our political process.

17 It's not exaggeration to say that over
18 the last two decades, that that transformation has
19 been pretty substantial; federal candidates,
20 parties, independent actors increasingly rely upon
21 online platforms to communicate with voters and to
22 raise funds. While American citizens use internet

1 resources to gain information about races and
2 issues that are influencing races and to organize
3 amongst themselves. The use of the internet is a
4 tool for political engagement has had a
5 democratizing effect. Low cost platforms enable
6 speakers with few resources to communicate to
7 large audiences. While at the same time, a
8 seemingly infinite way publicly available
9 resources aid the citizenry in casting informed
10 votes. And overall, this development has been a
11 positive one.

12 But while internet's expanding influence
13 on the electoral system has continued a pace, it
14 has created administrative challenges, especially
15 for the Commission as we have grappled with how to
16 apply a law that was written with kind of
17 traditional modes of advertising in mind;
18 television, radio, printed media. And we are now
19 tasked with how do we apply that law to speech
20 conducted on computers, tablets, smartphones, and
21 other emergent technologies as we've dealt with
22 this issue a number of times in the last decade

1 plus.

2 For instance, the Commission has
3 previously considered advisory opinions regarding
4 how federal disclaimer requirements apply to
5 character limited texts, small ads posted on
6 Facebook and Google, and small banner ads on
7 multiple devices. And the current rulemaking
8 internet communication disclaimers represents the
9 most recent and ambitious effort in this ongoing
10 process.

11 So, as we move forward with the
12 rulemaking, I believe its twin goals should be
13 first, vindicating the information interest of the
14 American people to know who is sponsoring
15 political ads, and two, ensuring that online
16 technologies continue to flourish as tools for
17 political speech. And to meet these goals I
18 believe any final rule must be flexible enough to
19 accommodate the numerous devices and platforms by
20 which political speech is delivered and consumed
21 and the rapid pace of technological innovation. I
22 agree with the Chair when she says that whatever

1 rule we adopt it must be objective and easily
2 administrable so that those who are subject to the
3 rule don't have to account to the Agency for
4 frequent advisory opinions to know what is or is
5 not permitted under that rule.

6 Today's hearing represents an important
7 step toward adapting the Commission's disclaimer
8 regulations to the realities have been in that
9 political communications. And like I said, I'm
10 optimistic that the Commission is going to
11 complete this task. And I want to echo what was
12 said earlier about thanking those who took the
13 time to submit comments. There were thousands of
14 individuals and organizations who felt strongly
15 enough about this topic to submit comments to the
16 Agency. And I greatly thank those who are willing
17 to testify today to help educate the Commission as
18 to the legal issues, the technological issues, and
19 how we can best construct the rule that will meet
20 the interests that are advanced in the Statute as
21 well as allowing the online tools that are
22 allowing so much innovation in the political realm

1 to continue to flourish without any impediment by
2 a regulatory regime, which may be a little slow to
3 adapt to the new realities in the online
4 atmosphere. So, I look forward to the comments
5 and the testimony that we receive today. And I'd
6 be happy to ask questions at that time.

7 CHAIRWOMAN HUNTER: Thank you
8 Commissioner Petersen. Mr. Walther?

9 COMMISSIONER WALTHER: Thank you, Madame
10 Chair. I just wanted to echo everything that's
11 been said already. And therefore, this will be
12 short. In preparing for this hearing I went back
13 into the first hearing that I attended when I was
14 Chair of the Commission in July 29, 2009, nine
15 years ago. And that was the beginning of a
16 three-day hearing entitled, Public Hearing
17 Internet Communications Improvement Initiative.
18 And here we are nine years later. We've been
19 through a lot of new technology and a lot of
20 advisory opinions. But we've tried to work
21 through a number of issues that now we are wiser
22 to a large degree, but we still have a long way to

1 learn.

2 I think my concern to some degree is
3 okay, we know where we are now. We know how
4 behind we've been but where can we look for the
5 future. And do we have any thoughts on where the
6 next step might be or two or three steps. We
7 should start thinking about that. I mean, for
8 example, I wake up this morning and I see a little
9 clip and it goes on in maybe three seconds and
10 then it gives me a little short notice about what
11 happened today. But if it said, "Vote for George"
12 on it, then what do we do? And if it's a matter
13 of a short time in thinking of timing, how can we
14 make sure that we do what I think is the key to
15 this whole Agency and that's disclosure. That's
16 the reason we're here is to educate the public on
17 the flow of money coming in and out of the
18 political system. And there's all these great new
19 innovations but we at the same time need to be
20 alert enough to know how we can cope with that and
21 still keep the public fully informed.

22 Again, I want to thank everyone that's

1 already been thanked. Our staff has been
2 incredible on this as well as our own assistants
3 who have worked together with each other. They've
4 learned. They've, you know, they've made
5 suggestions and have come up with a number of
6 interesting illustrations that should provide some
7 good comment. So, let's get started. And again,
8 thanks for being here.

9 CHAIRWOMAN HUNTER: Thank you,
10 Commissioner Walther. With that, I'd like to
11 introduce our first panel for the hearing. Mr.
12 Allen Dickerson who is the Legal Director for the
13 Institute for Free Speech, Mr. Brendan Fischer,
14 Director of Federal Reform for the Campaign Legal
15 Center, Mr. Paul Ryan, Vice-President, Policy and
16 Litigation for Common Cause, and Mr. Ilya. Did I
17 say your first name correct? Ilya Shapiro, Senior
18 Fellow in Constitutional Studies at the CATO
19 Institute. And I'm told Mr. Shapiro, that today
20 is your birthday. Is that correct?

21 MR. SHAPIRO: I'm celebrating it like
22 most people do in Washington. (Laughter)

1 CHAIRWOMAN HUNTER: Well, happy birthday
2 to you and thank for coming particularly on your
3 birthday. Mr. Dickerson, would you like to get us
4 started today?

5 MR. DICKERSON: It would be my pleasure.

6 CHAIRWOMAN HUNTER: Thank you very much.

7 MR. DICKERSON: Thank you. And good
8 morning, Madame Chair, Madame Vice Chair, members
9 of the Commission. It's a privilege to join you
10 for this hearing. And I thank you for choosing to
11 hold it and inviting me to appear on behalf of the
12 Institute for Free Speech.

13 More than six and a half years ago, this
14 Commission first solicited comments concerning the
15 appropriate application of the existing small item
16 and impracticability exceptions to the disclaimer
17 requirements for small or character limited
18 internet advertisements. As a legal matter this
19 hearing can only address that narrow question.
20 Nevertheless, certain commenters have attempted to
21 transform this rulemaking into a response to
22 foreign political influence. This Commission is

1 neither empowered and nor competent to
2 meaningfully contribute to that mission.

3 According to the Minority Party on the
4 House Intelligence Committee, recent Russian
5 efforts to influence the 2016 General Election
6 were overwhelmingly directed at organic social
7 media posts and not paid content. And of the paid
8 content, very little included express advocacy.
9 At most, according to USA Today, "only 100
10 Russian-backed Facebook ads supported or opposed
11 candidates". This Commission has authority over
12 paid expressed advocacy. So even if it had called
13 this hearing years earlier and used its authority
14 to the hilt, it would've added a disclaimer to
15 some subset of those 100 ads worth perhaps a few
16 thousand dollars. Of course, those ads were
17 already illegal as the Vice Chair already pointed
18 out. And as the recent indictments announced by
19 Special Counsel Robert Mueller document, Russian
20 Intelligence Agencies were willing to commit
21 multiple felonies including crimes like identity
22 theft completely unrelated to Campaign Finance

1 Regulation.

2 In this context of proper governmental
3 response is deterrence. And other agencies are
4 well equipped to provide the diplomatic military,
5 economic, and counter-intelligence resources
6 required. But I suspect that no informed person
7 outside this building and very few within it
8 sincerely believe that foreign intelligence
9 services will be deterred by this agency's civil
10 enforcement docket.

11 By contrast, average Americans without
12 the enormous resources of foreign government can
13 easily be chilled by this Commission's actions.
14 This first has long been understood in the more
15 run of the mill context of physical
16 advertisements. Even where disclaimers are
17 technically possible, they are often excused under
18 longstanding and uncontroversial exceptions.
19 Bumper stickers and campaign buttons could be made
20 larger. Billboards could be repainted. A second
21 skywriting plane could be sent aloft to deliver a
22 disclaimer but none of that is required.

1 The burdens of imposing a bureaucratic
2 script on these venerable forms of campaign speech
3 would render them ineffective, unaffordable, or
4 both. Many speakers would simply forgo using
5 them. No good reason has ever been given for
6 failing to import this common-sense approach to
7 small or brief online advertisements. The same
8 policy interest are present. Disclaimers distract
9 from a speaker's message. And this is
10 particularly true when the speaker's message is
11 especially brief. And the same legal concerns are
12 in play.

13 If it requires disclaimers that will
14 objectively swallow a speaker's underlying
15 message, the Commission will in essence be banning
16 certain forms of political advertisement. Is
17 there any question that campaigns would forego
18 printing campaign's bumper stickers or buttons if
19 they were required to carry the full disclaimer
20 required for printed material? And by analogy, is
21 there any doubt that advertisers will not run six
22 second ads if they must include online four

1 seconds of mandatory disclaimer?

2 As this Commission hopefully proceeds to
3 a final rule it should accomplish three things.
4 First, the adopted rule must allow speakers to use
5 any commercially available product they choose.
6 Especially, when that product is cheap, readily
7 available, and therefore a prime candidate for use
8 by modest and unsophisticated speakers. Second,
9 it should establish a clear line so that speakers
10 know precisely when a disclaimer is required and
11 what it must say. And third, and arguably most
12 difficult, this guidance must be flexible enough
13 to be applied in the future without further
14 rulemaking as technology advances.

15 Thank you again for the opportunity to
16 be here and I look forward to your questions.

17 CHAIRWOMAN HUNTER: Thank you very much,
18 Mr. Dickerson. Next, we're just going to go
19 alphabetically. So next is Mr. Brendan Fischer
20 from the Campaign Legal Center.

21 MR. FISCHER: Great. Thank you. Thank
22 you for holding this hearing and the opportunity

1 to testify. So, this is of course, a very
2 important issue and as Commissioner Weintraub
3 eluded to, a rapidly increasing share of political
4 spending is going towards digital political ads.
5 In 2012, 1.7 percent of political ad spending was
6 digital. This year, it's expected to reach 22
7 percent of overall political ad spending. And in
8 the 2016 Elections, both foreign and domestic
9 actors took advantage of the growth in digital
10 political advertising and the Commission's
11 relative inaction on this very topic to influence
12 American voters while omitting basic information
13 about who paid for these ads. And digital
14 political ads were not only used as a means of
15 encouraging people to vote for candidates but also
16 expressly used by both foreign and domestic actors
17 as a means of deterring people from voting at all.

18 And disclaimers give voters, press, law
19 enforcement tools to detect and uncover foreign
20 influence even if only a small percentage of the
21 ads run by Russia included disclaimers or should
22 have included disclaimers that may have been

1 enough for the press and the public to uncover
2 this foreign interference effort much sooner.

3 And I appreciate the work of the
4 Commission in crafting two alternatives that
5 attempt to ensure that viewers of digital ads have
6 information about who is trying to influence them.

7 So, I'll just hit a few main principles
8 that I think should guide the Commission's
9 consideration and look forward to your questions.
10 So first, disclaimer information should be
11 delivered in the same format as the communicative
12 content. Digital advertisements increasingly
13 communicate messages through a combination of
14 text, video, and audio. And the rules should make
15 clear that disclaimers are required for each
16 component of an advertisement that independently
17 satisfies the statutory criteria.

18 An advertiser running a native ad on
19 Buzzfeed, for example should not be able to evade
20 disclaimer requirements by embedding a video in an
21 otherwise text-focused ad and only including the
22 disclaimer at the end of the video. Facebook also

1 made this point in their comments, that
2 mixed-media ads should include a disclaimer on the
3 outside of the ad or in the frame of the ad. And
4 both alternatives from my perspective present
5 problems in this regard.

6 Two, as much disclaimer information as
7 possible should be delivered on the face of the ad
8 itself. Voters should be able to learn who is
9 influencing them immediately upon viewing a
10 political ad online.

11 Depending on the platform, it's very
12 easy to mistake a paid advertisement for an
13 organic post. And as Professor Young Mie Kim's
14 comments describe, voters are overloaded with
15 advertising on digital platforms both political
16 and commercial. And requiring voters to take an
17 affirmative step to learn who is trying to
18 influence them is very likely unrealistic.

19 Three, any exceptions from on ad
20 disclaimer requirements should be narrow and
21 guided by the objective constraints of the
22 advertising medium and not the subjective

1 preferences of the advertiser. And that the
2 Commission must be careful not to craft a rule
3 that renders disclaimers optional. Because if it
4 does, malicious actors both foreign and domestic
5 will find ways of avoiding disclaimers.

6 Alternative A only provides an exception when a
7 disclaimer cannot fit due to the external
8 character or space constraints and we support this
9 approach. Alternative B offers a 10 percent rule
10 and we appreciate the goal of crafting an
11 objective standard. But we have concerns that
12 this objective standard could be gamed and would
13 be largely within the control of the advertiser
14 and also have concerns about the 10 percent as a
15 number.

16 And the finally, want to make sure that
17 one step means one step. We applaud both
18 alternatives for requiring that viewers of ads
19 with adaptive disclaimers need only go one step to
20 acquire the full statutorily required disclaimer
21 information. And the Commission should make clear
22 that selecting an indicator on an ad is that one

1 step. Being forced to scroll through or click or
2 otherwise navigate other material in order to find
3 the statutorily required disclaimer information
4 would be a second step and should expressly be barred
5 either in the rule itself or in the explanation
6 and justification for the rule. And thank you and
7 I look forward to your questions.

8 CHAIRWOMAN HUNTER: Thank you, Mr.
9 Fischer. Mr. Ryan?

10 MR. RYAN: Good morning, Chair Hunter,
11 Vice Chair Weintraub, Commissioners. My name is
12 Paul Shamus Ryan. I'm Vice President for Policy
13 and Litigation at the non-Profit, non-Partisan
14 democracy watchdog group, Common Cause. Thank you
15 for this opportunity to testify at this hearing.
16 It is an honor to be before you representing more
17 than 25,000 individuals who signed the written
18 comments that Common Cause submitted in this
19 rulemaking last month and representing more than
20 1.1 million Common Cause members and supporters
21 across the United States.

22 Americans have a right to know who is

1 spending money to influence their votes on
2 election day and I'm here on behalf of Common
3 Cause and on behalf of American people to fight
4 for that right. Eight years ago, in Citizens
5 United, an 8:1 majority of the Supreme Court
6 upheld against constitutional challenge the
7 federal law disclaimer requirements at issue in
8 this rulemaking as applied to two 10 second tv
9 ads. It's worth noting that the FECA disclaimer
10 requirement required a text disclaimer on those
11 two 10 second tv ads to be on screen for a minimum
12 of four seconds. In other words, the Supreme
13 Court upheld a disclaimer that took four seconds,
14 40 percent of the 10 second ads at issue in that
15 case.

16 The Citizens United Court reason the
17 disclaimers provide the electorate with
18 information and ensure that the voters are fully
19 informed about the person or group who is
20 speaking. The Court went on to explain further,
21 "identification of the source of advertising may
22 be required as a means of disclosure so that

1 people will be able to evaluate the arguments to
2 which they're being subjected". At the very
3 least, the disclaimers avoid confusion by making
4 clear that the ads are not funded by a candidate
5 or a political party.

6 And finally, the Citizens United Court
7 underscored the promise of more effective
8 disclosure in the internet age. Explaining back
9 in 2010, "a campaign finance system that pairs
10 corporate independent expenditures with effective
11 disclosure has not existed before today". With
12 the advent of the internet, prompt disclosure of
13 expenditures can provide shareholders and citizens
14 with the information needed to hold corporations
15 and elected officials accountable for their
16 positions and supporters. This transparency
17 enables the electorate to make informed decisions
18 and give proper weight to different speakers and
19 messages.

20 The Supreme Court understands that while
21 it is indeed true that the internet and its
22 communications are different than traditional

1 media, the difference does not warrant an
2 automatic default to less informative disclaimers.
3 On the contrary, a principle virtue of the
4 internet is its ability to deliver information.
5 And the Commission's disclaimer rules should
6 capitalize on this virtue, not undercut it. Yet
7 despite the fact that the Supreme Court has
8 explicitly upheld current disclaimer requirements
9 as applied to 10 second tv ads and has extolled
10 the virtues of better disclosure in the internet
11 age, some argue that applying disclaimer
12 requirements to small internet ads is
13 unconstitutional. The Supreme Court has settled
14 this matter. The Supreme Court has spoken, and
15 the Commission should disregard such arguments.

16 Common Cause urges the Commission to
17 adopt disclaimer regulations proposed as
18 Alternative A in the NPRM. Alternative A sensibly
19 applies disclaimer requirements for tv, radio, and
20 print advertisements to their online analogs of
21 video, audio, text, and graphic advertisements
22 while allowing use of a less informative adapted

1 disclaimer only when a full disclaimer cannot be
2 included in the advertisement due to technological
3 constraints.

4 Common Cause opposes Alternative B,
5 which would not require online advertisers to
6 include the Stand by Your Ad disclaimer language
7 presently required for tv and radio advertisements
8 even though such disclaimer language could easily
9 be included in most online video and audio
10 advertisements. Alternative B would also permit
11 the use of a less informative adapted disclaimer.
12 Even when no intrinsic technological constraints
13 prevent the inclusion of a full disclaimer.

14 I'll close my remarks with a quote from
15 First Amendment stalwart, the late Justice Scalia
16 from his concurring opinion in the political
17 disclosure case, Doe v. Reed, "Requiring people
18 to stand up in public for their political acts
19 fosters civic courage, without which democracy is
20 doomed. For my part, I do not look forward to a
21 society which campaigns anonymously hidden from
22 public scrutiny and protected from the

1 accountability of criticism. This does not
2 resemble the home of the brave". Well count
3 Common Cause and its 1.1 million members as brave
4 members of the Scalia Camp in defense of political
5 disclosure laws. Thank you. I look forward to
6 your questions.

7 CHAIRWOMAN HUNTER: Thank you. The
8 birthday man, Mr. Shapiro.

9 MR. SHAPIRO: Thank you, Madame
10 Chairwoman and Commissioners. It's an honor and a
11 pleasure to appear before you. As you know, CATO
12 is a nonpartisan public policy research foundation
13 dedicated to free markets, individual liberty, and
14 limited government. And we have long advocated
15 for the right of citizens to speak freely,
16 especially about political topics relevant to our
17 democracy. Now, we are not litigators. We don't
18 file cases or advise clients on how to comply with
19 various of your rules. I'm a simple
20 constitutional lawyer, not a technical political
21 lawyer and so my focus will be on the First
22 Amendment issues, which are central I think to

1 whatever the nitty gritty of the rule ultimately
2 must be. And that's because that vigorous debate
3 on matters of public concern lies at the core of
4 the First Amendment. And political speech demands
5 stronger First Amendment protection than any other
6 kind, not lesser due to abstract fears of undue
7 influence or anything else. Too often the
8 assumption is the opposite, that speech related to
9 political campaigns is somehow more suspect than
10 any other kind of speech.

11 And disclosure requirements indeed have
12 the capacity to confuse or add noise to political
13 discussions as much or more as informing voters.
14 After all, what does a disclosure saying that this
15 paid for by the Motherhood and Apple Pie PAC
16 really do for voters? Take the infamous Jesus v.
17 Satan digital ad during the 2016 campaign that it
18 turns out was created by Russian hackers. It
19 seems like if that kind of advertising is what
20 swayed the election, then adding a little
21 disclaimer that this was funded by Russians,
22 that's not really getting at the heart at what

1 ails our democracy. And as the IRS has learned,
2 judging organizations based on certain search
3 terms that are disfavored is a dangerous
4 infringement on liberty, as well. Any good lawyer
5 will tell you that the more extensive the
6 disclaimer or disclosure, the less likely any of
7 it will be read or observed or absorbed. And
8 therefore, it could be counterproductive to the
9 entire effort.

10 While the Supreme Court has indeed held
11 that disclaimer requirements may be imposed, the
12 burdens of these requirements should be limited to
13 only the minimum required to actually inform the
14 public. All too often, the purpose of disclosure
15 rules and other as a subset of other campaign
16 finance rules is to chill political speech, rather
17 than actually informing voters or the political
18 debate. As the Supreme Court said in relation to
19 the NAACP's desire to protect its members in Jim
20 Crow Era Alabama, the disclosure requirements have
21 to be tailored to the narrow interest because,
22 "compelled disclosure of affiliation with groups

1 engaged in advocacy may constitute as effective or
2 restraint on freedom of association as a direct
3 curtailment of the right to speak itself".

4 And just yesterday of course, the
5 Supreme Court decided another relevant case, NFLA
6 v. Becerra that touched on the burden of compelled
7 disclosure. During oral arguments in NIFLA, three
8 justices specifically addressed this point.
9 Justice Kennedy declared that burdens from
10 requirement of the kind at issue there were undue
11 burdens, that we should suffice to invalidate the
12 Statute. And then two justices that ended up in
13 the dissent yesterday in the final opinion still
14 during oral argument talked about how a
15 multi-lingual requirement could be very burdensome
16 in the words of Justice Ginsburg. Or as Justice
17 Sotomayor said, "that unless the provision was
18 limited in certain manners, it would be more
19 burdensome and wrong". And Justice Thomas'
20 majority opinion talked about a billboard for an
21 unlicensed facility that says, 'Choose Life' would
22 have to surround that two-word statement with a

1 29-word statement from the government in as many
2 as 13 different languages. And so, the unlicensed
3 notice grounds out the facility's own message. I
4 think that is the cautionary tale here.

5 We can't have -- however you draw the,
6 you know, 10 percent, 12 percent, 8 percent, all
7 those technicalities, it can't be such that the
8 overall message that the ad is trying to convey is
9 drowned or obscured by whatever the disclosure
10 requirement might be. Even Justice Breyer in
11 dissent talked about that, said, "I agree that
12 unduly burdensome disclosure requirements might
13 offend the First Amendment". And Alternative A is
14 particularly troubling here. The Stand by Your Ad
15 requirement that's not even clear what the basis,
16 the statutory authority for the Commission to
17 impose this kind of requirement on internet ads in
18 the first place.

19 But in general, we submit that rules
20 designed for newspaper ads are not sensibly
21 applied to Twitter. Requiring that online media
22 comport with rules designed for a world of

1 newsprint in vacuum tube makes about as much sense
2 as requiring smartphones to use a rotary dialing
3 mechanism.

4 Alternative B does provide some more
5 flexibility but still it's somewhat Macgyvered.
6 Jamming the square peg of modern online media into
7 the round hole of campaign finance.

8 So, just my final thought, I agree with
9 Mr. Dickerson that to the extent that the
10 Commission feels that guidance to be given, we
11 would encourage it to consider the least
12 restrictive means available consistent with the
13 right of free expression and keeping in mind that
14 technology is constantly evolving. Less is more.
15 Thank you.

16 CHAIRWOMAN HUNTER: Thank you very much
17 to all of you. That was very helpful. So, now
18 we'll open it up to questions for Commissioners.
19 As I said earlier, we'll just kind of try to make
20 sure that we -- everybody gets an opportunity.
21 Does anybody -- would anybody like to start?
22 Madame Vice Chair?

1 VICE CHAIR WEINTRAUB: Okay. So, let's
2 jump into a couple of the issues that you all
3 raised in your opening statements. And thank you
4 Mr. Shapiro in particular for coming on your
5 birthday. We don't --

6 MR. SHAPIRO: It was this or the Supreme
7 Court. Either way I was doing something.

8 VICE CHAIR WEINTRAUB: Wow! You must
9 really like us. We don't have cake but there will
10 be cookies at lunchtime so, you know, I don't have
11 any candles. But we could sing "Happy Birthday".

12 A couple of issues that I think are
13 going to be key here: one as both the Chair and I
14 mentioned earlier is this issue of when does one
15 go to an adapted disclaimer? Do we have general
16 agreement from the panel that there are some
17 circumstances in which an adapted disclaimer would
18 be appropriate? Well, most people are nodding.
19 Mr. Dickerson doesn't like that disclaimer at all.

20 MR. DICKERSON: Something of an
21 overstatement, Madame Chair (sic) Vice.

22 VICE CHAIR WEINTRAUB: Okay. (Laughter)

1 Seems to be general agreement that sometimes we
2 could have an adapted disclaimer. So, the key -
3 one of the key questions is going to be, when does
4 that happen? Now, Alternative A proposes that
5 when -- unless there's some technological
6 impediment, you have to put the entire disclaimer
7 on the face of the ad. Now, as we were going back
8 and forth on this and trying to come up with
9 examples, the example was proposed well what if
10 the disclaimer could fit but it would take u 95
11 percent of the ad space. That I don't think was
12 the intention behind that proposal. But then the
13 question is, so if not that than what actually
14 would be the limit? Do we need some kind of
15 metric?

16 On the other hand, in Alternative B the
17 10 percent limit some people said was arbitrary,
18 you know, why 10 percent? Why not nine percent or
19 11 percent? And they would as the Chair eluded,
20 some commenters who worried how it could be
21 implemented across different platforms. So, I
22 think that we are open to suggestions for

1 improving either both, come up with a brand-new
2 idea for us.

3 I open it to the panel. Under what
4 circumstances should the Commission require that
5 or allow that one could use an adapted disclaimer
6 rather than put the full disclaimer on the face of
7 the ad? Anybody?

8 MR. FISCHER: Well, I think first of
9 all, I'll echo some of the comments of Mr. Shapiro
10 and Mr. Dickerson, that technology is dynamic and
11 adaptable and quickly changing. And the companies
12 like Facebook or Twitter or other platforms can
13 find ways to incorporate a full disclaimer without
14 necessarily limiting an advertiser's communicative
15 content. I know we'll be likely discussing some
16 of the examples that were distributed applying
17 these rules. But these examples are already out
18 of date.

19 Facebook ads are allowing a full
20 disclaimer on the ad itself without limiting what
21 an advertiser is communicating to its audience.
22 And I think if the Commission were to establish a

1 baseline that political advertising as a general
2 rule must include a full disclaimer on the face of
3 the ad or at a minimum include that name of the
4 advertiser that paid for the ad, the industry will
5 very quickly adapt.

6 These -- I don't know that these are
7 difficult questions. And I don't know that the
8 industry is unable to ensure that voters have
9 basic statutory information about who is trying to
10 influence them.

11 MR. RYAN: I have a few thoughts I'd
12 like to offer. So, I think with respect to this
13 question, the Supreme Court as I mentioned in my
14 opening remarks has given us some guidance. In
15 Citizens United Plaintiffs challenged the
16 application of the statutory disclaimer
17 requirements with respect to three video
18 advertisements; one 30-second ad, two 10-second
19 ads. And as required by the Statute, the
20 disclaimer for those ads must be on screen for a
21 minimum of four seconds. So, a four-second
22 disclaimer, 10-second ad, Supreme Court says

1 perfectly constitutional supported by
2 long-recognized important governmental interests.
3 Nothing has changed in that constitutional
4 analysis. That was eight members of the Supreme
5 Court approved a disclaimer that took up 40
6 percent of the ad. So, at the very least, I think
7 the Commission could look to that guidance as
8 establishing any threshold up to 40 percent as
9 being constitutionally permissible according to
10 the Supreme Court.

11 The proposed regulation in Alternative
12 A, which Common Cause supports only allows for the
13 alternative disclaimer, the adapted disclaimer if
14 the ad cannot fit due to external character space
15 constraints cannot fit a required disclaimer.
16 Only then can you move to the adapted disclaimer.
17 So, that's the standard and the rule.

18 The standard in the example ads is a
19 little bit different and I was confused a little
20 bit by that. Example No. 2 in particular caught
21 my attention and I think Allen, you mentioned in
22 your comments and the Institute's comments some

1 confusion about these examples. The analysis for
2 Ad No. 2 says, "does Alternative A require the
3 full disclaimer be used here? No, the
4 advertisement cannot due to external character or
5 space constraints practically include a full
6 disclaimer ad space." Well, 'practically' isn't
7 in the proposed regulatory text. So, Common Cause
8 didn't respond to that legal standard. You know,
9 and I would -- and it was only in prepping for
10 this that I gave -- you know, last night that I
11 gave that a close read and thought that's a
12 different standard. So, I'm not sure exactly what
13 'practically' means.

14 I like the standing of the proposed
15 rule, must have the full disclaimer unless there
16 are external constraints that mean cannot fit the
17 required disclaimer and I like to the Supreme
18 Court's guidance of up to 40 percent of the ad
19 would be permissible.

20 MR. DICKERSON: If I may, I think
21 there's two threshold questions. The first is,
22 the question of exactly how we reason in Citizens

1 United. And leaving aside the constitutional
2 issue and I think there's some debate about
3 whether the compelled disclosure or excuse me, the
4 compelled speech aspects of that claim were fully
5 presented in that case. What was presented was --
6 what Citizens United argued was an under-breath
7 argument. They said the reason we're complaining
8 in part is that we have to put these full
9 broadcast disclaimers on, but we wouldn't have to
10 do that if they were online. So, to the extent
11 that the Supreme Court reached this question in
12 Citizens United leaving aside the constitutional
13 issue, I think it speaks fairly clearly to the
14 fact that there's no statutory authority to
15 require the disclaimers that were present in
16 Citizens United and internet space. So, I'd start
17 there. And we explain that in detail in our
18 comments.

19 The second is, what is meant by
20 'external constraints'. Our position is that the
21 level of external constraints, the level of burden
22 that's being imposed is going to depend upon the

1 product that's being purchased. You know, as we
2 make I think fairly clear on our written comments,
3 full disclaimers are perfectly acceptable and
4 required on the vast majority of political ads.
5 What we're talking about here is a very small
6 sub-set of smaller brief ads where it is going to
7 be especially burdensome.

8 So, I guess you could read external
9 constraints in one of two ways. One of which
10 would not be problematic and one of which would.
11 If by 'external constraints' we mean the product
12 that we are buying is say, a six-second ad. And
13 the provision of a full disclaimer in that context
14 will be especially burdensome. And I think that
15 understanding of external constraints is fair. To
16 the extent what we mean by 'external constraints'
17 is, you could have purchased a different product.
18 Instead of the six-second ad you should've
19 purchased a 15-second ad and at that point it
20 wouldn't be overly burdensome. I think that's a
21 very different understanding of external
22 constraints and that this Commission should be

1 looking at again the analysis of burden and the
2 analysis of thresholds within the context of any
3 particular commercially available product.

4 MR. SHAPIRO: I'd like to answer the
5 question by reversing it. I think the default
6 should be maximal freedom. And so, you question,
7 is there a justification for a particular kind of
8 regulation rather than the default being here's
9 our standard regulation. Under what circumstances
10 do we deviate from that? And that actually, is in
11 line not even with my kind of political theory or
12 constitutional First principles, but graphic
13 designers and psychologist will tell you that if
14 there's kind of blank space surrounding some small
15 thing, people's eyes are drawn to that and they
16 will be more curious at that rather than just a
17 wall of writing or somebody speed talking their
18 way through a video or audio ad, or what have you.

19 I mean, think about it yourselves. When
20 you're looking or when you're grocery shopping,
21 you might look in that design box about the
22 calories and the percentage of sodium and all of

1 that. But you're not going to read all the rest
2 of the fine print that's there. Or similarly,
3 with prescriptions when you get that printout at
4 the pharmacy, you're not going to read that. Or
5 the fine print, the boiler print when you're even
6 buying a house. I mean, most of us are lawyers
7 here unfortunately, I think at least, in the front
8 of the dais. And we don't read that even though
9 buying a house or a car is really important and
10 significant. But I would tell you that if there's
11 just the website or for more information, go over
12 there.

13 Now with -- who knows what technology is
14 advancing. Some little hieroglyphic symbol that
15 you point your smartphone at and that gets you
16 whatever information you might want catered to
17 what you're interested in because you will have
18 presets; I care more about sodium or I care more
19 about sugar, or I care more about the financing
20 rate, I care more about this. So, similarly with
21 political ads, even this, you know, front page,
22 you know, very basic example where it doesn't look

1 burdensome to have this two-line of small print
2 after the actual ad, I would wager that would be
3 more effective in terms of voter information and
4 fundamentally in terms of maintaining voter
5 confidence in the integrity of elections to just
6 have the website say or paid by FAC PAC and
7 Fac.org or whatever. That's more -- or just that
8 symbol that people could look at if they really
9 care than to have these two-lines that take that
10 up. Let alone when it, you know, it's a smaller
11 or these other kind of issues that have been
12 discussed.

13 So, I would, you know, I'm obviously not
14 a psychologist or a graphic designer. But I would
15 encourage you to seek advice from those kinds of
16 professionals in addition to lawyers and political
17 professionals.

18 CHAIRWOMAN HUNTER: Okay. Thank you. I
19 appreciate your starting it off. This is exactly
20 what the kind of discussion I was hoping to have.
21 And thank you to the commenters for entertaining.
22 So, we just put on the screen, I don't know if

1 everyone can see it but as I said, there's a
2 handout in the back of the room. This is a side
3 by side of Example 2 and Example 10, which again,
4 are both printed in the handouts that everybody
5 has. And the purpose is to try and understand.
6 And I think this is a question that's mostly
7 directed at Mr. Fischer and Mr. Ryan who have
8 said that they support Alternative A. And Mr.
9 Ryan said, Alternative A in the NPRM. What --
10 it's hard, you know, as you know in the examples
11 Alternative A is the full disclaimer is not
12 required in Example 2, but it is required in
13 Example 10. And I'm wondering if you could look
14 at that with the standard proposed by Alternative
15 A, which is "due to external character or space
16 constraints cannot fit a required disclaimer, must
17 include an adapted disclaimer". And as I said at
18 the outset, the reason that we proposed
19 Alternative B is because I was having a very
20 difficult time understanding what does that mean?
21 How does one determine whether it can fit or not
22 and how would we do this? It seems to me

1 Commissioner -- the Vice Chair asked at the
2 outset, "would you be okay with some kind of
3 adapted disclaimer?", and Mr. Fischer and Mr. Ryan
4 both said, "Yeah" or nodded their head, yes. And
5 Mr. Fischer said that he would be okay especially
6 if at least the name of the payor was on the face
7 of the ad. And so again, that brings us to well,
8 how does one decide, you know, when to make that
9 change from one to the other.

10 I agree with Mr. Shapiro and Mr.
11 Dickerson that, you know, we should start from a
12 different benchmark of what can we do to allow
13 people to express their thoughts as widely as
14 possible on the internet while providing the
15 information but maybe in a more technologically
16 savvy way. And I think that's really incorporated
17 nicely in the comments from Twitter, which they
18 called a visual badge on the face of the paid
19 political communication to make it clear when
20 users see or engage a political ad. So, they seem
21 to -- there's -- they don't provide a specific
22 standard on how to get there. But it seems, I

1 mean, and of course, Twitter has a smaller
2 platform than Facebook. I think Facebook --
3 you're right. Some of what we've been proposing,
4 Mr. Fischer has been overcome by events. And
5 Facebook obviously has a different platform than
6 Twitter. But Twitter is basically saying, if you
7 adopt a lot of the rules in both A and B but in
8 particular A, you're going to -- it's going to
9 mean that advertisers can't use a lot of the ads
10 that they're allowing. And the ones that I think
11 we've all agreed are more popular now are those
12 smaller ads and the shorter video ads.

13 So, for the two of you, do you have any
14 comment on these alternatives and how -- why one
15 would be okay and the other one wouldn't under
16 Alternative A?

17 MR. RYAN: Yes.

18 CHAIRWOMAN HUNTER: Oh, great.

19 MR. RYAN: Yeah, I definitely have some
20 thoughts on it. I reach a different conclusion to
21 the question posed in Example 2, "does Alternative
22 A require that the full disclaimer be used here?".

1 CHAIRWOMAN HUNTER: Okay.

2 MR. RYAN: My answer is, yes. I admit
3 that that ad looks pretty good to me. I can read
4 the disclaimer. It's, you know, it's clear. It's
5 of sufficient type size to be clearly readable,
6 yes. Yes, yes and I don't think there is an
7 impediment to including it as it's presented. And
8 so, I think the two examples you present are
9 consistent. Both require a full disclaimer.

10 CHAIRWOMAN HUNTER: Are you a
11 psychiatrist or a graphic designer?

12 MR. RYAN: I am neither, unfortunately.

13 CHAIRWOMAN HUNTER: Because I'm
14 wondering if that really, you know, that surprises
15 me that you think that that should be required on
16 there. Because obviously, that takes up a good
17 percentage of the ad and it's a lot of what Mr.
18 Shapiro I think was saying, kind of, I don't know
19 if he used this exact word. But it seems to me a
20 little bit -- a lot of noise. And I don't know
21 that it's really useful to a person who's looking
22 at a very small ad probably flipping through their

1 phone. What are the odds that the person's
2 actually going to read that.

3 And I don't believe we have any
4 testimony that answers that specific question. We
5 have some testimony that says people may not click
6 through, but we don't have anything that tells us
7 whether or not people are actually going to read
8 that. And how useful is that information. And
9 somebody also mentioned how much information does
10 it really tell you that paid for by, someone said,
11 "Mom and Pop Ad". What did you say?

12 MR. SHAPIRO: Motherhood and Apple Pie
13 PAC.

14 CHAIRWOMAN HUNTER: Right. Motherhood
15 and Apple Pie PAC. How useful is that type of
16 information on the face of the ad again, for these
17 small platforms on the internet?

18 MR. RYAN: Again, I'm not ad expert, a
19 psychologist.

20 CHAIRWOMAN HUNTER: I was only kidding
21 there.

22 MR. RYAN: I am an attorney. I was

1 involved in litigating the Citizens United case.
2 And again, I look back to the Citizens United
3 eight Justice majority for guidance here. The
4 Court gave the green light to a disclaimer ad,
5 disclaimers that took up four seconds of a 10
6 second ad.

7 CHAIRWOMAN HUNTER: It wasn't on the
8 internet.

9 MR. RYAN: No, it wasn't. And I think
10 that there is no reason as I mentioned in my
11 opening remarks, to provide less information via
12 the internet than we have through traditional
13 media.

14 CHAIRWOMAN HUNTER: What about if it
15 means that people can't use certain ads on certain
16 platforms. Are you okay with that?

17 MR. RYAN: Well, that's not this
18 example. I'm not sure which example we get to
19 that presents that question. But this ad looks
20 legible to me. It looks useful to me if I were an
21 ad buyer.

22 CHAIRWOMAN HUNTER: We'll bring up an

1 example in a minute and we'll put it on the screen
2 in a minute. But it's Example 16 through 18,
3 which is the micro buy example. If you require a
4 disclaimer, it means essentially that those ads
5 can't be run because you can't see, you literally
6 can't see the disclaimer in examples 16 and 17.

7 MR. RYAN: And if I could respond to
8 that and also, I think respond to something that
9 Mr. Shapiro said and I know it's the position of
10 the CATO Institute that markets are wonderful
11 things and if they can quickly correct. And I
12 think that would be the case here. Advertisers or
13 advertising platforms have an incentive to make
14 sure that the ads they are selling are going to
15 be, are going to influence people. That's how
16 they are going to get political advertisers to be
17 repeat customers, to continue coming back, and
18 buying ads. So, it's in everybody's interest who
19 are going to be complying with these rules to make
20 sure that the ads that are fully compliant will
21 influence voters, that an adequate amount of space
22 will be around the communicative message, that

1 voters are going to be influenced, that people are
2 going to look at the ad, click on the ad if that's
3 the goal, and that these entities, these platforms
4 will be able to accommodate the requirements that
5 the Commission lays down.

6 CHAIRWOMAN HUNTER: So, are you saying
7 that we come up with the requirements and the
8 platforms just won't sell the small ads to
9 political committees, is that what you're saying?

10 MR. RYAN: No, I think that there's --
11 this is a dynamic process. And I think again, the
12 challenge with applying some of these rules to
13 these particular ads is that they are -- I mean
14 this is effectively a billboard. This is
15 effectively a billboard that we're sizing down to
16 the internet. And that's not the way that digital
17 advertising works. There are a number of
18 different ways that information can be presented
19 on the face of the ad or in the frame surrounding
20 the ad. And I'm confident that for the vast
21 majority of ads that are sold online that the
22 disclaimer information can be presented on the

1 face of the ad without having to limit the
2 communicative content or the overall goal of the
3 ad. If it --

4 CHAIRWOMAN HUNTER: But we have comments
5 from Twitter and others that say that's not
6 accurate. That requiring a full disclaimer, even
7 a shorter one would diminish the ability for
8 people to run certain ads.

9 MR. RYAN: Mm-hmm. Well, and I nodded
10 my head when you asked if adapted disclaimers were
11 appropriate in certain circumstances and I agree
12 that they are appropriate and in certain
13 circumstances where it is not possible to include
14 a full disclaimer.

15 CHAIRWOMAN HUNTER: So, the standard for
16 you is where it's not possible?

17 MR. RYAN: Yes, yeah. I think it would,
18 where's it not possible and again, I think it's a
19 -- this is a dynamic process that can be resolved
20 through advisory opinion requests. And it's a
21 dynamic process that can be resolved through
22 advisory opinion request. And sort of the rigid

1 approach of treating digital ads as smaller
2 billboards is not helping things.

3 VICE CHAIR WEINTRAUB: And if I may,
4 Madame Chair.

5 CHAIRWOMAN HUNTER: Yes.

6 VICE CHAIR WEINTRAUB: As the I think
7 sole member of the Commission that actually uses
8 Twitter, Twitter is actually pretty flexible. You
9 can add pictures, you can have -- I've never had a
10 problem linking to anything on Twitter. So,
11 there's a variety of ways that Twitter ads are
12 susceptible to providing additional information.
13 And they don't even -- if you add a picture, it
14 doesn't even charge against your 280 characters,
15 which of course, is a choice that Twitter has
16 decided. It used to be 140. Then, overnight it
17 suddenly was 280. And, you know, maybe tomorrow
18 they'll decide it's 313. I mean, you know, that's
19 just, that's the way they design it. But I think
20 that --

21 MR. SHAPIRO: I want it on the record
22 that I think Twitter should go back to 140.

1 (Laughter) It's more useful that way.

2 VICE CHAIR WEINTRAUB: And I wish that
3 Twitter had come here to help us. I think it is
4 unfortunate that while they all submitted comments
5 and they were all generally supportive of our
6 doing this rulemaking and encouraged us to come up
7 with some standards and regulations, I think it is
8 unfortunate that Twitter, Google, and Facebook all
9 decided not to come because I think some of the
10 questions that we have are kind of nitty gritty
11 technical questions and having those tech people
12 here might have been perhaps even more useful than
13 a battle of constitutional lawyers. I know that's
14 hard to envision that anything could --

15 CHAIRWOMAN HUNTER: I'll allow that.

16 VICE CHAIR WEINTRAUB: -- be more useful
17 that that. I also wanted to just throw in that
18 there seems to be sort of an underlying premise in
19 some of the comments that disclaimers ought to be
20 avoided at all if they could be because they
21 interfere with people's ultimate freedom to say
22 absolutely everything and only those words that

1 they particularly choose to say. You know,
2 disclaimers are already a legal requirement. And
3 nothing in this rulemaking is intended to revoke
4 any disclaimer requirements. So, that's just not
5 where we're going here.

6 CHAIRWOMAN HUNTER: All right. I don't
7 want to speak for the panels, but I think that one
8 of the ideas that's thrown out by a number of
9 people including Twitter, is using what we called,
10 at the FEC, an indicator. As I said, Twitter
11 calls it, a visual badge. So, I think that's what
12 people are talking about is if not the full
13 disclaimer, then potentially something that's a
14 truncated version of it. If not that, then some
15 kind of visual badge or an indicator that would
16 take you very quickly to additional information
17 that many people have said could provide more, it
18 would be more readily available and provide more
19 than just what you see on the face of this. But
20 I'm going to turn it over to others that have a
21 question.

22 But one last thing for Mr. Fischer. So,

1 are you okay on example two? You think that we
2 should require the full disclaimer on Example 2?

3 MR. FISCHER: Well, I think the -- I
4 agree with Mr. Ryan that under the text of
5 Alternative A this would -- that the full
6 disclaimer would be required. I think certainly a
7 full disclaimer -- it's -- it would be incorrect
8 to say that a full disclaimer cannot be included
9 on this particular ad. I don't know whether that
10 should be the case. And I think again, I think
11 that the problem with these examples is that
12 digital advertising is very dynamic. And there's
13 going to be few ads in the 2018 elections and
14 beyond that are nothing but an image where the
15 disclaimer information is going to be included
16 within that image. I think that the digital
17 platforms and the websites that are going to be
18 selling advertising are going to find much more
19 dynamic ways of representing the disclaimer
20 information on the ad.

21 CHAIRWOMAN HUNTER: But you're talking
22 about Facebook.

1 MR. FISCHER: Well, Facebook, Twitter,
2 Google, Pokémon Go, the various platforms that are
3 selling advertising to political advertisers --

4 CHAIRWOMAN HUNTER: Just --

5 MR. FISCHER: -- are finding a number of
6 different ways of representing the disclaimer
7 information.

8 CHAIRWOMAN HUNTER: So, are you saying
9 that if the platform already requires people to
10 provide this stuff, then we don't have to do
11 anything?

12 MR. FISCHER: No, I'm not saying that at
13 all. I'm saying that if you make clear that
14 platform -- that as a default, platforms -- as a
15 default, an advertiser that -- who's advertisement
16 meets that statutory requirements must include a
17 disclaimer, then platforms will make sure that
18 that happens. That platforms will offer ways for
19 political advertisers to comply with the
20 regulations.

21 CHAIRWOMAN HUNTER: Okay. I don't want
22 to take up any more time. I just don't think

1 that's consistent with the comments that they've
2 submitted but maybe we can come back to that.

3 VICE CHAIR WEINTRAUB: Can I just ask a
4 follow up?

5 CHAIRWOMAN HUNTER: Yeah.

6 VICE CHAIR WEINTRAUB: I want to go back
7 to this issue of how much of the ad is it
8 reasonable to expect there to be disclaimer
9 filling up that space as opposed to using an
10 adapted disclaimer. So, I hear from Mr. Ryan that
11 we've sort of got, you know, up to 40 percent
12 would be reasonable under Supreme Court doctrine,
13 but I'm troubled by the 95 percent hypothetical.
14 I mean do we agree that even if you could fit it
15 in, it would take up, there's some portion of the
16 ad that would basically obscure the entire ad and
17 then it would not be reasonable to require the
18 full disclaimer.

19 Would you agree with that or would you
20 disagree or -- would you disagree?

21 MR. RYAN: Agree.

22 VICE CHAIR WEINTRAUB: Okay. So then

1 where do we find the line? If we -- and by the
2 way, if we come up with any kind of number, like
3 40 percent or whatever, we're still going to have
4 the problems that were raised in response to the
5 10 percent threshold, that any number is
6 arbitrary -- what's the difference between 41
7 percent and 39 percent? And how is it going to
8 transfer from one platform to the other?

9 But putting that aside for a second, how
10 would we make, how should we make the
11 determination, so in your view 40 percent is okay,
12 95 percent is excessive? We just call it a day at
13 40 percent because we've got some Supreme Court
14 imprimatur on that, or is it over 50 percent would
15 be unreasonable because that would take up more
16 than half of the ad space and that somehow doesn't
17 feel right?

18 I mean how would you make the
19 determination? How do you think we should do
20 that?

21 MR. RYAN: I would encourage you to
22 employ the expertise of some who specialize in how

1 people perceive advertising and communications.

2 I don't know if there have been any
3 comments along those lines, but it is sort of
4 along the lines that Mr. Shapiro has suggested,
5 that that type of science matters.

6 I think I will stick to my area of
7 expertise. The law, I think up to that 40 percent
8 threshold, you are on perfectly solid
9 Constitutional grounds. Perhaps you could push
10 the boundary further than 40 percent.

11 My inclination with this Supreme Court
12 is not to do so. And I'm disinclined to encourage
13 you to do so. So I'd say up, as a legal matter,
14 up to 40 percent.

15 But I don't have a great answer for the
16 precise number that most effectively communicates
17 this information to its viewers.

18 I strongly suspect that there are
19 advertising scientists who do know how to measure
20 that and could provide that information to the
21 Commission. You know the breadth of comments
22 you've received better than I. You should receive

1 any comments along those lines from those who have
2 an expertise in the social science of advertising.

3 MR. SHAPIRO: You know, just because
4 something might be legal doesn't mean it's the
5 best way of regulating it. Again, I'm not going
6 from some ideological priors but just in terms of
7 effectiveness.

8 As I was getting ready to go work, I
9 think it was yesterday, the TV was on in the
10 background and there was some pharmaceutical ad
11 and I think more than 40 percent, more than half
12 of the ad was this disclosure about possible side
13 effects, all the things that they read, right?

14 Now I would think that those kinds of
15 disclosures in the pharmaceutical and medical
16 context are more important than disclosures in the
17 political arena.

18 We could quibble over that but
19 regardless, those are very important things that
20 could help people or kill people or whatnot.

21 Wouldn't it be more effective in that
22 context, I'm thinking -- and it's my lay opinion

1 because I'm not a psychologist -- to say: There
2 could be serious side effects, talk to your doctor
3 before using, rather than reading out this whole
4 list that takes up 50, 60 percent of the ad.

5 I think there's a similar dynamic going
6 in here. So, again, less is more, even if your
7 sole purpose is, which it should be, to inform
8 voters and enhance confidence in the integrity of
9 the election.

10 Again, just something smaller might be
11 more effective, forgetting all of the ideological
12 principles.

13 VICE CHAIR WEINTRAUB: I think that's a
14 really important point and I'm -- it is something
15 I thought about when we were crafting the
16 alternatives. Some of what was going on there was
17 to try and present alternatives, so that people
18 could have things to compare, not necessarily that
19 people were locked down on one side or the other.

20 So the alternatives take different
21 positions on whether, even when you have an
22 adaptive disclaimer, do you have to have some

1 indication of the name of the sponsor and,
2 secondly, can it be an abbreviated name of the
3 sponsor.

4 And it occurred to me that an
5 alternative ace, that you've got to have it, at a
6 minimum, the full name of the sponsor.

7 But I am sensitive to that concern, that
8 maybe you would get more, you would actually
9 convey more useful information by having something
10 shorter and punch it to the people that actually
11 read and see and get it.

12 So I'm curious about the, I guess on
13 this question, I'm particularly interested in Mr.
14 Fischer and Mr. Ryan's view, since the other
15 panelists were more in the less is more camp, so I
16 can kind of guess where they might come out.

17 Although -- feel free to jump in -- is
18 it okay to have an abbreviated -- well, how do you
19 feel about something that's, a requirement that
20 there be some indication of the name versus just
21 having a little indicator that says: Go here to
22 get further information; and, secondly, where do

1 you stand on abbreviations versus full name.

2 And if you are -- and I think some of
3 your comments suggested that you were okay with
4 abbreviations -- how do we determine what's a
5 commonly understood abbreviation given that in
6 Washington, everybody understands what the DNC and
7 the RNC are, just to take just a couple of
8 examples.

9 But I don't know, maybe in the middle of
10 Idaho, they don't. You know, that doesn't
11 resonate for them the way it does here in D.C.

12 MR. FISCHER: So I think, I mentioned
13 this earlier, I think the most important
14 information that should be included is the name of
15 the advertiser, the name of the group that paid
16 for the ad.

17 And I did like an Alternative B, the
18 tiered approach. Where, depending on where you
19 set the line, maybe it's a percentage that for
20 Tier One, if the full disclaimer, the full
21 statutorily required disclaimer that includes the
22 not authorized any candidate's committee, or

1 candidate or candidate's committee and website,
2 exceeds a certain percentage, then you can drop
3 down to the shortened disclaimer, the adapted
4 disclaimer that only provides the name of the
5 advertiser.

6 And I think that's the most, that's the
7 most important information.

8 VICE CHAIR WEINTRAUB: Just let me be
9 clear on this. That part of the tiered approach
10 in Alternative B is, and then if that's too long
11 for, by whatever criteria, then you get to go to
12 just a simple indicator.

13 MR. FISCHER: That's where I think,
14 that's where I would, that's something I disliked
15 in Alternative B. I think that if you are going
16 to, if you meet whatever requirements it is, or
17 whatever threshold it is that you can use a
18 shortened adaptive disclaimer, then the bar should
19 be much higher for not including that adaptive
20 disclaimer at all.

21 It should not be 10 percent for both,
22 for example. I think if you have a percentage for

1 Tier One, then for Tier Two it should be much
2 closer to an impossibility standard, much closer
3 to the standard in Alternative A, that if the
4 adaptive disclaimer cannot be included in the ad,
5 then you can include only an indicator.

6 MR. RYAN: I think Alternative A gets it
7 right on this point. I think at a minimum, you
8 should have the name of the advertiser and an icon
9 that makes clear that additional information is
10 only one step away.

11 At your next panel, you'll be hearing
12 from Professor Kim who wrote about this in her
13 comments, she wrote about what she referred to, I
14 believe, as information overload. Her view is
15 that it is unreasonable and unfair to require
16 viewers to investigate who is behind an ad. The
17 type of investigation that would be required if
18 all you saw was an icon.

19 Her recommendation, I believe, if I read
20 her comments correctly, is at a minimum, you
21 should have the advertiser's name plus the icon
22 that alerts you to the availability of additional

1 information.

2 So you will also hear, I believe, on the
3 next panel from a representative from the Center
4 for Democracy and Technology, which wrote at some
5 length in their comments about the challenges
6 faced by the development of an icon in the
7 advertising community around the ad choices
8 campaign.

9 And then it hasn't really worked very
10 well. I found those comments very interesting to
11 read because I've been using the Internet as long
12 as I can remember and I had no idea what the ad
13 choices icon meant or what it was about. And I'm
14 a pretty engaged user of the Internet, so the
15 comments from the Center for Democracy and
16 Technology resonated with me on that point.

17 The limitations that are presented by an
18 approach that allows advertisers to only use an
19 icon, and not at a minimum also include the
20 advertiser's name, are serious. And I think that
21 the public would be poorly served by a disclaimer
22 requirement that allowed only an icon and not the

1 advertiser's name.

2 VICE CHAIR WEINTRAUB: But you're okay
3 with something abbreviated --

4 MR. RYAN: Yeah, I think that's a
5 slightly tougher question. Certainly I'm much
6 more comfortable with a disclaimer requirement of
7 an abbreviated name plus icon versus icon-only.
8 And I've seen examples, both presented by the
9 Commission and elsewhere, really long committee
10 names.

11 So, yeah, I'm definitely open to this
12 abbreviated name approach.

13 But, Vice Chair Weintraub, I share your
14 concern that, yeah, within Washington, what's
15 considered to be a well-known abbreviation may
16 differ dramatically from what my parents
17 understand to be a well-known abbreviation when
18 they're sitting in their rural home outside of
19 Scranton, Pennsylvania.

20 MR. FISCHER: And I agree. I think we
21 noted that in our comments, that the universe of
22 organizations that would be entitled to use an

1 acronym is going to be pretty small.

2 MR. DICKERSON: I would just add one
3 cautionary note, which is that this Commission's
4 experience with the advisory opinion process has
5 not been a happy one in this space. And to the
6 extent that we're adding these sorts of
7 ambiguities as to who comes in, who goes out, I
8 think you're going to see reasonable people on the
9 Commission disagree on those points, possibly in a
10 way that will land us somewhere close to where we
11 are right now.

12 So with that said, I do want to answer a
13 question I sort of raised earlier, which is is
14 there a reason for having less information on a
15 disclaimer on the Internet space than there is in
16 a physical billboard or an ad or something along
17 those lines.

18 I think the answer is pretty obviously
19 yes. And we go through this history in our
20 written comments.

21 But the original intention of these
22 disclaimers was for non-interacted advertisements,

1 whether they are broadcast into someone's living
2 room or found in a newspaper, where the only
3 information that would be available to a voter
4 about who is behind this ad, et cetera, was, in
5 some cases, depending how far back you go, to come
6 physically to the FEC and search through its
7 archives.

8 You know, the ideal was to allow people
9 some anchor to get at the larger disclosure
10 information that the Act requires. The disclaimer
11 itself is not supposed to convey that information.
12 It's supposed to be a key to allow the voter to
13 get to it. And obviously in an interactive space
14 like the Internet, that is far easier than it is
15 in a broadcast ad.

16 Just to take an example, I've been
17 looking at example two from the vertical banner,
18 you know, in the Internet ad it is not obvious at
19 all why you should have to include a web address,
20 given that in almost all circumstances, given the
21 interactivity and the progress that's made in this
22 area, you're probably going to be able to click

1 directly on it and get somewhere close to that
2 information.

3 So I think that, frankly, maybe it's a
4 question for Congress and maybe it's a question
5 for this Commission. But a lot of this
6 requirement is simply obsolete, because it doesn't
7 fulfill the requirements of the original act.

8 MR. SHAPIRO: Or you could Google the
9 name as easily as you can input whatever the
10 website that they tell us is true.

11 MR. DICKERSON: Good open secrets. My
12 point is merely that the intention here is not to
13 convey this information because it is somehow
14 sacrosanct and useful. I don't think anyone
15 thinks that. It's to serve as a key to a lot of
16 voters to get to get to real disclosure
17 information.

18 And that can be done with an indicator,
19 I think quite easily. And while avoiding this
20 problem of well, I don't know, we're the DNC, are
21 we sufficiently well known in Iowa to get the
22 permission of this Commission to shorten our name,

1 which I think will just be an invitation to
2 trouble.

3 MR. FISCHER: If I could just respond
4 quickly, in terms of what information the
5 disclaimer itself actually provides, just provide
6 a few examples we've seen so far from the 2016
7 election.

8 There's a Facebook page called Who Are
9 Your Country? It described itself as a community
10 for anyone who wants to show their Hoosier pride.

11 And when you go to the Facebook page, it
12 has local news about potholes, Caterpillar plant
13 moving to Indiana. And when you look at the
14 Facebook ad archive and see that the ads that
15 Hoosier Country is running, it says "Paid for by
16 Priorities USA and Senate Majority PAC."

17 The Facebook page itself, the name of
18 the Facebook page that will appear on the ad does
19 not give you any indication that these ads are
20 actually being paid for by national Democratic
21 super PACs.

22 So I think there is a great degree of

1 information that can be provided on the face of
2 the ad by including the statutorily required
3 disclaimer information.

4 CHAIRWOMAN HUNTER: Commissioner
5 Petersen.

6 COMMISSIONER PETERSON: Thank you,
7 Madame Chair. One of the concerns that I have in
8 this rulemaking, which I mentioned in my opening
9 statement, was to insure that low-cost advertising
10 formats remain available to candidates, to
11 committees, to individuals who may not have the
12 resources of super PACs, can't, well-financed
13 candidates, and other wealthy individuals.

14 We received a comment from Google and
15 they were talking specifically about the Stand By
16 Your Ad requirements and the implications of
17 imposing that on all video ads. And it says
18 imposing Stand By Your Ad requirements on all
19 video ads would force political advertisers out of
20 short-form ad formats and this is like six-second
21 YouTube ads.

22 I suppose one response could be that

1 while those candidates and speakers poured in more
2 money to purchase online ads with either longer or
3 larger formats that can comply with a disclaimer
4 requirement on the face of the ad. Obviously
5 there are practical concerns that we'd be forcing,
6 again, those with fewer resources to have to spend
7 more, which would inherently limit how much they
8 could speak.

9 Let me ask you, Mr. Shapiro, would that
10 raise Constitutional problems for disclaimer rules
11 to result in short video formats,
12 character-limited text ads, perhaps small graphic
13 and banner ads being unavailable as speech
14 vehicles for candidates, committees and citizens,
15 especially for those who don't have the resources
16 to use more expensive ad formats?

17 MR. SHAPIRO: I think so. I think if a
18 regulation causes a certain kind of political
19 communication to simply be impracticable or too
20 expensive or otherwise unfeasible, that's a
21 problem.

22 And I think, just like technology

1 adapts, I think the onus is on the regulatory
2 commission to figure out a way to apply the
3 regulatory regime; or have an alternative way of
4 getting who funds the ad, in whatever way that
5 might be possible, whether it's having a rule that
6 whoever publishes some kind of ad has to be, you
7 can find it on the FEC's website that they've
8 registered or whatever the thing is.

9 So I think the default should be do
10 whatever you can not to take means of
11 communications off the table, whether due to a
12 legal or practical barrier.

13 COMMISSIONER PETERSON: And on the issue
14 of Stand By Your Ad, the requirements and their
15 application in the online context, Mr. Dickerson,
16 you wrote at some length in your comments on that
17 very issue. You touched upon it very briefly in
18 one of your responses but could you spell out with
19 a little bit more detail why you think that that's
20 problematic from a statutory perspective?

21 MR. DICKERSON: I'd be happy to. So I'm
22 looking here at 52 U.S.C. § 30120, which I'm sure

1 you all have in front of you, and you know, there
2 are -- it's multiple parts and this has been
3 changed over the years. We give that background
4 for the intellectually curious in our comments.

5 But essentially, the underlying baseline
6 is that a speaker has to identify the
7 organization, or entity or person or committee
8 that makes an ad.

9 And then there's this sort of
10 explanation of what needs to be included. So I'm
11 looking here at subsection A, sub 3, which talks
12 about, for example, independent speech. And there
13 it says that if an ad is not authorized by a
14 candidate or political committee, the ad should
15 clearly state the name and permanent address, et
16 cetera.

17 And that is required for anything.
18 That's required for broadcast ads, that's required
19 for other public communications which this
20 Commission has consistently slotted the Internet
21 in to.

22 The problem is that the Stand By Your Ad

1 provisions come into the broadcast space as a
2 result of the McCain-Feingold Act, amendments to
3 the FECA.

4 And there you have, and very
5 specifically, that those are requirements for
6 television and for radio. And there is a long
7 statutory argument in our written comments which I
8 won't bore everyone with, though it could be
9 copied and posted into a brief, I suppose. And
10 there, you do have this issue of, those apply to
11 broadcast stations putting out radio and
12 television.

13 Broadcast stations are not general
14 public communications within the meaning of
15 Subsection A. And it's been the consistent
16 understanding of this Commission that into the
17 Internet is a general public communication under
18 Subsection A.

19 So this picture will have to break with
20 quite a long period of consistent statutory
21 interpretation in order to suggest that television
22 and radio are covered under the broadcast

1 communication portions of that Act.

2 I think that's a tough row. And I think
3 it's made especially difficult, as I added
4 earlier, by the fact that Citizens United
5 specifically said that no, you're right. The
6 reason you have another breath challenge here,
7 although we reject it, the reason you have another
8 breath challenge is that the Stand By Your Ad
9 provisions only apply to broadcast and
10 specifically do not apply to the Internet.

11 So I think perhaps Congress could wade
12 into this and provide this Commission with that
13 authority. But there's a significant trip on step
14 one problem with the importation of the radio and
15 televisions requirements online.

16 COMMISSIONER PETERSON: Mr. Ryan and Mr.
17 Fischer, I know that you supported the inclusion
18 or the importation of Stand By Your Ad
19 requirements to online video communication. I want
20 to give you a chance to respond to that. To what
21 Mr. Dickerson has said.

22 MR. FISCHER: Yes, I, too, have 52 USC §

1 30120 open in front of me.

2 COMMISSIONER PETERSON: Looks like we're
3 all in agreement on that.

4 MR. SHAPIRO: I don't. I just have my
5 pocket Constitution.

6 VICE CHAIR WEINTRAUB: (Laughter)
7 That's all you need. We can get you a copy if you
8 want --

9 MR. SHAPIRO: Oh, thank you.

10 MR. RYAN: I think Allen wants to share
11 something. My view is FECA is amended by BCRA as
12 Allen had to explain, it does not mandate the
13 extension of Stand By Your Ad disclaimer
14 requirements to online video and audio, but nor
15 does it foreclose it. I think the Commission
16 would be well within its authority under 30120 Sub
17 A to include, or to require Stand By Your Ad
18 disclaimers in online video and audio
19 communications.

20 And so the way this would play out,
21 Allen knows well, Commission adopts the
22 regulation, Alternative A. Allen and the Institute

1 perhaps sues the Commission and argues in the
2 context of that litigation, under the
3 Administrative Procedures Act applying Chevron,
4 steps one and two, that this remove regulation
5 Alternative A is arbitrary, capricious, abuse of
6 discretion, contrary to law. I would be happy to
7 litigate and argue that case in defense of such a
8 rule.

9 I think Allen and I are just not going
10 to agree on that today. Allen thinks it's beyond
11 the Commission's authority. I think it's with the
12 authority of Sub Part A of this Statute. But
13 that's how this would go.

14 It's not -- it is certainly not required
15 by the statute but nor is it foreclosed.

16 COMMISSIONER PETERSON: Okay. Because
17 the provision, because the Stand By Your Ad is
18 under the Subsection D, entitled additional
19 requirements, meaning it, whatever is so, what is
20 contemplated in A, D is in addition to that; and I
21 think, we've received, in addition to Mr.
22 Dickerson, we've received a lot of comments from

1 across the board raising the same concern.

2 And maybe this, we can throughout this
3 rulemaking, without getting too bogged down in the
4 Stand By ads, reach a place where we can provide
5 the necessary information for voters to make
6 informed choices and to understand who is paying
7 for ads while at the same time accommodating the
8 speech that's delivered on the Internet.

9 Mr. Fischer, you mentioned that Facebook
10 ads, when we were talking about the earlier
11 examples, currently, you had mentioned the ads are
12 now on update because Facebook ads now require a
13 full disclaimer on the face of the ad.

14 I just wanted to clarify what you meant
15 by on the face of the ad. Some of the ads that
16 I've taken a look at, there might be a partial
17 disclaimer but then an icon or an information tag
18 of some sort which then pops up some additional
19 information.

20 And I just wanted to clarify what you
21 meant on the face of the ad.

22 MR. FISCHER: Sure. So the, I'm just

1 trying to use this as an example, under Facebook's
2 new rules, assuming this is the image you upload
3 on the Facebook ad itself --

4 VICE CHAIR WEINTRAUB: You're talking
5 about example one on the handout?

6 MR. FISCHER: Example one on the
7 handout. It would be above the image, then it
8 says "sponsored" and "paid for by Senate Majority
9 PAC and Priorities USA". It's not the -- it's
10 something that's built into the frame surrounding
11 the ad as opposed to the image or the text that
12 the advertiser is seeking to include within the ad
13 itself.

14 COMMISSIONER PETERSON: Is that with
15 every ad?

16 MR. FISCHER: Yes.

17 COMMISSIONER PETERSON: I'm just looking
18 at an ad right here that's for a local race and it
19 has a video that's attached, and then there's an
20 information icon on which you can click and find
21 -- it will pop up and give you the full name of
22 the committee, as well as a link to further

1 information about that, about that candidate.

2 And I guess, this is an interesting
3 rulemaking, in the sense that -- well, I guess
4 there's some ideological components regarding
5 First Amendment and Free Speech and so forth.

6 There are some very practical,
7 down-in-the-weeds considerations where I think,
8 and I hope we can find some agreement, even across
9 lines that were, maybe we had some ideological
10 disagreements.

11 Mr. Ryan, you had mentioned that on the
12 Internet it's a virtue that it's not a static
13 medium like television or radio, print. It's
14 interactive and that we need to capitalize on the
15 virtues of the Internet.

16 And to me, it seems that one of the
17 virtues is the ability to interact and have
18 information readily available within, whether you
19 are hovering over a screen, whether or not you're
20 clicking and immediately getting a pop-up, and so
21 that perhaps we need to expand our conception of
22 what "on the face of an ad" means, or expand our

1 conception of what a communication is.

2 Obviously, when you're dealing with
3 newspaper ads, television ads, radio ads, when we
4 talk about having a disclaimer on the face of it,
5 I mean there's nothing else that is involved in
6 that communication on which you can append a
7 disclaimer.

8 But the Internet's different, I guess.
9 In mail communications the Commission has long
10 said that not every page of that letter, if it's a
11 multi-page mailing, needs to have a disclaimer and
12 could we, do we need to kind of reconceptualize
13 what it means for a disclaimer to be on the face
14 of an ad.

15 Because it seems like there are
16 mechanisms, and we've received comments from
17 groups like the Internet Association which talked
18 about the Digital, I believe it's the Digital
19 Advertising Alliance, and I think on the next
20 panel we may learn more about some of the new
21 voluntary standards that are being put into place
22 so that information could be readily accessible,

1 so that the keys, as Mr. Dickerson said, that are
2 provided in disclaimers can immediately be used to
3 go to, whether it be campaign websites or to FEC
4 web pages or to databases and information sites
5 that are supported by the platform itself.

6 But do we need to reconceptualize what
7 "on the face of the ad" means in the online space.
8 I'll just leave that open for whoever wants to --

9 MR. FISCHER: I think, my interpretation
10 of "on the face of the ad" means that when the
11 viewer looks at the ad they can immediately know
12 who is paying for it without having to go through
13 any -- without having to take any affirmative
14 steps.

15 And that with an indicator, that is an
16 affirmative step that you have to click on to get
17 the disclaimer information. So I apologize for
18 the confusion with that but, for example, I would
19 think that most of the Facebook political ads that
20 I've seen it's within the frame itself that said
21 "paid for by X, Y, Z", and that the viewer, by
22 looking at the ad, without having to take any

1 additional affirmative steps, would know who had
2 paid for it.

3 COMMISSIONER PETERSON: And I'll add
4 that I think, in a perfect world, having the
5 disclaimer on the face of the communication is
6 probably the ideal.

7 As both the chair and vice chair pointed
8 out, I think we all agree there are circumstances
9 where that ideal just can't be met. And that
10 there's going to have to be some sort of
11 flexibility so that we can continue to accommodate
12 shorter ad formats online that are valuable, that
13 are valuable to those who are speaking. They're
14 valuable to those who are receiving the message
15 that's being conveyed.

16 And the trick is how do we get from,
17 what's the objective trigger that gets us from the
18 full disclaimer to the adaptive disclaimer, or the
19 icon, or the whatever we want to -- or the
20 indicator, those are the terms that are getting
21 thrown around.

22 And that continues to be, and I think

1 throughout this rulemaking, that's going to be I
2 think one of the main challenges that we have.

3 Because the way I look at it, in many
4 cases, when I look at some of the examples of
5 putting a full disclaimer, for one thing, what may
6 be clear and conspicuous in one format -- if
7 you're on an iMac with a 25-inch screen -- the ad
8 format may be clear and conspicuous and easily
9 readable.

10 Once it's scaled down to a smart phone,
11 it may not be so much. If it's scaled down to an
12 Apple Watch, it may be just nothing but gibberish.

13 It seems we may be putting a great
14 burden on online advertisers to guess as to, okay,
15 when is it -- when am I going to be required to
16 have a full disclaimer; when can I have something
17 that's a little bit more of a truncated
18 disclaimer.

19 And I don't know if there's any easy
20 answers on that. But I'm hoping we can reach, and
21 like we said, utilize the tremendous capacities
22 that the Internet provides to allow us to have the

1 best of both worlds.

2 Because when I look at some of these
3 ads, it seems that we're getting the worst of both
4 worlds. We're getting a cluttered ad which
5 doesn't give you much in the way of speech and
6 frankly doesn't give you much value in terms of
7 what's on the disclaimer itself.

8 Maybe I'm a little too Pollyana-ish, but
9 I would hope that we could have a win-win
10 situation where the speech could be clearly
11 conveyed by the speaker and understood by the
12 recipient of that speech, while at the same time
13 having the information right there available,
14 again through some of a click-on icon, some sort
15 of hover, something that's readily accessible. So
16 that the viewer of that ad can have the
17 information to which they're entitled under the
18 statute.

19 So that's what I hope we can achieve in
20 this rulemaking.

21 One last question I just want to ask
22 regarding -- I agree with what you said, Mr.

1 Fischer, earlier that one step should mean one
2 step. And I know there have been concerns
3 addressed in the past that when you click,
4 occasionally when you click on an ad that does not
5 have a disclaimer and go to a landing page
6 sometimes, those hyperlinks might be broken or
7 maybe the disclaimer is buried in some obscure
8 place on the website.

9 Should the Commission consider, or set
10 some sort of standards for how landing page
11 presentation of a disclaimer should be displayed?

12 MR. FISCHER: I don't know that you
13 would want to lay out, layer anything with that
14 degree of specificity within the rule, because
15 there are going to be so many different ways of
16 complying with the one-step requirement.

17 Twitter, for example, or the IAB
18 proposal, for example, you may click on the "I"
19 and immediately, within the application itself or
20 within the website you're visiting itself, you
21 would get the full disclaimer information.

22 You would know whether it is paid for by

1 a candidate. You would have a link to their
2 website. There is also the option of complying
3 with the one-step requirement by clicking a link.
4 And if the link, if you follow that link, then the
5 disclaimer information should be presented
6 immediately.

7 But I think clarifying, within the rule
8 itself, that one step actually requires being
9 presented with the full statutorily required
10 disclaimer information is not more than one click
11 or not more than, literally, one step away from
12 the indicator.

13 COMMISSIONER PETERSON: Okay. Thank
14 you.

15 VICE CHAIR WEINTRAUB: Mr. Walther, do
16 you have any questions?

17 COMMISSIONER WALTHER: At this time, no.

18 MR. RYAN: I was wondering if I could
19 take a few minutes to respond to a few of the --

20 COMMISSIONER PETERSON: Sure, sure.

21 MR. RYAN: You used, I believe you used
22 the word "can't" to describe the ads that the

1 Commission needs to be -- to give some latitude
2 for inclusion of disclaimers on. And that can't
3 include the disclaimer, we need to not rule out
4 the use of those ads. We need to have an adaptive
5 disclaimer.

6 COMMISSIONER PETERSON: I was quoting
7 from Google and there were other comments that
8 talked about how certain advertising formats would
9 in essence be banned or no longer useable by
10 political speakers because of just how much space
11 those would take up.

12 MR. RYAN: Understood. And one thing we
13 haven't discussed, really at all this morning, is
14 the universe of advertisers who simply don't want
15 to, and under Alternative B would choose not to,
16 would design ads; and given the latitude of
17 Alternative B, to not include the disclaimer.

18 And Professor Kim gets into this a
19 little bit in her written comments where she talks
20 about malicious actors. I think there's a really
21 important distinction that must be recognized
22 between commercial advertisers and a significant,

1 although subset, of political advertisers.

2 Commercial advertisers, they have the
3 goal of impressing upon you their name identity.
4 Their brand recognition, that's what they're
5 seeking. They want to be disclosed. They want to
6 impress that in your mind.

7 And by contrast, there are a bunch of
8 spenders in the political sphere, particularly non
9 candidates, non parties, outside groups that are
10 running negative advertising who want nothing more
11 than to remain hidden and to not be disclosed, not
12 have their identities disclosed.

13 I mention that, mainly as a caution
14 against looking solely to commercial advertising
15 standards and practices for guidance on what
16 should be the standards and practices for
17 disclaimers on political advertising, because
18 there are different motivations, different
19 incentives.

20 And one final point that was made by
21 Democracy 21 in its written comments is that this
22 problem, or this issue, this dilemma of small

1 screens is not entirely new. And I'm old enough
2 to remember my next-door neighbor who used to
3 watch baseball games all summer long, on like a
4 four-inch TV screen sitting on his porch, black
5 and white.

6 And this is the point Democracy 21
7 makes, televisions have been available in all-size
8 screens as long as they have existed. Screen size
9 shrinking, shrinking, shrinking and the Commission
10 has never, to my knowledge, contemplated any sort
11 of exemption from disclaimer requirements because
12 of the fact that a particular ad might appear on a
13 really small screen.

14 Brendan has referred to this. I think
15 Allen, you get into this a little bit in your
16 written comments about the challenges of looking
17 at these examples. That how they are displayed is
18 going to vary dramatically dependent on the user
19 and the viewer, not necessarily on the spender or
20 even on the platform architects.

21 So there haven't been exemptions made to
22 disclaimer requirements in the past solely due to

1 the fact that an ad might appear on a small
2 screen, as they have for many years on tiny
3 televisions. So I don't think we should knee-jerk
4 say we need to exempt ads that might appear on new
5 small screens from disclaimer requirements.

6 MR. DICKERSON: If I could add something
7 to that, I agree that it's not a new problem. I
8 just think we're looking at different pieces of
9 history.

10 It's also true and it's been completely
11 uncontroversial, and I've heard no pushback on
12 this, that we don't require this on bumper
13 stickers, we don't require this on skywriting, we
14 don't require this on billboards, we don't require
15 this on an enormous litany of standard,
16 well-funded political expenditures.

17 And there's two reasons for that. One
18 is we got a disclosure regime that's sitting in
19 the back of all this. That is not really being
20 discussed because we're concentrating on the
21 disclaimer, again the key part instead of the vast
22 storehouse of readily available knowledge that

1 everyone now has access to that was not true in
2 the past.

3 And the other point is that I think
4 there is some, you know, "where's the beef" issue
5 here. In the sense that we somehow managed to win
6 the cold war without requiring these disclaimers
7 on billboards.

8 I think in terms of the worries about
9 malicious actors, et cetera, are somewhat
10 overblown in the context of rulemaking, which is
11 only about a very small subset of online ads that
12 are almost universally going to be used by
13 Americans, or almost universally going to be used
14 in situations where better funded, more
15 sophisticated sorts of ads are not available; and
16 where, if there is substantial spending on these
17 sorts of ads, and for some reason disclaimers are
18 not available, that's still going to get picked up
19 on the disclosure side of the Commission's
20 jurisdiction.

21 So I think there's a danger about
22 overstating the issue that's in front of the

1 Commission, and where this is still all going to
2 come out.

3 VICE CHAIR WEINTRAUB: Thank you.
4 Commissioner Walther?

5 COMMISSIONER WALTHER: Thank you. Just
6 a couple more questions. As I mentioned a little
7 earlier, I'm also a little puzzled about how we
8 could see, two things. One is where the
9 technology is going to go and, secondly, what --
10 to be mindful of those who are not interested in
11 complying and how our rules might innocently work
12 really great but on some stretch, really thinking
13 about it, we have another what we call loophole.

14 And so that's where I think we can
15 really use, I welcome your suggestion we have some
16 people who really know how this works.

17 Are we talking dollars, and we are, so
18 there might be a gap of information that could
19 really help us answer these questions.

20 It seems to me maybe a way to work on
21 the amount of time it takes to digest information.

22 So if you put something up for a very

1 short period of time, you go to make a grab for
2 your pencil, or something like that, and by that
3 time it may be gone. Or there might be a name you
4 never heard before, or it's a name that might have
5 three or four words to it that never makes it into
6 your mind before it's gone.

7 So when should we -- looking at some of
8 this, should we look and say, "Okay, if you're
9 going to have a," like one example here, and we're
10 requesting whether 40 percent works here, "if you
11 have 40 percent, we're worried about that," could
12 we say, all right, you have 60 percent but it only
13 takes them one-third of the ad time and not so
14 much worry about, still an ad might be ten seconds
15 and we have three or four seconds, if that's all
16 it takes to read in larger space where it can all
17 be read but it's not all the ad, the whole part of
18 the ad.

19 Should we look at something like that to
20 help us free ourselves from the barrier of, well,
21 it's too small or that kind of thing. If we just
22 make it, okay, if it's big enough you need to have

1 it four seconds, or say five seconds or whatever
2 sociologists would tell you you need. Maybe we
3 could look at other types of approaches.

4 I welcome it, somebody's comment on
5 that, that concept. We have an ad and the ad
6 doesn't carry the whole message the whole time
7 but, rather, maybe it would objectionable if it's
8 a whole ad but larger print in a shorter period of
9 time.

10 MR. DICKERSON: It has the virtue of
11 clarity in the sense that - I think the real
12 danger, lying in the background of this, is sort
13 of how do we define the numerator and the
14 denominator of the burden that's being imposed by
15 the government.

16 I appreciate the idea of trying to lower
17 the burden in that way. The worry I have is how
18 you would go about drafting that rule. I'm
19 actually sympathetic to the problem of loopholes
20 in the space, for a lot of reasons, partially just
21 the way investigations play out.

22 But I think that the way the Commission

1 has to write this is to include two steps. First,
2 has to be some understanding of what the ad is, to
3 your point, Commissioner. And I think your
4 suggestion, Commissioner Walther, in the context
5 of the video ad makes a lot of sense.

6 The difficulty is that if you have a
7 rule that says something like that, you now have
8 to define video, you now have to define the
9 underlying ad. Your list of definitions is going
10 to get very long very quickly.

11 One of the virtues of the second option,
12 Option B, is to say no, we're going to just take a
13 percentile of the overall ad, however defined, and
14 we're going to say that's the cutoff.

15 And I think if you had an ad, if you a
16 rule that said we've suggested four percent, 10
17 percent has been suggested, I think 40 percent
18 would probably lead to litigation; but if you did
19 have some sort of clear number like that, allowing
20 the regulated community the flexibility to do what
21 you suggest, sir, in the sense of it's a 10
22 percent number but if it's 10 percent and you

1 happen to do that on a temporal versus a font
2 basis, you're good to go. I think that has a lot
3 of advantage from the point of view of providing a
4 really clear line.

5 And that leads to my second point, which
6 is that it's not just finding the percentage. And
7 I think for all the reasons that have come out in
8 the advisory opinion process, it's important to
9 have that sort of objective line where there's
10 just not going to be differences of opinion on
11 whether something is clear or conspicuous; but you
12 also have to have an agreement on what the face of
13 the ad is.

14 Of course the face of the ad is a
15 metaphor. There is no face of an ad of this sort.
16 There is a face of this piece of paper. There is
17 not a face of a digital ad.

18 And so in that sense, I think that the
19 right approach, and one that could be, that your
20 example could fit, would be to say: The
21 denominator is whatever product you're purchasing.
22 It might be a video thing, it might be an audio,

1 it might be text, it might be whatever. It might
2 be a brain implant in thirty years. We don't
3 know.

4 And the whole point is not to have to
5 get this gang back together in thirty years to
6 revisit this.

7 And say, once you have defined --

8 MR. SHAPIRO: We'll do it on your
9 birthday next time.

10 (Laughter)

11 MR. DICKERSON: I'm sure my wife would
12 appreciate that.

13 You know as long as you, as long as we
14 understand that that's the denominator. You can
15 play with that numerator however you wish,
16 without the Commission second-guessing you, or
17 forcing you into an advisory opinion or
18 enforcement process.

19 MR. FISCHER: I'm not sure the
20 denominator though is as clear as you would make
21 it seem. And I'm worried that even a 10 percent
22 rule, or a four percent rule would still give rise

1 to confusion and still require the same number of
2 advisory opinion requests before the Commission
3 has a more simple rule. Like if the advertisement
4 cannot accommodate a disclaimer, then and only
5 then can you use an adaptive disclaimer or an
6 indicator.

7 I'm just thinking of Facebook ads, for
8 example. A Facebook ad has some text at the top
9 within the frame of the ad. It has some text that
10 is in the ad itself and then the vast majority of
11 the ad is either a video or it's an image, so how
12 is that percentage calculated?

13 Is the percentage calculated based on
14 the available characters in the ad that surround
15 the image, or is that percentage calculated based
16 on the overall size of the ad itself, including
17 the frame, not including the frame.

18 Is it calculated based on pixels. Are
19 you considering the pixels within the image, the
20 image or the video itself, or are you only
21 considering the pixels within the character limit?

22 And there are a number of other dynamic

1 types of digital advertising that are likely to
2 emerge in the coming years that are still going to
3 make this very complicated.

4 So regardless, so if you go this route,
5 if you go the route of an objective percentage
6 standard, you're still very likely to be faced
7 with difficult challenges and advisory opinion
8 requests.

9 And just on the, on the advisory opinion
10 requests point, I think it may be worth the
11 Commission considering, whichever route you go
12 with the rest of the rule, having some sort of
13 expedited process for requesters who are inquiring
14 about the application of these rules to, under a
15 new technology or their desired ad.

16 Of course there's already the statutory
17 requirement that a candidate seeking an advisory
18 opinion request within 60 days of an election can
19 get a -- is entitled to an opinion within 20 days.
20 And the Commission may consider something like
21 that for these rules.

22 MR. DICKERSON: I guess my rejoinder

1 would just be it's not clear to me that it
2 matters. In the sense that if you have a 10
3 percent rule -- and I'm picking that number at
4 random -- whether the advertiser decides to
5 calculate that by pixels or by time, or by, you
6 know, font size, or by whatever. If you're hitting
7 that, the information is still getting to the
8 potential voter.

9 And I would encourage the Commission to
10 be flexible in allowing voters to make those
11 determinations. Because I'm having difficulty
12 imagining the hypothetical where someone meets an
13 objective standard like that and somehow the
14 information that the statute requires is not
15 getting to the voter.

16 CHAIRWOMAN HUNTER: Steve, do you have
17 anymore questions? I just want to make sure.

18 COMMISSIONER WALTHER: Not yet.

19 VICE CHAIR WEINTRAUB: I know we're
20 getting to the end here, but one of the
21 differences between Alternative A and Alternative
22 B is Alternative B has an exception and I'd like

1 to ask, actually anybody on the panel, whether you
2 think that is statutorily authorized, to put an
3 exception into a rule like this; and if so, where
4 does the authorization come from?

5 MR. DICKERSON: The authorization comes
6 from the Administrative Procedure Act, which
7 allows for agencies to exercise their discretion
8 in de minimis situations such as this, just as it
9 has for decades, in the context of the small item
10 and impracticality exemptions.

11 VICE CHAIR WEINTRAUB: I'm not sure at
12 what point when a billion dollars in political
13 advertising would fall under a de minimis
14 exception but I'll --

15 MR. DICKERSON: That's the exercise of
16 discretion.

17 MR. RYAN: Is the exception you're
18 referring to --

19 VICE CHAIR WEINTRAUB: -- the one in
20 Alternative B? Which says that if it can't
21 comply, you know, if it's not, if it's more than
22 10 percent of the ad space, then you go down to an

1 adaptive disclaimer. If there's not room for
2 that, you go down to a further adaptive disclaimer
3 to just the icon and if you can't do any of that
4 then you get an exception?

5 MR. RYAN: My view, and I think the view
6 of Common Cause, would be that that would be
7 arbitrary, capricious and abuse of discretion by
8 this Commission and contrary to law.

9 MR. SHAPIRO: So the whole regime has to
10 fall? Oh, interesting.

11 MR. FISCHER: I think, and as we noted
12 in our, I can't believe he agrees. And as we
13 noted in our comments, the NPRM asks whether any
14 types of advertising exists that would even fall
15 under this exception.

16 If there are any forms of digital
17 advertising that literally cannot accommodate a
18 link to a landing page, or cannot accommodate a
19 disclaimer, absent any, so treating it in
20 exception for a technology that we don't even have
21 any information that exists would be arbitrary and
22 capricious.

1 And if the technology does not exist
2 now, you can be sure that it will exist tomorrow
3 if this exception is created.

4 MR. SHAPIRO: One little bit of
5 technical stuff that my associate gave me was 11
6 C.F.R § 110.11 F, which is the exceptions that the
7 FEC has previously recognized, and that's -- we've
8 alluded to this bumper stickers and pens and
9 buttons and skywriting and, as well as checks and
10 receipts and other items of minimal value.

11 So either there is authority for those
12 kinds of exceptions along the lines that Allen
13 stated, in the Internet realm and otherwise, or as
14 I said then, there has to be others, massive First
15 Amendment violations and then we've got bigger
16 problems.

17 VICE CHAIR WEINTRAUB: Maybe there was
18 never statutory authorization.

19 MR. SHAPIRO: Well, could be. Could be.
20 Well, in which case as I said, I'll have to file
21 an amicus brief supporting Allen's challenge to
22 the entire FECA or whatnot.

1 VICE CHAIR WEINTRAUB: Entire FECA, wow,
2 You think big.

3 CHAIRWOMAN HUNTER: That's a good place
4 to end. I like that. So thank you all. That
5 concludes our first panel for the day. And very,
6 very helpful comments from all four of you. A
7 very good back and forth, I think among
8 Commissioners, and I think a clear indication that
9 we're all kind of struggling with the same kinds
10 of questions and, you know, people have various
11 answers.

12 I think -- and just for me -- we're left with the same
13 question that we started with, which is what would the
14 standard be.

15 We had a variety of different options from people
16 today. Of course, we put two different ones out with
17 Alternative A and Alternative B. I just don't think
18 we've gotten much further yet, at least on this panel,
19 I know we have the rest of today and tomorrow but I
20 think --

21 VICE CHAIR WEINTRAUB: Keep hope alive,
22 Madame Chair.

1 CHAIRWOMAN HUNTER: What was that?

2 VICE CHAIR WEINTRAUB: Keep hope alive.

3 CHAIRWOMAN HUNTER: Yes. Hope's alive
4 but I think, some suggestion was made, and I was
5 kind of alluding to this earlier, to the extent
6 that we're not able to come up with a practicable,
7 administrable objective standard. And the notion
8 that we want people to come back to the FEC every
9 time they want to run an Internet ad just does not
10 work for me at all.

11 I mean that's really the goal of this is
12 to come up with a rule to prevent that exact
13 situation from happening and as Mr. Dickerson
14 said, our track record on those kinds of advisory
15 opinions is not good at all.

16 We were not able to agree on a number of
17 those. So with all of that in mind, we may sort
18 of be forced, and it would be, I think, defensible
19 under the Administrative Procedures Act to say
20 that, while it might be ideal to have as much
21 information on the face of the ad as possible,
22 because of the nature of the ads.

1 And because we may be potentially not
2 able to come up with an administrable standard,
3 the indicator may solve all of those issues once
4 and for all, by saying we have a place here where
5 we can go and lead you to a bevy of information
6 that's even greater than what was presented on the
7 face of the ad and arguably what's presented on
8 the face of the ad probably doesn't do the reader
9 a whole lot of good with respect to providing
10 information on who's placing the ad.

11 But in any case, thank you all very much
12 for coming this morning. We greatly appreciate
13 it.

14 And happy birthday, happy birthday to
15 Mr. Shapiro.

16 VICE CHAIR WEINTRAUB: Madame Chair, the
17 administrative matter, although, oh, okay,
18 administrative matter and a quick rebuttal which
19 is that right now, well right now the loss is that
20 all public communications, including paid
21 advertising on the Internet, require a clear and
22 conspicuous disclaimer. So that's what the law is

1 now, if we don't --

2 CHAIRWOMAN HUNTER: Well, there is that
3 -- that's what we've got. That is what the
4 regulation says, however, there are exemptions
5 that we've got, the exceptions that we just talked
6 about and those advisory opinions also on point.

7 VICE CHAIR WEINTRAUB: So lunch,
8 everybody, there is lunch available in the
9 conference room which is out the doors and to the
10 right. It's raining out there and the security
11 takes awhile, so I invite you to partake of the
12 finest lunch that Costco afforded. Sorry, I
13 didn't mean to make a commercial. That's just
14 happens to be where I do my shopping.

15 CHAIRWOMAN HUNTER: What's the
16 disclaimer on that?

17 VICE CHAIR WEINTRAUB: Well, I will make
18 one disclaimer announcement and that is that the
19 handout at the back of the room was actually
20 prepared by the Chair's office. It is based off
21 of the examples we agreed to but it includes some
22 compare and contrast and commentary that was not

1 part of --

2 CHAIRWOMAN HUNTER: No. It doesn't. The
3 handout in the room is the one that was --

4 VICE CHAIR WEINTRAUB: I don't think
5 that language was in --

6 CHAIRWOMAN HUNTER: No, that's not in
7 the back of the room.

8 VICE CHAIR WEINTRAUB: Oh, okay.
9 Somebody handed me something that's not what's in
10 the back of the room. Okay, then.

11 Anyway, lunch next door. See you at
12 1:00 o'clock.

13 CHAIRWOMAN HUNTER: Thank you.

14 (Recess)

15 CHAIRWOMAN HUNTER: Good afternoon. The
16 public hearing on the Internet Disclaimer --
17 Internet Communications Disclaimers is back in
18 session. Welcome to Panel Number 2. We have Mr.
19 Dave Grimaldi from the Interactive Advertising
20 Bureau. He's the Vice President for Public
21 Policy. Welcome. We have Mr. Joseph Jerome, the
22 Policy Counsel for the Center for Democracy and

1 Technology. We have Professor Young Mie Kim,
2 professor from the School of Journalism and Mass
3 Communication at the University of Wisconsin and
4 Mr. Berin Szoka, did I do it.

5 MR. SZOKA: Perfect.

6 CHAIRWOMAN HUNTER: Oh my gosh, thank
7 you. President of Tech Freedom. Welcome to you
8 all and we look forward to Panel Number 2. And we
9 just figured out in the hallway though, I might
10 mention that that Dave and I were interns together
11 on a presidential, political campaign about 20
12 years ago ish, something like that. And we
13 remember one and other from that long ago, so
14 welcome.

15 VICE CHAIR WEINTRAUB: Is it anybody's
16 birthday?

17 CHAIRWOMAN HUNTER: Yeah, that's true.
18 We had a birthday person, a birthday boy on the
19 first panel. Anybody, no, no birthdays. That's a
20 good question though.

21 All righty. So, we're start out with
22 five minutes of opening remarks from each witness.

1 We have lights there in front of you. The yellow
2 light will come on when you have one-minute left
3 and the red light will come on when it's time to
4 wrap up your comments. So, whenever you're ready
5 Mr. Grimaldi.

6 MR. GRIMALDI: Okay.

7 CHAIRWOMAN HUNTER: Go for it.

8 MR. GRIMALDI: Thank you Chairwoman
9 Hunter and to the Commission for having me here
10 today. I'm here on behalf of the Interactive
11 Advertising Bureau or IAB. We are the Association
12 of Digital Media and Marketing Industries. IAB
13 and its member companies are committed to a
14 transparent web- based advertising ecosystem and
15 rules that foster an informed electorate without
16 chilling political speech.

17 IAB believes that the DAA, the Digital
18 Advertising Alliance's political ads program
19 should be an important part of the FEC's digital
20 rulemaking. Although most people think of
21 self-regulation as something done instead of
22 government regulation. As a founding trade of the

1 DAA, we see the political ads program as a
2 standard to assist the FEC with creating flexible
3 sustainable and useful transparency standards in
4 the digital world. Just last month the DAA
5 launched its industry wide initiative to increase
6 transparency and accountability around digital
7 political ads. The program builds off of DAA's
8 successful privacy program and the political ads
9 program is based around a signifier that clearly
10 shows people when an ad is paid, is a paid
11 political ad. DAA's well known icon for helping
12 people identify commercial ads has been translated
13 to help those learn more about who is paying for
14 political ads. The political advertiser is
15 responsible for providing that signifier which
16 will link to information about who placed the ad,
17 their spending and contributions and how the
18 advertiser can be reached. By including the DAA
19 political ads icon as a recognized signifier in
20 this rulemaking the FEC can provide one method to
21 enhance online transparency.

22 The benefits of the icon are clear. It

1 is employed in a clear and recognizable fashion.

2 The enhanced notice associated with the political

3 ad will include any disclaimer required by state

4 or federal law and as recognized by the FEC, this

5 is a program with teeth. Translating DAA's well

6 known blue icon, helping people identify

7 commercial ads to political ads includes placing

8 those ads under DAA's accountability programs,

9 which include independent monitoring,

10 self-reporting and enforcement. By including the

11 DAA program within its regulatory framework, the

12 FEC could have private sector help in making sure

13 this icon is used. Moreover, recognizing the DAA

14 political ads icon as a recognized signifier like

15 the political ads icon, as a way of satisfying the

16 FEC's disclaimer requirements would allow for

17 greater flexibility, it would provide simple

18 objective criteria to determine whether the FEC's

19 requirements have been met and provide a symbol

20 that will become well known to users across the

21 country and across platforms. While education

22 around a signifier is essential, DAA's icon

1 helping people identify commercial ads is already
2 well known. Recent studies have shown a
3 significant increased awareness of DAA's icon
4 helping people identify commercial ads and the
5 purposes it serves to inform consumers. In fact,
6 awareness of the ads choices icon has risen from
7 roughly 5 percent consumer awareness in 2011 and
8 2013 to over 60 percent awareness this past year.
9 This lays a strong foundation of awareness for our
10 new political ads icon.

11 Companies spanning the breadth of
12 internet advertising eco system -- of the internet
13 advertising eco system have invested significant
14 resources in deploying the DAA's transparency
15 infrastructure. These companies are the same ones
16 that help facilitate the creation and display of
17 political ads online. In the coming months these
18 companies will be able to seamlessly extend
19 existing DAA infrastructure and platforms to
20 political ad disclaimers. And in this way the DAA
21 program creates a uniquely strong foundation upon
22 which to build and display disclaimers to small

1 political ads. DAA's icon for helping people
2 identify commercial ads has drawn praise from
3 regulators, including the prior administration in
4 2012 and former FTC Acting Chairwoman Maureen
5 Ohlhausen, who referred to the DAA as one of the
6 great success stories. In addition, FTC's staff
7 said in 2017 that the DAA has taken steps to keep
8 us up to speed with evolving technologies and
9 provide important guidance to its members and the
10 public. Its work has improved the level of
11 consumer protection in the marketplace.

12 Finally, at a time when the Commission
13 is considering clarifying its rules and
14 strengthening transparency, it should embrace
15 innovation as a way to provide more information to
16 the public, supporting a signifier-based system is
17 the most technologically resilient approach.
18 Rules focused on characters, pixels, seconds, font
19 size, contrast and other visual factors are too
20 inflexible to withstand technological change.
21 Consider, for example, the different readability
22 of disclaimers on various devices. A rule driven

1 by pixel count or other static metrics may provide
2 a clear and conspicuous disclaimer on a tablet,
3 but not on a phone or a smart watch. A
4 signifier-based rule avoids these concerns and
5 provides a readily recognizable icon for political
6 ad consumers. The DAA's icon works across web,
7 mobile and video formats.

8 Thank you for the opportunity to speak
9 to you today about the political ads program and
10 the reasons to include DAA political ads and its
11 icon as a recognized signifier as one way to
12 provide enhanced online transparency. I look
13 forward to your questions.

14 CHAIRWOMAN HUNTER: Thank you. Mr.
15 Jerome.

16 MR. JEROME: Thank you and thank you
17 again for the opportunity to testify today on
18 behalf of The Center for Democracy and Technology.
19 CDT is a nonpartisan, nonprofit technology policy
20 advocacy organization dedicated to promoting civil
21 liberties and human rights online. That includes
22 privacy, free speech and access to information.

1 We recognize that campaign finance rules can in
2 some respects put these values in tension with
3 each other. That said, CDT strongly believes that
4 the internet provides new outlets for political
5 expression. That stated, the elephant in the room
6 today is that the mechanics of online advertising
7 have become notoriously opaque while our
8 transparency rules certainly with respect to
9 political advertising have not evolved.

10 New industry led efforts at
11 self-regulation may solve this problem. It also
12 has the potential to make the situation worse if
13 the FEC does not engage in meaningful oversight.
14 We are concerned that the myriad of different
15 disclosure initiatives, frameworks and mechanisms,
16 some good, some bad all complicated. Speaking
17 from my experience in work in the context of
18 privacy and traditional consumer protection,
19 effective disclosure requires both standardization
20 and education. So, what can the FEC do? First,
21 any industry led advertising transparency program
22 will need to be vetted by the FEC, as well as

1 independent researchers and designers. The
2 political ad program that was recently announced
3 aims to promote transparency and accountability.
4 CDT hopes that this is the case, but experience
5 has shown that there is some need to be skeptical
6 here. Why some may argue that no one knows how to
7 do advertising better than advertisers, the ad
8 choices program has been far from a messaging
9 success. The most recent industry funded survey
10 that I've seen suggests that awareness of the ad
11 choices icon has risen to approximately 42 percent
12 of respondents to that survey. I would note,
13 however, that awareness is not the same thing as
14 understanding. And anecdotally, as someone who
15 frequently speaks both to consumer advocacy
16 organizations, tech-oriented students, I can say
17 that few people I speak with understand what ad
18 choices is, or frankly recognized the ad choices
19 power triangle. Meaningful short form notices
20 cannot be created by committee, they cannot be
21 created by lawyers. They need to be created by
22 experts, UI, testers, independent researchers.

1 That said, the FEC should be clear about what it's
2 expectations are. Safety symbols, for example
3 must be correctly understood by 85 percent of
4 study participants. In the narrow context of
5 political advertising, we would hope to see a set
6 of indicators or other sort of disclaimers that
7 are one, created by UI and UX experts; two,
8 empirically tested and three, results informed and
9 reported back to the FEC. Again, past experience
10 suggests that at least with the example of the ad
11 choices icon, that there were some problems in
12 this respect.

13 Second, I think it's an open question
14 how self- regulation of political advertising will
15 be enforced. The FEC must keep itself up to speed
16 on how different platforms and initiatives are
17 policing political content. A long-standing
18 concern of consumer advocates, with respect to ad
19 choices is frankly, unclear how rigorous
20 enforcement actually is. The existing program is
21 enforced by industry-oriented bodies experienced
22 in consumer advertising. Again, it's unclear how

1 that translates to political ads. On one hand,
2 the -- because of the essential component of this
3 program is simply transparency in not more
4 substantive and contentious data privacy
5 protections. The interests of industry and the
6 public may align in a way that does not exist for
7 purely data driven advertising. But ultimately,
8 difficult questions will have to be asked as to
9 who determines and labels an online communication
10 as a political ad. Already, we have seen
11 tremendous problems with Facebooks attempts to
12 place rules around issue ads. While these ads are
13 not at issue here, this is a complicated topic
14 that casts a pale on everything involving
15 political expression. Making candidates and
16 campaigns responsible for disclosure may be the
17 best option, but this creates some of the same
18 systematic accountability problems that exist
19 throughout the ad tech eco system. At the same
20 time, disclosure frameworks may be subject to
21 scope creep. There will be a pressure to label
22 more and more types of communications as political

1 ads and there may also be incentives for political
2 advertisers to air on the side of more disclosure,
3 not less. This basically seems to call for a
4 broad-based education campaign.

5 And finally, frankly more must be done
6 to understand how micro targeting of political
7 messages works. This is outside the scope of this
8 real rulemaking effort, but it cannot be ignored.
9 The FTC, certainly with alternative B seems to
10 recognize that internet advertising is
11 fundamentally different from traditional
12 advertising and that disclosure requirements
13 should be adjusted accordingly. But one of those
14 fundamental differences is that the nature of how
15 digital ads can be targeted, raise new interest
16 that are, I think, new to the FTC and frankly we
17 have been reluctant to deal with, both inside and
18 outside of the advertising industry. There are
19 many scenarios online where a combination of the
20 idea of the political advertiser, the content of
21 the political advertisement and the group being
22 targeted may make us uncomfortable. I think this

1 is the lesson of the past election.

2 There are experts on this subject at
3 today's hearings, but this is an issue that has
4 frankly challenged CDT to our core. While
5 Facebook has begun to provide more and more
6 information about how its ads arrive in our
7 newsfeeds, that sort of information is not
8 available on most online advertisements. In the
9 long term, that sort of disclosure may be much
10 more informative to the public than simply who
11 paid for the ad. Thank you very much for the
12 opportunity to participate today. I look forward
13 to your questions.

14 CHAIRWOMAN HUNTER: Thank you very much.
15 Professor Kim.

16 DR. KIM: Thank you for the opportunity
17 to testify at the hearing. I'm a Young Mie Kim,
18 Professor of the School of Journalism and Mass
19 Communication at the University of Wisconsin,
20 Madison. Also, faculty affiliate of The
21 Department of Political Science at The University
22 of Wisconsin, Madison. I'm an (inaudible) social

1 scientist who studied digital, political
2 advertising. My research project, project data
3 digital ad tracking and analysis and particularly
4 investigates the sponsors content and target of
5 digital political ads across multiple platforms
6 with a user based real-time tracking tool. The
7 tool works like an ad blocker, but instead of a
8 blocking ads, it captured ads in a landing page
9 information. Out of this project the most
10 relevant research outcome to this hearing is my
11 team's recent paper, the Stealth Media Groups and
12 targets behind the Divisive Issue campaigns on
13 Facebook, which is a peer reviewed article
14 forthcoming in academic journal, Political
15 Communication. The research examined five million
16 paid ads exposed to nearly 10,000 consented
17 participants who represented the US voting age
18 population. The data was collected for six weeks
19 prior to the election, from September 28 to
20 November 8, 2016. The copy of the manuscript is
21 submitted to the Commission. As an opening
22 statement I will summarize my view on online

1 disclaimers and then briefly comment on the
2 proposal A and B.

3 I believe online disclaimer rules must
4 be formally grounded on two normative guiding
5 principles. First, online disclaimers must help
6 individual voters make an informed decision
7 without overburdening their ability to learn about
8 issues, candidates and elections. Second, online
9 disclaimers must help civil society such as
10 academic researchers and a journalists and
11 interested investigators, adequately monitor
12 election related activities. Firmly grounded on
13 these two normative guiding principles, I asked
14 the Commission to fully recognize the challenges
15 we face in the 21st Century to this all media
16 environment.

17 First, voters are overloaded with the
18 constant flood of information on digital platform.
19 My research indicates that individual voter
20 received an average of 50 Facebook ads during the
21 six weeks prior to the election. In case of
22 digital advertising, therefore, voters are

1 overburdened, not speakers. This suggests that
2 demanding voters to investigate who is behind the
3 political ads, beyond the face of ads is not only
4 unrealistic, but also against the normative
5 guiding principle. Second, unlike broadcast media,
6 by nature, digital ads are not publicly accessible
7 as they are designed to appear to targeted
8 individuals only. This means currently, it is
9 almost impossible for civil society to monitor
10 digital ads. This suggest advocacy rulemaking
11 would better consider how online disclaimers help
12 monitoring digital ads. Online disclaimers for
13 example, must provide the consistent rules, not
14 only across platforms, but also across other
15 advocacy monitoring mechanisms. Third, malicious
16 actors deliberately take advantage of the lack of
17 disclaimer requirement. My research revealed that
18 many campaigns in the 2016 elections were run by
19 anonymous groups who did not report the file to
20 FEC, including suspicious groups who have no
21 public footprint. One of six -- one out of a six
22 suspicious groups later turned out to be Russian

1 groups. This research also evidenced that when
2 only the link to a group's landing page was
3 required, only 45 percent of the groups revealed
4 their identity on the face of the ads. Taking
5 into account these challenges I found Alternative
6 B's two tier approach problematic. I believe
7 Alternative A appears to be a better approach.
8 Still however, I propose two amendments to
9 Alternative A. First, the report to requirement
10 adapted names, with the full names in case the
11 adapted names are used in the ad. And the
12 placement of online disclaimers in the text as the
13 title or headline of the ads in case multimedia,
14 such as video ads are utilized in conclusion,
15 digital disclaimers are long overdue. I urge the
16 Commission to take immediate action to make a
17 clear disclaimer rules. Thank you.

18 CHAIRWOMAN HUNTER: Thank you very much.
19 Mr. Szoka, please.

20 MR. SZOKA: Thank you for having me.
21 And congratulations on pronouncing my name
22 correctly. That almost never happens. I'm Berin

1 Szoka. I'm president of Tech Freedom. We're a
2 think tank dedicated to promoting technology that
3 improves the human condition and in general our
4 focus is on empowering users to make choices for
5 themselves and in doing so, protecting free speech
6 under constitutional values.

7 I will make two disclaimers up front.
8 First, I'm not an elections law expert. I come to
9 this hearing with no preconceptions about your
10 Commission or who you are or where you're coming
11 from and I'm here really just to talk as a
12 generalist about free speech and my experience
13 with these similar issues in the context of online
14 privacy, where many of the same questions about
15 transparency and user choice have been asked.

16 And second, I am not a technologist, so
17 take what I say with a grain of salt. I'm trying
18 to point you in the right direction and suggest
19 ways for you to draw technical expertise into your
20 decision making, rather than making firm
21 recommendations myself about specifics.

22 In general, our focus, as I said, is

1 first and foremost on free speech. It unites all
2 of our work and it is a framework through which we
3 look at internet policy generally, because it is
4 really a framework about user choice, about
5 letting ideas flourish in the marketplace. I'm
6 very concerned when people say that there are too
7 many ads, for example. To me, that's people
8 saying that there is too much free speech and yet,
9 at the same time, the professor is quite right.
10 There is a real burden upon users. And
11 transparency and meaningful transparency and
12 choice is the way to address that. And the
13 question that we deal with in much of our work,
14 especially about privacy and I think faces your
15 Commission, is how to balance those competing
16 interests. And I think the way to do that is to
17 focus on usability, which ultimately is a question
18 for technical experts, rather than lawyers like
19 myself.

20 In my testimony I outline that I see
21 these questions breaking down into essentially two
22 broad categories. The first question is, what is

1 the nature of the ad and much of the criticism
2 that has been directed towards the ad choice
3 system, I think is not applicable here for the
4 simple reason that many political ads are
5 political ads on their face. Not all of them of
6 course, but in many cases, it will be apparent
7 that, that is the case, and certainly far more so,
8 relatively speaking than it is apparent that a
9 behaviorally targeted ad is a behaviorally
10 targeted ad. And that is the very difficult
11 challenge that the online advertising industry was
12 attempting to deal with, with the ad choices icon.
13 There is no shorthand for communicating that idea
14 to users. I think the ad choices term is the best
15 signifier that they could have come up with, but
16 there are many others and there are technologists
17 who will tell you that there might have been a
18 better implementation. However, here I don't
19 think there is any better signifier than the term
20 political ad. To me, that does all the work you
21 would expect it to do on the face of the ad. I
22 think that's a quite an adequate answer to the

1 first question. And I would also caution you that
2 trying to extend that signifier to include other
3 things or to make it more complicated will
4 compromise usability in terms of making that
5 signifier less consistent and therefore, less
6 recognizable and Joe is quite right, that we have
7 to ask how often do people understand what they're
8 looking at. How do you consistently label like
9 political ads? I think it is really critical for
10 useability. The second question, of course, is
11 the one that Congress has commanded you to answer.
12 The one in your statute, which is who is behind
13 this ad. Now, I think the only way to do that in
14 the context of very small ads to provide this
15 information the way it is useable for users, for
16 voters, is to provide that in a separate page.
17 And the critical question is; how do you make sure
18 that the user knows that they can get there?
19 Again, many questions have been asked about the ad
20 choices icon. Do people understand what they're
21 getting when they click on that text. I think
22 those questions are somewhat less applicable here.

1 I think it is a little more clear that if you want
2 more information about that, you ought to go
3 there. It's not a behaviorally targeted ad, which
4 has made some people perhaps concerned about
5 clicking on the ad choices icon. In the interest
6 of time I'll just point you to my testimony, but
7 say that I would note that there is no single
8 right answer as much as useability is important.
9 Recognizability and consistency is important for
10 useability. That suggests having one system that
11 works for banner ads, but there will be other
12 kinds of ads. Google, for example, in search
13 results being, they have more room to experiment.
14 They can do different things, but it would be
15 unreasonable to expect those same things to be
16 done for all banner ads. So, I would conclude by
17 just noting that my general recommendation as
18 outlined in my testimony is to allow room for
19 experimentation. I think the best way to do that
20 is to allow time in the field for this system to
21 be tried. But then, yes, of course the Commission
22 has a role to play and I think that role can be

1 played by demanding technical analysis of how
2 that's worked in practice, when you have real
3 experience with an election or two. Encourage
4 awareness building on behalf of industry. And
5 then finally, in my testimony I offer what may be
6 a novel suggestion, but it's one that's very
7 familiar to people in the privacy context. I
8 don't think any disclosure that is required to be
9 made by the government should not also be made in
10 a machine-readable format if it is practical to do
11 so. And that here would be a very simple thing,
12 it would simply mean that the text that is
13 required by your statute that would appear in the
14 disclosure page would also be communicated along
15 with the ad in a tool that could be -- would be
16 invisible to the ordinary user, but it could be
17 parsed by any user agent, which means a browser or
18 a browser extension. This would open the door to
19 all sorts of experimentation, which would provide
20 you a better check to see how this is working in
21 the real world, it would allow researchers like
22 this professor here to do her research in a more

1 -- in an easier way and empower users to make
2 their own decisions. So, thank you again for
3 inviting me here to testify.

4 CHAIRWOMAN HUNTER: Okay. Thank you to
5 all of you, that was very helpful. Any questions
6 from the panel. See if -- okay, so, I have a
7 question or two for Professor Kim. You mentioned
8 on page 2 or excuse me page 3 of your written
9 testimony that your -- the gist of your research
10 was figuring out how many advertisements that
11 people that were selected, 17,000 people saw per
12 day. And it says that they were exposed to 34
13 impressions per day and approximately seven
14 political ad impressions per day during the FEC
15 window. And I think you said something else in
16 your oral testimony.

17 DR. KIM: Yes, right.

18 CHAIRWOMAN HUNTER: 50,000.

19 DR. KIM: Right, right. So, that is for
20 the entire year, like from February '15 to --

21 CHAIRWOMAN HUNTER: -- I'm sorry, what
22 is for the entire year.

1 DR. KIM: So, 17, so 34 ads per
2 individual on average, that impression and that is
3 for the data collected throughout the entire year.

4 CHAIRWOMAN HUNTER: Oh, okay.

5 DR. KIM: Yep. So, but the paper we are
6 publishing is just focusing on the Facebook and
7 then that is 5 million ads exposed to nearly 10
8 thousand people. So, that is -- average of 50
9 impressions per day, per individual during the FEC
10 window.

11 CHAIRWOMAN HUNTER: So, that is a
12 completely different --

13 DR. KIM: Yes, that's a different --

14 CHAIRWOMAN HUNTER: Okay, it has to be.

15 DR. KIM: Yep.

16 CHAIRWOMAN HUNTER: I thought I was --
17 okay. So, the one that's in the comment talks
18 about 50 impressions for the entire year and a
19 fraction or a percentage of that, seven political
20 ads per day, the paper that's coming out talks
21 about 34 impressions per day, per individual on
22 Facebook. And how did you select the number of

1 people -- the people who were part of this study.

2 DR. KIM: So, we got help from the
3 scientific research fund, so, this is typical,
4 like a sampling strategy. So, we tried to sample
5 other people who mirrors the US voting age
6 population.

7 CHAIRWOMAN HUNTER: I'm just writing
8 that down. If you'd be willing to provide the
9 background information on the sampling that you
10 did, that would be really helpful.

11 DR. KIM: Yes. That is included in the
12 paper -- in the paper.

13 CHAIRWOMAN HUNTER: The paper that's not
14 out yet.

15 DR. KIM: Paper, the full manuscript is,
16 it is available online and it is also submitted to
17 the Commission as an attachment.

18 CHAIRWOMAN HUNTER: Okay.

19 DR. KIM: My public comment.

20 CHAIRWOMAN HUNTER: And so, your
21 conclusion from at least the stuff that was in
22 your, the comment that you submitted was that

1 because people saw 34 impressions per day and
2 seven political ads per day during the FEC window,
3 that you say this suggests that demanding voters
4 to investigate who is behind the political ad is
5 not only unrealistic, but also against the
6 normative guiding principles for online
7 disclaimers. So, because there's a lot of them,
8 we shouldn't expect them to look further. Is that
9 what you're saying?

10 DR. KIM: Yes. We probably set like a
11 too high expectation for the voters.

12 CHAIRWOMAN HUNTER: Okay, so, where --
13 did you do any research about how many people who
14 are receiving all these ads that you talk about
15 are reading the disclaimer on the face of the ad?

16 DR. KIM: Well, no. The short answer is
17 no, because we did not find any candidate
18 committees. For example, like a following the full
19 disclaimer rules in the 2016 campaigns. We found
20 only few of candidates have like a full disclaimer
21 with the full names on their Facebook ads out of
22 1,038 candidate committees.

1 CHAIRWOMAN HUNTER: Okay. So, that was
2 my next question. But we'll go to that now, so
3 out of 1,000 --

4 DR. KIM: Thirty-eight --

5 CHAIRWOMAN HUNTER: Thirty-eight --

6 DR. KIM: -- candidate committees.

7 CHAIRWOMAN HUNTER: -- candidate
8 committees, how many ads did you analyze that were
9 placed by --

10 DR. KIM: How many campaigns, like I
11 said, three campaigns -- only three campaigns
12 utilized, used the full disclaimer, paid for by --

13 CHAIRWOMAN HUNTER: Three campaigns out
14 of --

15 DR. KIM: -- 1,038. That information is
16 also included in the paper.

17 CHAIRWOMAN HUNTER: Okay and the other
18 campaigns didn't use the full disclaimer on their
19 internet ads?

20 DR. KIM: Correct.

21 CHAIRWOMAN HUNTER: And can you give me
22 an example of a kind of ad that didn't use the

1 full disclaimer on their internet ad?

2 DR. KIM: So, there is no information
3 paid for by and then they did not use like a full
4 name, like registered with that or reported to the
5 FEC.

6 CHAIRWOMAN HUNTER: Did the ad contain
7 express advocacy?

8 DR. KIM: Eighty percent of the ads
9 contained express advocacy.

10 CHAIRWOMAN HUNTER: Eighty percent of
11 the ads that you're talking about, 80 percent of
12 the 1,038 included express advocacy?

13 DR. KIM: Yes.

14 CHAIRWOMAN HUNTER: Okay and is that
15 laid out in the --

16 DR. KIM: Yes, in the paper.

17 CHAIRWOMAN HUNTER: Can you give us an
18 example of one of the ads that included express
19 advocacy. Was it a small --

20 DR. KIM: Express advocacy, you know,
21 there are magic words. So, we used as like a
22 magic word to match what their ad content. So,

1 yes.

2 CHAIRWOMAN HUNTER: And the ad doesn't
3 have any, any link to anything at all?

4 DR. KIM: Well, most of the ads have a
5 link, yeah.

6 CHAIRWOMAN HUNTER: So, that complies
7 with an advisory opinion request.

8 DR. KIM: Right, but the problem is that
9 --

10 CHAIRWOMAN HUNTER: That's not, I mean,
11 I haven't reviewed all the ads, but as long as it
12 was impracticable to include the full disclaimer,
13 a link to a landing page with the full disclaimer
14 is permissible under our current advisory opinion
15 guidance.

16 DR. KIM: Yes. So, I like to respond to
17 that. First of all, not many digital campaigns
18 use like a full disclaimer, even on their landing
19 page. We found that a lot of groups use like a
20 project name, so to fit particularly, with
21 (inaudible) a good example, this is run by the
22 American Number One Pac. They used the full

1 disclaimer on the video and then link to the
2 video, but not clearly indicate that. Sorry, I
3 have to correct that. So, the Trump Traders, it
4 would be a better example. So, Trump Traders used
5 like a project name, but face of the ads it could
6 never indicated that it's run by people working
7 for Clinton 2016. So, that information you'd have
8 to find it, like it really go to their website and
9 then some of the ads are linked to external
10 website and some of the ads are not.

11 CHAIRWOMAN HUNTER: Okay, thank you.

12 I'll take a further look at that. So, with
13 respect to what I was talking about earlier, the
14 number -- again, your conclusion is because people
15 have -- are viewing a lot of ads, the people that
16 you used in your sample, requiring them to go any
17 further is overly burdensome where the words you
18 used is not realistic and against the normative
19 guiding principles. But again, how do we know
20 that if we require the information on the face of
21 the ad, that they're going to read it, that,
22 that's going to -- that's also not going to be

1 unrealistic and flood them?

2 DR. KIM: Well, the one way, one
3 scientific way to look at that is like, what if
4 the landing page information is required, but not
5 disclaimers. And in my --

6 CHAIRWOMAN HUNTER: I'm sorry, what --

7 DR. KIM: -- in the case -- some cases,
8 for example, like a Facebook, right column ad
9 required the landing page information, but did not
10 require full disclaimer because there was no like
11 requirement, like a disclaimer requirements were
12 exempted in the 2016 election. So, in that case
13 I'll -- what we found is that like a 45 percent,
14 only 45 percent of the campaigns indicated their
15 names in the face of the ads, then -- but if you
16 think about a commercial ad, like a commercial ad
17 never missed their identity or print name on the
18 ads. But political ads utilizing the landing page
19 information and then that means that like for 55
20 percent cases, the users have to investigate the
21 groups behind these ads by clicking through like
22 multiple pages. And then research shows that if

1 you have like a hyperlinks on one webpage, this is
2 slightly different than like political ads, but if
3 you think about you're reading like a news article
4 on a page. There is a one click rule, so, people
5 usually click only one thing when they read like a
6 page on the website.

7 CHAIRWOMAN HUNTER: So, I think those
8 numbers that you gave were different than the ones
9 we were just talking about, where you said three
10 out of 1,038 posted.

11 DR. KIM: That's candidate committees
12 and then 45 percent include all the political ad
13 sponsors. Forty-five percent of all the political
14 ad sponsors identified their group names, campaign
15 names on the face of the ads, but 55 percent of
16 the campaigns did not.

17 CHAIRWOMAN HUNTER: I'll have to go back
18 and look at your upcoming paper. But what I was
19 trying to get out is how do we know that people
20 are reading, to the extent you want to require
21 full disclaimer on the face of the ad, what
22 research tells us that people are going to

1 actually stop, pay attention -- stop their busy
2 lives of scrolling through everything and read,
3 you know, one of the lengthy disclaimers that we
4 have in our examples paid for by Federal Election
5 Committee PAC, not authorized by any candidate or
6 candidates committee, www. FEC.web?

7 DR. KIM: So, this research -- my
8 research did not utilize, for example, like an eye
9 tracking method to see where the eyes are at the
10 first place. But I think it is evolving question
11 because unlike broadcast media ads, exposure means
12 that the people look at the face of the ad. So,
13 whatever the information is in the face of the
14 ads, people exposed to like a broadcast
15 advertising, you can skip it, you can just turn
16 off the TV, but digital ads is different than
17 broadcast ads.

18 CHAIRWOMAN HUNTER: Okay, all right.
19 Does anybody else have any other questions for the
20 panel? Commissioner Peterson?

21 COMMISSIONER PETERSON: Thank you, Madam
22 Chair. Mr. Grimaldi, I wanted to ask you a little

1 bit more about the political ads icon program that
2 the DAA is beginning to establish. I guess I
3 should step back and first ask how widespread the
4 commercial icon that's been in place. Is that,
5 how widespread is that currently?

6 MR. GRIMALDI: Sure Commissioner, a good
7 question. It is, DAA is not a member organization
8 so it's up to individual companies to individual
9 companies to avail themselves of the icon. It is,
10 the numbers are impressive. There's 70 million
11 unique visitors to date. It has served over one
12 trillion times per month in the upper corner of
13 online ads. If you haven't had a moment to click
14 through and take a look at your behavioral ad
15 choices and what the icon enables the consumer to
16 do I'd encourage you to do it. It has in under 10
17 years become widespread and well known to a degree
18 that rivals a lot of other brand campaigns, some
19 of them that were launched even by the US
20 government. If you take the recycle logo, which
21 had millions and millions, if not billions of
22 dollars behind it and became a household name, we

1 -- the DAA icon is on track to have that kind of
2 growth, although albeit born from private industry
3 without government help. It's flexible, it can go
4 across formats. Our research shows that there is
5 60 percent awareness of the icon and that over 50
6 percent of those asked know where it takes them
7 and what it does. And we're building that, we're
8 building that. And the political ads icon, we
9 feel would leverage existing tools from that
10 awareness that I just mentioned and on improved
11 transparency and infrastructure, it would just be
12 a flip of the switch to turn the icon from blue,
13 what it is currently to purple, obvious reasons,
14 blue and red, so you have some political fun
15 there. And we could just flip that switch in
16 order to provide the transparency that the
17 Commission is looking for, for how online ads are
18 funded and where they come from.

19 COMMISSIONER PETERSON: And this icon
20 would be present on ads run, you said across
21 format, so, whether or not there's an ad that's
22 being run on Google, Twitter --

1 MR. GRIMALDI: Correct.

2 COMMISSIONER PETERSON: -- Facebook and
3 whatever other platform you want to mention that
4 would be an icon that would be present across all
5 of those?

6 MR. GRIMALDI: Right. The icon is live,
7 it was launched May 22nd and we are convening
8 cross industry working groups to look at how that
9 would be presented across different formats. But
10 it is, as with the five times evolved DAA icon,
11 across formats and through multi-stakeholder
12 working groups and I think you could probably
13 appreciate how hard it is to get consensus on
14 these sorts of things, we've slogged through it
15 with the aim of providing consumer transparency
16 and consumer choice. This is just an iteration of
17 that to provide transparency behind political ad
18 funding, who paid for it, what the website is, who
19 runs it, et cetera and that's what the icon would
20 lead to.

21 COMMISSIONER PETERSON: Okay. To the
22 extent that you are here for the earlier panel

1 discussion, there were a lot of questions that
2 dealt with short form ads or small ads that --
3 where it's not realistic that a full disclaimer be
4 included and one of the issues we're grappling
5 with is what should be the trigger for when an ad
6 should be able to just use an indicator or some
7 sort of a truncated disclaimer. And that issue
8 gives rise to another issue, which is to what
9 extent are frequent online users familiar with
10 these sorts of icons or indicators and are savvy
11 to the fact that when you see one of those I can
12 click on that and get the information I need. I
13 think the Chair points out that in many cases when
14 we're interacting with -- and come across ads on
15 these various platforms, oftentimes, we just don't
16 even look at them and that's the main reason why
17 we don't click on anything. But to the extent
18 that you know and have information, how
19 comfortable are frequent online users with
20 understanding that when you see an advertisement
21 and you see whether it's the icon, the commercial
22 icon that DAA promotes, how comfortable are users

1 with clicking and understanding that that's, those
2 are resources that they can go for the additional
3 information. Because if that is something that
4 they expect out of the online experience and that
5 could be one way to help us resolve the issue of
6 insuring that the disclaimer requirements of the
7 act are fully implemented while at the same time
8 the various short form advertising formats are
9 also available to candidates, committees and other
10 speakers.

11 MR. GRIMALDI: So, icons are trusted,
12 they are always present, at least ours are. To
13 quote a younger colleague of mine in the office,
14 "icons are the new norm." They are -- they
15 provide a portal which is usually one click away
16 or we're proud to say ours is, to further
17 information and data in terms of what they're
18 looking for or something that could take them to a
19 related piece of awareness. And so, our
20 researchers show that people do use them. To go
21 off of your hypothetical, do people or will people
22 click it if they see it, I -- in terms of smaller

1 ad formats and online ad formats we can't do the
2 icon with a sign next to it saying click here for
3 more information. So, at some point you do have
4 to -- you do have to take the leap of faith that
5 people will investigate and that they will go
6 through it. As I mentioned earlier, the facts are
7 we've had 70 million unique users and visitors and
8 the fact that it is so ubiquitous people migrating
9 that way, we've done education campaigns, we have
10 large meetings every year. We had a summit last
11 month to help push this awareness out. I can say
12 that help from this Commission would be tremendous
13 and even increasing that awareness further than
14 where it is today and leveraging that existing
15 infrastructure that we have already have built is
16 a very quick way to just change the data behind
17 that icon, which would be a different color to
18 take people to the information that the Commission
19 is hoping that they have. We would love to
20 partner in that regard and to just learn from you
21 about your findings, the ones that we haven't read
22 that could make it even better.

1 COMMISSIONER PETERSON: Mr. Jerome, let
2 me pose the same question to you. In that as I
3 read your comments and just your opening
4 statement, correct me if I'm wrong in my
5 impression, but you don't seem overly excited
6 about the proposals that are here and seem to
7 almost advocate a go slow, gather information
8 before jumping into the crafting of a rule that
9 may not be fully informed by all of the facts in
10 terms of how users interact with online ads and
11 how they interact with indicators and so forth.
12 Obviously, as we've mentioned, we hope to be able
13 to craft a rule. We want to have something that
14 can meet the demands of the statute, while also
15 allowing for the proliferating varieties of ad
16 formats to continue to be available --

17 MR. JEROME: Right.

18 COMMISSIONER PETERSON: -- to candidates
19 and so, so let me just ask you some of your
20 observations about how online users interact with
21 icons, indicators, truncated disclaimers and so
22 forth. And let me start out by asking you those

1 and then once you've answered that then I'll ask
2 you my next question, not to overload you.

3 MR. JEROME: No, no, I hopefully won't
4 pontificate. So, I wanted to sort of say that Mr.
5 Szoka and I oftentimes are on opposite sides of
6 the table, but I think we're sort of been in
7 agreement here that we're both generalists and
8 lawyers and the people that need to be part of
9 this conversation are as I said in my testimony,
10 UX experts and other types of people who create
11 and design these icons.

12 COMMISSIONER PETERSON: You're going to
13 have to -- I'll have to apologize. Not being a
14 techie myself, when you refer to UX, what --

15 MR. JEROME: Oh, my apologies. User
16 Interface and User Design.

17 COMMISSIONER PETERSON: Okay.

18 MR. JEROME: And not to conflict with my
19 colleague over here, but I guess I would push back
20 on the notion that people recognize this icon that
21 we're discussing. And it's simple as just
22 flipping a switch from blue to purple is going to

1 convey anything to anyone. You know, I was
2 flippantly considering just coming here and
3 holding up the icon. I wonder if all four of you
4 have seen this icon, because again, most --

5 CHAIRWOMAN HUNTER: There you go. He's
6 holding up the icon.

7 MR. JEROME: And it's not that, you
8 know, it certainly is -- I think that if the
9 Commissioner wishes to piggyback off of the icon
10 there's some merit here. That said, if we had our
11 way we would go back to the drawing board and
12 create a new icon, both for online behavioral
13 advertising, but also for political advertising.
14 But if that's not going to be the case, at minimum
15 I think the public and certainly the FEC needs to
16 be involved in the conversations that are going on
17 at the DAA. And I would just point out that users
18 do not understand this icon. There's a
19 qualitative study that I can follow up with that
20 was done earlier this year, that interviewed
21 people about how they understand and see this icon
22 on different environments. And frankly, even

1 today people think that this is an arbitrary
2 symbol, it's tiny in various size, it's usually
3 keyed to pixels, really impedes discoverability.
4 I'd point out that another thing that's been
5 missing from this conversation is how any sort of
6 icon or notice and machine readability intersects
7 with web content accessibility guidelines, that
8 study found that the contrast ratio for the ad
9 choices icon was 1.65 to one which fails the WCAG
10 2.0 guidelines for contrast ratio for small and
11 large text. That's all just sort of a long way of
12 saying I don't think people recognize this icon.
13 Now, perhaps with more public education on behalf
14 of advertisers, but also the FEC, we can turn that
15 around, but at present simply slapping a purple
16 triangle all over the place is going to do nothing
17 to convey anything to the Commission.

18 COMMISSIONER PETERSON: But just taking
19 it to a higher level of generality, to what extent
20 do you have information or have you done research
21 on how online users interact with ads in general?
22 Do they have an expectation that, hey if I want to

1 more about that ad I know how to click and get
2 more information about that ad. And if I see an
3 icon on it, that's a method, maybe they don't
4 specifically recognize -- I actually have seen the
5 icon that Mr. Grimaldi has mentioned and clicked
6 on it before. But what I am trying to understand
7 better is what should we expect online users to be
8 familiar with and have some sort of savvy about
9 when they're interacting with an online ad.

10 MR. JEROME: So, that's a very good
11 question and it's also, I guess I would add it's
12 unfortunate that some of the platforms like Google
13 and Facebook aren't here today. I think they've
14 certainly done a better job of implementing these
15 types of icons, like Facebook's most recent
16 revision of it's ad, has basically a floating
17 circle with an I on it. There's evidence I think
18 to suggest that users understand that they can
19 click on that. I think just because of the vaguer
20 use and just the complexity that the advertisers
21 have had with trying to put this icon throughout a
22 really complicated ecosystem, I think we'll be in

1 disagreement. But I would, I can certainly say
2 that there's evidence out there that suggests that
3 people don't know what they're getting when they
4 click on that icon and then again, when I just
5 sort of mentioned that the way that the icon sort
6 of hides in the ad and the qualitative study I was
7 pointed to you highlighted this; it's not
8 prominent enough for people to really know what to
9 make of it, it's just sort of seems like a thing
10 that hangs out in the corner, roughly akin to
11 seeing a TM or Rights Reserved symbol on a slogan.

12 COMMISSIONER PETERSON: I see Mr. Szoka.
13 Let me just let him have a chance and then I'll
14 give you a chance to respond as well.

15 MR. SZOKA: Well, first, I'm delighted
16 to be here with my colleague from CDT. We again
17 don't often -- don't always agree on things, but I
18 think here we're in the right -- same ballpark. I
19 just want to note here. I think we can be helpful
20 in trying to give you a conceptual map for
21 thinking about this and it's important to divide
22 this problem of relatively small ads into I think

1 two buckets. One bucket is the banner ads that --
2 where we're talking about the DAA icon and the
3 other bucket is Google and Facebook and Twitter,
4 who control the eco system. I mean, they can
5 design what the entire page looks like, so, we
6 should expect them to do better and they have done
7 better and if you look again, and I use the
8 example of Google search results, I think you see
9 some pretty good implementations of how to label
10 political ads and pointing out the hover that says
11 why this ad -- those are great, but those are not
12 going to work for all sorts of practical reasons
13 in the same way for banner advertising. Banner
14 advertising, remember is a little rectangle that
15 gets planted on any page, anywhere across the
16 internet. And the ad network has no control over
17 what the rest of that page looks like. The
18 diversity of the ads themselves is far greater, so
19 in Google search results they have perfect control
20 over what the text ads look like. They can make
21 the contrast ratio very user friendly. The
22 advertising network doesn't have that same degree

1 of control. So, that's the first suggestion I
2 would make to you is to think about those problems
3 differently, allow Google, Facebook, Twitter to
4 experiment on their own and then in the context of
5 banner advertising, what we need is a system that
6 is going to be recognized over time by consumers
7 and be recognized not just by virtue of the icon,
8 which sometimes in very small ads will have to
9 stand on its own. But also in the larger ads,
10 where the icon stands next to a signifier. And
11 this is why I go back to the importance and I
12 think the clarity of what political ad
13 communicates. To me, again, I'm not a usability
14 expert, I'd like to hear what Professor Kim
15 thinks. But political ad is the clearest possible
16 signifier you could ask for that short space. And
17 that the clarity of that standing alongside that
18 icon will build understanding among users when the
19 icon stands on its own, but that's not the end of
20 the story. There are other things that could be
21 done. You could imagine a hover text that appears
22 over that, that says something like, why this add,

1 question mark. Just like you see on the Google
2 search results page. There are many, many ways to
3 do this. My main concern is I'm not particularly
4 optimistic that the government, without any
5 offense to anyone at this dais --

6 COMMISSIONER PETERSON: None taken.

7 MR. SZOKA: -- is going to be in a good
8 position to make those design decisions. I think
9 it is certainly fair to ask questions now, but I
10 would encourage you to let this play out in the
11 real world and then make sure that you are in a
12 position the next time you hold one of these
13 hearings, let us say next year or in a few years,
14 to ask very tough questions and to make sure that
15 what industry does now is done -- well, you can
16 change their incentives, you can do that much
17 better than you can push them to a particular
18 solution. So, if you set goals, I don't want to
19 call them benchmarks, because I'm not sure what
20 the right benchmarks are, but if you make clear
21 what you want to see happen and you ask the right
22 questions now, you're going to change how the

1 implementation occurs and I think it's going to be
2 done in a better and more consistent and more
3 user-friendly way. And that serves my first goal
4 of useability.

5 It also, if I may, serves my second goal
6 which is about First Amendment. I'm very
7 concerned as a First Amendment lawyer that I see
8 in the context of advertising discussions
9 generally and things like the Honest Ads Act,
10 there is a very easy mental slip that happens
11 amongst politicians who just say we do X, Y and Z
12 for broadcast advertising, why don't we do that
13 across the board. Well, first of all, let me just
14 remind everyone in this room that broadcasting is
15 unique among all media in not enjoying full
16 protection under the First Amendment. That is
17 because of the Supreme Court's decision in Red
18 Lion, a decision that I think is probably outdated
19 as it is and probably the Supreme Court is going
20 to revisit, but be that as it stands, that is
21 limited to the broadcast medium as being something
22 that is effectively owned by the public and of

1 scarcity and there are several rationales for
2 that. None of those apply to the internet. The
3 Supreme Court has made clear repeatedly that all
4 other media, including to be blunt, videos of
5 crushing kittens are all fully protected, however
6 horrible they may be by the First Amendment. So,
7 we cannot as a matter of First Amendment principle
8 simply say, well we require X, Y and Z for
9 broadcasting, so therefore, we should require the
10 same for the First Amendment for the internet. We
11 have to ask these hard questions about the First
12 Amendment from the ground up. And that as a
13 practical matter, those are hard questions,
14 because we're talking about a medium where it's
15 not simply a matter of sticking some percentage of
16 the print text for the disclosure or having a
17 voiceover at the end for video. When we're
18 talking about small ads, we're talking about an
19 intrusion on speech that I think rises to the
20 level of being a very serious First Amendment
21 problem. I think we need to start with the least
22 restrictive means. I think a signifier-based

1 system implemented effectively would be a very
2 good way to accomplish the governmental -- the
3 clear governmental interest in ensuring that
4 people know that this, what kind of ad this is and
5 how to get the disclosure elements that are
6 required by statute. But I just, if you start
7 from the First Amendment framework, you will wind
8 up, I think, at a place that is useable and also
9 does not intrude unduly on free expression.

10 COMMISSIONER PETERSON: You were
11 reaching for the microphone earlier and then I'll
12 step down and let my colleagues answer questions,
13 but just wanted to hear what your response was.

14 MR. GRIMALDI: No, thanks Commissioner.
15 In response to Joe's points. Going slow is a good
16 thing. I've spent a lot of years in government
17 and know the virtue of that and the safeguards
18 that it provides. The reason that we didn't go
19 slow on this is because the last election showed
20 exactly what can happen when there aren't, when
21 there isn't awareness and when there aren't cops
22 on the beat and when too much is being taken for

1 granted and as to how simple everyday things can
2 be weaponized. So, we didn't go slow and we stood
3 this up in a response to better online advertising
4 for political campaigns. Now, issue ads are
5 obviously very different. Those are what was
6 weaponized in the past election. We, as a cross
7 industry group as we have with our other
8 self-regulatory bodies and I can get into those in
9 any detail that you would like, to prevent fraud
10 and malware and then just bad and annoying ads.
11 We decided to coalesce and figure out what we can
12 do to help improve transparency. The political
13 ads icon allows that with the user really not
14 having to do anything but click. Joe mentioned
15 that they don't know what they're getting and that
16 it impedes discoverability. That's the opposite
17 of what it does. They don't know what they're
18 getting, well, if they click on it, they do. It
19 impedes discoverability if they click on it they
20 discover who was funding that ad. So, I would
21 push back on that. I mean, I think it's a pretty
22 universal concept to think that if you don't walk

1 through a door, you're not going to know what's on
2 the other side of it. Well, that's the case here.
3 If you click on it, you find out what it does. It
4 doesn't take you down a rabbit hole, it takes you
5 right to a popup that says CEO of this
6 organization, who is funding it, here's their
7 contact information, here's their web address,
8 data-linked to the FEC's website to do further
9 investigation. So, I would note that. We're not
10 just to use just words, slapping a purple icon on
11 something and trusting that it will work. This is
12 years of research from a related icon that has 70
13 million, now 70 million and one, so, thank you for
14 that Commissioner unique visitors that has proven
15 to improve their online experience. And you
16 clicked on it and it said to you learn more about
17 why I am seeing this ad. That's a good thing,
18 that's discoverability, that's using your own
19 preferences and what you want to see and how you
20 want to be served an ad to a degree that didn't
21 exist before. We would like to do that for online
22 ads. And again, just to push on the ease of it

1 notion, it does not require the user to download
2 an extension, or to do anything to enable their
3 laptop or anything else to be a machine readable.
4 It's just right there in their face. The one
5 thing is; users do have to click on it to see
6 what's behind it and we would love to partner with
7 you and anyone else and the experts in this
8 industry to continue the education to do that.

9 CHAIRWOMAN HUNTER: Thank you.

10 PROFESSOR KIM: Can I just -- can I make
11 a comment?

12 CHAIRWOMAN HUNTER: Sure.

13 PROFESSOR KIM: Excuse me. So, I
14 acknowledge that, that a self-regulatory design
15 elements have some positives. However, who
16 determines like a political ad, that goes back to
17 the guidelines. Unless the FEC provide consistent
18 guidelines, we just (inaudible) let tech platforms
19 who do not have understanding of the campaign
20 finance issues arbitrarily determine what the
21 political ads. And I think, I believe, I didn't
22 know that the FEC cares about -- cares so much

1 about design issue. It is really good to take
2 into account user ability and then their practices
3 and things like that. But we really need to be
4 cautious about all the usability research because
5 usability research, I did some of them that like
6 in the past, usually happens in an isolated lab,
7 when users have a lot of time and they are usually
8 paid to do so. Therefore, it does not -- it is
9 completely acontextual and it is good to pin down
10 what causes, like the preferences for color or
11 what element that could make it more visible,
12 things like that. But it is not, I think relevant
13 to the discussion of the disclaimer policies.

14 CHAIRWOMAN HUNTER: Madame Vice Chair.

15 VICE CHAIR WEINTRAUB: Thank you, Madame
16 Chair. And thank you to all the witnesses. It's
17 a very interesting panel, very different from our
18 first panel, which is a lot less legalistic and
19 that's actually kind of fun for us. Thank you for
20 recognizing that there is some urgency to this,
21 that the notion of going slow and sitting back and
22 seeing what happens and what develops. I'll tell

1 you one thing that's going to happen is more
2 elections are going to happen while we're sitting
3 around watching and waiting. I don't really feel
4 like we have the luxury of sitting back and
5 waiting and seeing, let's see what happens in
6 2018, let's see what happens in 2020. I think we
7 need to move a little bit faster than that. And
8 we're not writing on a blank slate from a First
9 Amendment per standpoint, because there is a law
10 on the books that requires disclaimers that has
11 actually been upheld by the Supreme Court. I
12 mean, they recognize that there's some burden on
13 people who have to put a disclaimer on their ads
14 and they said that's okay. That doesn't -- that's
15 not an unconstitutional requirement. So, I had
16 not seen the little triangle icon until I read
17 your comments. When I looked at it, I have to
18 say, it didn't really speak to me as something
19 that I would normally look at and say, "Oh, I can
20 see I need to click on that to find more
21 information." It kind of looked like the little
22 "I" with the circle around it, but somebody wanted

1 to change it up a little bit and make it a little
2 different, so they made it a triangle instead of a
3 circle.

4 So, I guess, one question is, what do we
5 get by moving to a triangle from a circle? When
6 we were kind of playing around with the examples,
7 we thought, "Well, let's just throw at is one way
8 of doing this a little "I" with a circle around it
9 as a -- as an icon because know to look for that
10 in train stations when they're looking for
11 information, and in airports, and sort of all
12 around. So, maybe that would be a clearer
13 indicator. So, I guess, one question for you is,
14 what's the advantage of using the triangle
15 (laughs) over a circle?

16 MR. GRIMALDI: Sure. I -- and we'd be
17 happy to monopolize on all the confusion of all
18 the letter "I" icons globally. (Laughter) But it
19 is a proven trusted signifier. So, it -- while
20 you may not know precisely what it is, if you see
21 the -- any letter "I" icon that denotes
22 information and clicks on it, you will be taken

1 currently for the choices program to opting out of
2 certain behavioral ad-tracking preferences. But
3 for political ads, if you click on it, you will be
4 taken to that disclosure information. It is --
5 again, just noting the facts and the numbers of
6 the less than 10-year history growth of this,
7 there are millions of people who know what it is.
8 We wish that number was billions of people;
9 hopefully we get there as we continue to grow this
10 and member companies use it. And now political
11 campaigns and political ad agencies use it.

12 It will have the benefit of growing for
13 consumers, for the benefit of consumers on both
14 sides. Because those viewing a political ad to
15 click on it to find out what it is or what it
16 leads to, they will see the purple "I" and the
17 sideways triangle. Then when they see the blue
18 one, perhaps they'll think, "Well, that took me to
19 great political disclosure information. I'm going
20 to click on this because this isn't a political
21 ad, clearly," and it takes them to opting out or
22 learning more about their -- about how their

1 preferences are gleaned online.

2 So, I think that answers your question,
3 Commissioner. I can keep at it, but it --
4 basically, it's their -- our education and our
5 history shows that this is clicked through, that
6 users use icons and they trust them. We hope they
7 continue to use this one as we enter this kind of
8 brave new world of political ad transparency.

9 VICE CHAIR WEINTRAUB: Because it sounds
10 a little bit to me like you're saying, "Hey, we've
11 got an icon. Why don't you use our icon because
12 you will help us promote something that we're
13 trying to promote for our own reasons," and that's
14 not really -- (laughs) that's not my goal.

15 MR. GRIMALDI: Correct. No, that's not
16 our goal, either. It's to give users more
17 preferences. We -- I would imagine that if
18 another icon was offered that had a different
19 disclosure mechanism and led to increased voter
20 awareness of who was funding a political ad, that
21 would be a terrific thing, too. I don't know if
22 it would come, though, with the infrastructure

1 that we've already built in a parallel capacity.
2 So, it's already up and running and this is
3 already up and running. I mean, this -- as I
4 said, this launched May 22nd, so it's out there.

5 And we've convened all these
6 cross-industry working groups to continue working
7 on it, so it's going to continue to be out there.
8 Any -- hopefully those watching this hearing will
9 hear what we're discussing and they'll go check it
10 out, as well. But again, this is an industry
11 self-regulatory piece of awareness. So, there's
12 not -- you were going to say? I'm sorry.

13 VICE CHAIR WEINTRAUB: No, it's okay. I
14 don't mean to cut you off. Let me take a step
15 back. This is, you know, sort of in broad brush
16 what I take from this panel. So, Mr. Grimaldi
17 says, "Use an icon. Here, use ours." Mr. Szoka
18 says, "No, use political ads. That's -- that'll
19 be clearer. Then people will know to click on
20 that." Professor Kim says, "Nobody's going to
21 click on these things anyway, so that's not really
22 great." And Mr. Jerome says, "You should be

1 really skeptical about anything that industry is
2 offering up and you really need to keep a sharp
3 eye on it." So, am I -- (laughs) A) am I --
4 (laughs) have I gotten that right, and B) so, what
5 are we as a body supposed to glean from all that
6 and how are we supposed to use that and the
7 information -- the really good information that
8 all four of you have provided to us in order to
9 craft a rule?

10 DR. KIM: I would like to provide some
11 context about all the (inaudible) political ad
12 batch or indicators. These tools are originally
13 designed to protect user privacy. So, these tools
14 are great for protection of user privacy. But ad
15 choice icon, for example, a list of the current
16 form is nothing to where the disclaimers,
17 political disclaimers. And then a political ads
18 indicator, for example, as I mentioned, this -- no
19 matter what the platforms do, somebody needs to
20 provide guidelines, the consistent guidelines and
21 then define what should be reported and then what
22 should be archived if a platform decided to

1 archive. And I think that should be FEC.

2 And just to add a little bit more
3 information about these tools, so, for example,
4 like, "Who Targeted Me," it's like a Facebooks
5 tool that's, like, similar to the ad choice and
6 then Google has, like, "Why These Ads?" kind of
7 things. And it provided some target information;
8 that's why I said, like, this is originally
9 designed for the protection of, like, privacy,
10 user privacy.

11 A group of researchers show that, like,
12 "Who Targeted Me" information provided by that
13 tool is misleading or at least vague -- so, I can
14 provide the research paper later to the
15 Commission. So, what they did is that, like, they
16 got the information of -- "Who Targeted Me" is,
17 like -- it's so they observe the targeted
18 information and then compare that to their own,
19 like, simulation, like, of different users and
20 then how -- what are the differences between the
21 tool -- the information they got from the "Who
22 Targeted Me" from the Facebook and the information

1 they got as a user, as simulated users, and that
2 they found, like, huge discrepancies.

3 So, I to some extent took, you know, the
4 problem is that it is still black box and it is to
5 be incredibly impossible to know what decides,
6 like, a political ad and then who are targeted,
7 who will be -- provide information, on what basis.
8 Therefore, I'm very skeptical about any of those
9 innovative tools that are those tools that cannot
10 -- that can replace online disclaimers.

11 MR. SZOKA: So, first, I want to say, I
12 think this country is under attack. I think what
13 you're doing is extremely important. There are
14 certainly people who are trying to compromise the
15 integrity of our elections. Please do not
16 misunderstand anything I say to you today as
17 suggesting that you should go slow. I think very
18 much that the Commission does need to issue a
19 rule. I think there are certainly aspects of
20 this, like the definition of what is a political
21 ad that only you can clarify. I don't dispute
22 that at all. What I'm simply suggesting is that

1 when you do what you do, you should be careful not
2 to be overly specific about usability issues.

3 And so I think you can go quickly in
4 issuing a rule. My advice and as -- and what I
5 lay out in my comments is, if I were you, I would
6 encourage you to have a -- you could call it an
7 interim rule, you could call it a sunset, you
8 could have any number of ways of doing this. I'm
9 not familiar with your administrative procedures
10 or precedence. But I would suggest that to the
11 extent that you are concerned about these
12 questions, about is it recognizable enough and so
13 on, that those things and those things only that
14 you treat in a going forward basis, you allow
15 there to be room for experimentation. And that
16 you use the window of, I would suggest, the next
17 two federal elections to collect data on how that
18 -- on how those things are implemented before you
19 leap to specificity in that aspect of your rule.

20 So, I just want to make sure that that's
21 clear. I think you would learn a lot about the
22 way that the marketplace works, about these

1 usability questions. And as I said, I think you
2 have an opportunity to shape what an industry does
3 in the meantime by asking the very questions
4 you're asking today. And also, zeroing in on some
5 of the uncertainties. So, you -- Commissioner
6 Weintraub, you have identified some confusion even
7 on this panel as to exactly how the political ad
8 system will be implemented. And I think that's
9 because it's what I read as being a first draft of
10 what their protocol looks like. And you will note
11 if you read carefully that they call for
12 participating advertisers and ad networks to
13 implement an icon/wording.

14 Now, it's not clear what will apply in
15 what context. My understanding -- and I'll let
16 the representative here from industry speak to
17 this. But my understanding is that they would
18 apply a rule that is similar to the rule that
19 applies in the ad choices context where for
20 relatively large ads or essentially for all ads
21 other than where it really becomes infeasible
22 because of the very tiny size of the ad, that the

1 advertiser/ad network is expected to include the
2 wording.

3 And so when I said earlier that I
4 understand that we're talking about an icon plus
5 the signifier, and the signifier is political ad,
6 what I understand will happen is that most
7 implementations of the ad will display both of
8 those things. However, there will be small ads
9 where the -- where it is not feasible to put even
10 political ad in the ad itself, where you just have
11 to have the icon. And in this respect, I think it
12 is very important that we've built recognition of
13 the icon in that larger context and that the -- we
14 don't -- that we're not starting from nowhere.

15 So, far from promoting something in
16 industry as monetizing, that they're very good at
17 monetizing content, as far as I know, they're not
18 monetizing the icon. I think it actually is good
19 that we're building on something that already
20 exists because there is some initial consumer
21 understanding. And so if we have another version
22 of that, that has a different color, that has the

1 word -- the wording "political ad" next to it, I
2 think we'll be starting from a better place in
3 terms of user recognition and that that -- that
4 really should be our goal, is building up from
5 there.

6 And then if I may just note, you also
7 asked a question or you noted about the First
8 Amendment case law in this area. It's been a
9 while since I've read that case, but my
10 recollection is that that case dealt with
11 traditional forms of advertising. I don't think
12 that those questions are the same here. I think
13 the tradeoffs we're talking about where we're
14 talking about very tiny ads, the kind of ad where
15 you couldn't fit "political ad" even in and you
16 need something small with an icon, I think those
17 represent -- raise very different First Amendment
18 problems because there you're talking about really
19 intruding on a significant percentage of the
20 content of the ad, of the look of the ad, of the
21 ability to design something effective. So, I
22 would just tread with caution and, again, look for

1 the least restricted means.

2 VICE CHAIR WEINTRAUB: Well, as one of
3 our witnesses pointed out earlier, the Supreme
4 Court approved a four-second disclaimer on a
5 10-second ad, so we -- we're going to have to
6 table that because you and I are not going to
7 resolve that particular debate.

8 MR. JEROME: May I comment?

9 VICE CHAIR WEINTRAUB: Sure.

10 MR. JEROME: So, again, Mr. Szoka and I
11 are generally in agreement. And I think what you
12 should take away from this panel, it seems to be
13 that everyone is in favor of some form of
14 disclosure. So, I guess, I would just like to add
15 that alternative B's providing for some sort of
16 exception is no longer necessary. Like, internet
17 advertising should be able to facilitate
18 something. We're constantly told that online
19 platforms are driven by advertising and I think
20 Berin is actually correct that you can do -- be a
21 very powerful signifier to sort of, say, start
22 doing some interesting stuff here.

1 The thing that needs to happen is
2 follow-up as to how exactly that plays out. And,
3 you know, I think we all agree that this needs to
4 start happening now. You know, I would encourage
5 you to engage with the DAA. You know, I was
6 printing out and reviewing their application of
7 the Self-Regulatory Principles and they're very,
8 very high level. These principles are currently
9 enforced by the Better Business Bureau and the
10 Data and Marketing Association. Again, I don't
11 know if anyone has ever sat down and had them
12 start looking for political advertisements. I
13 don't know if they know how to do that. And I
14 also don't know how political campaigns are really
15 informed of how the ad tech ecosystem works.

16 I think there's a role for you guys to
17 play in doing that. It's obviously not a perfect
18 solution, but I think Berin's correct that if we
19 do this now, you're going to get a lot of
20 interesting data in this election and be able to
21 do something in the future.

22 VICE CHAIR WEINTRAUB: Let me follow-up

1 on that and ask about the -- one more -- let me
2 just -- one more. The enforcement mechanism. Mr.
3 Grimaldi, you talked about this briefly and you
4 have it in your testimony. What exactly is the
5 enforcement mechanism, because I don't really
6 understand this concept? I understand what our
7 enforcement (laughs) mechanism is; I'm not sure
8 what your enforcement mechanism --

9 MR. GRIMALDI: Sure.

10 VICE CHAIR WEINTRAUB: -- is.

11 MR. GRIMALDI: So, we -- as you pointed
12 out, we partner with the Better Business Bureau, a
13 division of that called the ASRC, which is the
14 Advertising Self-Regulatory Council, and the DMA
15 and the public. Complaints come in about
16 violations of use of the ad choices icon. Those
17 are taken very seriously and they're investigated.

18 VICE CHAIR WEINTRAUB: By?

19 MR. GRIMALDI: And should --

20 VICE CHAIR WEINTRAUB: By whom?

21 MR. GRIMALDI: By the ASRC and by DMA.

22 And should the -- and should an --

1 VICE CHAIR WEINTRAUB: I'm sorry. Can
2 you spell out those initials for me?

3 MR. GRIMALDI: Oh, sure. The
4 Advertising Self-Regulatory Council is the ASRC.
5 The Data and Marketing Association is the DMA.
6 They are our watchdogs and every year, they
7 compile a book with all of the enforcement cases
8 that have come -- and there's 87 so far -- that
9 name and shame, and we found that that works.
10 What we first do, though, is -- or what the ASRC
11 and the DMA do is, is that they work with
12 companies to bring them into compliance, should
13 they be running afoul of any of the ad choices
14 principles. The working groups that we are using
15 right now in conjunction with those two bodies are
16 looking at how to enforce any violations or any
17 misinformation that would be provided through the
18 political ads icon.

19 So, if there is a website that a user
20 goes to and they click the icon for a campaign
21 that doesn't work, that would be investigated.
22 They would go to that campaign or that campaign ad

1 marketer or the PR firm that they used and say to
2 them, "We got a complaint from Joe Smith, who went
3 on an ad for your candidate and the icon took them
4 to an address for the campaign that doesn't exist.
5 We found out that -- or we went on -- we clicked
6 the icon, went to the FEC's website. It conflicts
7 with information that you have given." That's the
8 watchdog mechanism, but we would also work with
9 the FEC on enforcement and regulation in terms of
10 how we could make that even stronger.

11 The FTC said that we were -- that the
12 DAA icon and the enforcement had teeth. As was
13 mentioned earlier in my testimony, the previous
14 administration praised it. Chairwoman Ohlhausen
15 said this is a success story. The FCC used it in
16 their privacy proceeding as one of the questions
17 to be asked, like, "Is this -- should we think of
18 a self-regulatory group like this for privacy
19 purposes?" And we've stood up or -- other
20 organizations, the one I mentioned earlier that
21 root out fraud and malware and another
22 organization, the Coalition for Better Ads, whose

1 purpose is to make ads less annoying. Because we
2 have found that the --

3 VICE CHAIR WEINTRAUB: Totally down with
4 that.

5 MR. GRIMALDI: Yes. And I would
6 encourage you to go to that website to see how we
7 pass standards through a cross- industry group
8 that spoke to what ads were the most annoying:
9 Flashing ones, banner ones, ones that the sound
10 automatically came on, ones that you couldn't stop
11 before 30 seconds. We take this stuff seriously
12 because if we don't do it right, people block our
13 ads or they just go on -- go online less and they
14 don't click through ads. So, we take this stuff
15 very seriously.

16 VICE CHAIR WEINTRAUB: But you're
17 talking about commercial entities with an ongoing
18 existence. You're not talking about, for example,
19 a pop-up political committee that exists for two
20 months before an election and then suddenly goes
21 out of existence. And I don't know what your
22 enforcement mechanism would have to say about

1 that.

2 MR. GRIMALDI: Correct. That -- that's
3 what we are currently working on through all of
4 our working groups, is to find out what we can --
5 to the extent that we can work with the FEC and to
6 put more teeth to this, to root out fraudulent
7 campaign information, information that is posted
8 that -- for a candidate, for a state or federal
9 office that comes under your auspices and it's
10 incorrect. We would certainly go to the heart of
11 that and have -- and work with that group to have
12 it changed or we would flag it hopefully for the
13 FEC.

14 CHAIRWOMAN HUNTER: Commissioner
15 Walther.

16 COMMISSIONER WALTHER: Thank you Madame
17 Chairman. I just had a question --

18 SPEAKER: Steve, we're not (inaudible)

19 COMMISSIONER WALTHER: Question or two
20 about, is there an icon that we could use that is
21 generally recognized and I'm thinking the little
22 -- the "I," which at least for me is -- seems to

1 be the one that I recognize as means there's
2 information if it -- for some -- in some way,
3 there's information. So, I was talking about my
4 son with this about a watch. They're getting
5 information of all sites, from all sources and
6 stuff like that, from watches. And so if you look
7 at the problem we would be faced with, this lets
8 us talk about a watch right now and figured that
9 the icon would be "I."

10 What could we do if somebody wants to
11 say -- and, like, for example, under the
12 regulations, express advocacy is Mondale! with an
13 exclamation mark. The decision was, is it conveys
14 enough of a message to know that that is a
15 favorable message for Mondale. This is an old
16 reg, but it's still on the books. So, somebody
17 says Mondale! it's on the watch, and then if there
18 was a small "I" there to press it, wouldn't there
19 have to be some indication that this will tell you
20 who paid for it? Or do you just take a risk that
21 somebody will press the "I" and says there's more
22 information then they click it and in theory they

1 get it? How do they get it, with a watch?
2 Where's the way in which that information is
3 received?

4 And I bring that up because there is --
5 and it was interesting to me to say, "Well, we
6 don't have, like, a small items accession --
7 exception anymore," but in theory, we would have
8 to deal with circumstances like that. So, any
9 comment for anybody that wants to --

10 MR. GRIMALDI: You --

11 COMMISSIONER WALTHER: Just wanted to do
12 that.

13 MR. GRIMALDI: You went to the heart of
14 it. So, if there was an icon -- be it ours, be it
15 another one -- that leads to further information,
16 a user oftentimes has to be over and clicking it
17 or on a desktop environment would a simple mouse
18 hover over let that information pop up. With a
19 watch, it gets a little bit trickier.

20 COMMISSIONER WALTHER: Right.

21 MR. GRIMALDI: And so you have to go
22 across formats and across devices. That is where

1 the evolution of this will go.

2 COMMISSIONER WALTHER: Right. That's
3 where my children are communicating now. (Laughs)

4 MR. GRIMALDI: But it's --

5 COMMISSIONER WALTHER: I have a
6 five-year-old granddaughter who goes to school and
7 they have a watch there and they can communicate
8 with mom and, yeah, they know where she is --
9 (laughs) it's just like they're talking to each
10 other, you know, in person. So, it's got to be
11 just like the internet has grown. That type of
12 personal messaging, I think, is going to end up
13 growing a whole lot, too. And so I think I'm
14 trying to suggest, how can we look forward? Do we
15 talk so generically with our language that we pick
16 that kind of thing up or I'm trying to figure out
17 for the future, what would we put in a regulation
18 that would cover those things?

19 MR. SZOKA: Commissioner, if I may. So,
20 this is exactly the kind of problem that
21 TechFreedom deals with all the time. We -- our
22 general advice is to caution lawmakers against

1 making technology-specific rules. We don't want
2 to write a rule today for all of the technologies
3 that exist. Because you're -- today, you cite the
4 example of the watch; tomorrow, it could be a --
5 an augmented reality on a contact lens. There are
6 any number of implementations where this might
7 arise. My suggestion is that you focus on coming
8 up with standards that are functional rather than
9 being technologically specific.

10 In other words, I think if you write a
11 standard that says something like, "Where a --
12 where it is not feasible to display more
13 information," however you want to word that, then
14 you can use an indicator system or the smaller
15 version, the truncated version, where you don't
16 have the wording. Right? And the important thing
17 is A) getting the standard right --

18 COMMISSIONER WALTHER: Or you could have
19 the streaming, so you would press a button and
20 then say, "This ad has been paid for, and they
21 were just going to stream." Like, even if you
22 couldn't get it on the face of the watch, but it's

1 --

2 MR. SZOKA: Well, and I just want to
3 note here that there's two different dimensions,
4 if you will, of this problem. One is a dimension
5 of visual physical space. That problem's much
6 harder to solve. That's where you're going to
7 have an icon where wording may not even be
8 feasible if it's small enough. Anything that has
9 the dimension of time, even if it's a 10-second
10 video, you can stick an oral or a visual wording
11 onto that in a much easier fashion. The thing
12 that I'm concerned about is the small rectangular
13 spaces, the contact lens, the banner ad, the
14 watch. Those are examples where what you need is
15 an icon that will be recognized because you have
16 built up consistency across time, right?

17 That -- that's where their system, I
18 think, is -- could be very usable. But you need
19 to have real world data that's only going to come
20 from real world experimentation, because Professor
21 Kim is quite right. It's very easy to be misled
22 into designing something that you think will work

1 based on a lab data that is a contextual. What
2 you really need is real-time experience and that's
3 going to require industry being allowed to
4 experiment.

5 CHAIRWOMAN HUNTER: Okay, no. Steve,
6 you still have --

7 COMMISSIONER WALTHER: I'm fine.

8 CHAIRWOMAN HUNTER: -- the floor. Do
9 you have --

10 COMMISSIONER WALTHER: I'm fine.

11 CHAIRWOMAN HUNTER: -- any other
12 questions?

13 COMMISSIONER WALTHER: I'm good.

14 CHAIRWOMAN HUNTER: Okay. If we have
15 time. So, I just wanted to follow-up with
16 Professor Kim. If you could provide to us
17 additional information -- I could be missing it,
18 but I went back and looked at your comments again.
19 And when you characterize some groups as FEC
20 groups and I -- the reason why I'm so interested
21 in this is, a couple of different panelists in the
22 previous panel cited your work. Two different

1 people who testified earlier today cited your work
2 for the proposition that not all political
3 advertisements are using any kind of information,
4 whether it's a link or disclaimer information on
5 the face of the ad, and you also said that today.

6 So, I just want to be clear about what
7 kind of ads you're talking about. I know you
8 characterize in your -- the paper that's appended
9 to your comments, FEC groups, but when I looked at
10 the ads included in that, that -- those ads were
11 all issue ads and they weren't even electioneering
12 communications. But just to make sure I'm not
13 looking at the wrong thing, if you wouldn't mind
14 submitting --

15 DR. KIM: Samples, like, in the paper?

16 SPEAKER: Yes.

17 DR. KIM: Yeah, samples, the images.

18 CHAIRWOMAN HUNTER: Oh. Ms. Kim, could
19 you please --

20 DR. KIM: So, image as -- the images of
21 the ads in the paper are issue ads.

22 CHAIRWOMAN HUNTER: Okay.

1 DR. KIM: So, those are non-FEC group.

2 CHAIRWOMAN HUNTER: What about for the
3 FEC group ones?

4 DR. KIM: FEC groups are -- so, the --
5 your question is, like, FEC groups --

6 CHAIRWOMAN HUNTER: I think --

7 DR. KIM: What their --

8 CHAIRWOMAN HUNTER: I think you said --

9 DR. KIM: -- FEC groups are?

10 CHAIRWOMAN HUNTER: -- that there were
11 some political ads who didn't include disclaimers
12 or even links to the disclaimer information.

13 DR. KIM: That includes that
14 information. Forty- five percent, only 45 percent
15 of the groups identify themselves on the face of
16 ads. That's -- that information is based on all
17 the sponsors of the political ads. And the
18 political ads include all kinds of ads.

19 CHAIRWOMAN HUNTER: Okay. I just -- I
20 would love it if you could supply us with the
21 information of just what's within our
22 jurisdiction.

1 DR. KIM: Yep.

2 CHAIRWOMAN HUNTER: Thank you. I
3 appreciate it. Because I'm not able to follow
4 exactly what you're talking about.

5 DR. KIM: Yeah, it's because --

6 CHAIRWOMAN HUNTER: I mean, not
7 understand it.

8 DR. KIM: -- the way papers are framed
9 is not --

10 CHAIRWOMAN HUNTER: Okay.

11 DR. KIM: -- (inaudible) the magic words
12 or --

13 CHAIRWOMAN HUNTER: Okay.

14 DR. KIM: -- express advocacy.

15 CHAIRWOMAN HUNTER: Thank you. That
16 would be very helpful. And then with respect to
17 the icon, this conversation is really helpful and
18 I liked your summary of what -- (laughs) where
19 people kind of were. I was thinking something
20 very similar. But, I guess, one wrinkle to that
21 that I'm sort of taking away is, it seems like
22 with the exception -- we'll put Professor Kim to

1 the side for a moment. Everybody else seems,
2 like, with some levels of variation of thinking
3 that an indicator's a good idea and there is some
4 debate about which indicator.

5 Putting that aside, I think probably
6 where I'm leaning is not specifically specifying
7 which indicator and perhaps leaving that up to
8 either the advertiser or the platform. So, the
9 platform can be the one who decides which
10 indicator is appropriate for a variety of reasons
11 that we have discussed today. And also, the
12 notion of having an indicator that says political
13 ad is going to be very difficult because then you
14 get to the question of who decides whether it's
15 political.

16 And I don't think any of the platforms
17 want to be in a position of trying to decide
18 whether something's political or not because we
19 know -- it seems as if their definition of that is
20 very different from ours. Ours is a narrow
21 express advocacy, you know, type of thing and we
22 know that Facebook is requiring some additional

1 information from even groups that are doing sole
2 issue advocacy. You have a --

3 MR. SZOKA: Well, I'm a little -- I --
4 what you say about Facebook is accurate. But I
5 think if anything, it's Facebook that's muddying
6 the waters and they're doing so, frankly, under a
7 great deal of pressure from lawmakers. Seems to
8 me that your definition is the narrow one.

9 CHAIRWOMAN HUNTER: Right.

10 MR. SZOKA: And I don't -- I -- I'm not
11 sure why anyone would object to something that
12 actually does fall within that definition, being
13 labeled as such, because it would exclude issue
14 advocacy. So, I don't see that as a problem with
15 the DAA system. I think the problem may be that
16 others outside of your Commission may pressure the
17 DAA system to be applied to issue ads, but the --

18 CHAIRWOMAN HUNTER: Yeah.

19 MR. SZOKA: But that's not really your
20 -- wouldn't be your fault and I don't think it's
21 your problem.

22 CHAIRWOMAN HUNTER: Point taken. I hear

1 what you're saying. That does make sense. So,
2 that -- it's just a matter of deciding, you know,
3 sort of what indicator might work better and this
4 has been incredibly helpful. But at least I'm
5 getting the sense that you're all open to the
6 notion of doing that and that, I think,
7 Commissioner Petersen was asking this question and
8 I didn't hear a great response to it: putting
9 aside specific indicators, is it true that at
10 least the three of you think that a indicator is
11 an appropriate mechanism for the reader to be able
12 to determine that there is more information there?
13 Not arguing over what is the indicator itself, but
14 just the notion that this icon here at least most
15 people would recognize that there was additional
16 information to be found.

17 MR. GRIMALDI: (Nodding)

18 MR. JEROME: I would say -- CDT would
19 say yes.

20 CHAIRWOMAN HUNTER: Okay.

21 MR. JEROME: And frankly, due to the
22 complexities of how some of these advertising

1 formats work, an indicator is probably the best
2 way to go.

3 CHAIRWOMAN HUNTER: Okay.

4 MR. JEROME: And I also would like to
5 echo what Berin just said, that certainly in the
6 narrow categories of advertising that you're
7 focused on, we very much believe that proper
8 labeling is appropriate.

9 CHAIRWOMAN HUNTER: Okay. Thank you.

10 MR. SZOKA: I just want to emphasize
11 here that I am supportive of an indicator system
12 combined with smart disclosure. It is a
13 well-recognized principle. Cass Sunstein, who was
14 the director of OIRA for the Obama Administration
15 was very articulate in describing the benefits of
16 smart disclosure also known as machine-readable
17 disclosure. I think that should be combined with
18 indicator system and it means that it would allow
19 a combination of many kinds of user demands.

20 So, if a user doesn't want to see each
21 individual ad and wants to see a report that says
22 at the end of the month who showed me ads, someone

1 could build an extension that would do that.
2 Because the machine-readable code would be
3 supplied, the extension could just tick off how
4 many ads were shown by X, Y, and Z political
5 committees, and then display that report at the
6 end of the month. And any implementation could be
7 developed. So, that to me is user empowerment at
8 its best and it comes at no cost to the advertiser
9 because the advertiser's already required to
10 supply that information by statute or to the
11 ordinary user who doesn't want to be bothered
12 because they never see that unless they implement
13 a user agent like an extension that chooses to do
14 that.

15 But, of course, if Mozilla decides that
16 they want to improve upon the way that DAA is
17 doing their thing, they can change the way that
18 they parse that code. They could put "political
19 ad" in big red letters over the ad. I don't think
20 that would be a good option, but they could do
21 that.

22 (Laughter) And you know what?

1 That's the free market at work.
2 Let civil society groups make
3 decisions, let individual
4 entrepreneurships who make
5 extensions make decisions. If a
6 Commission doesn't have to make
7 those decisions, if the
8 machine-readable code is mandated
9 to be disclosed, anyone can
10 experiment.

11 CHAIRWOMAN HUNTER: Okay. Thank you.
12 Go ahead, Vice Chair.

13 VICE CHAIR WEINTRAUB: Thank you. So,
14 one concern that I have is if we leave it open to
15 everybody in industry to pick their own icon, then
16 isn't that going to undermine the principles that
17 Mr. Grimaldi was talking about where, "Oh, this is
18 great if we have the uniform icon, then everybody
19 will recognize it and they'll know what to do with
20 it. If there -- if we've got a lot of icons then,
21 I think, we could have a problem of people saying,
22 'Well, what the heck does that mean?'"

1 That's part one of my question and part
2 two, just to get it all out there, is, some of the
3 testimony that we got -- perhaps from one of you,
4 because I can't remember where I read this, at
5 this point (laughter) -- spoke to the problem of
6 broken and malicious links where you click on
7 something and either, you know, the next day that
8 same information isn't there anymore, so you --
9 when you go back and try and figure out, you know,
10 where that ad came from, you can't find it anymore
11 or -- and that could be for innocent or, you know,
12 inadvertent or purposeful reasons.

13 Or somebody who maliciously -- you click
14 on something and instead it kind of hijacks you to
15 a different website that in fact says, you know,
16 you click on a link that looks like it's going to
17 be for pro-candidate Jones and instead you're
18 hijacked to a place that tells you every miserable
19 thing that anybody's ever said about candidate
20 Jones.

21 DR. KIM: That was me. So, that was --
22 I made a comment about that. Like, we found that

1 malicious actors, like, took advantage of this
2 landing page information, like, as, you know, for
3 example, some of the groups are, like, redirected.
4 Like I said, they're, you know, technicians can
5 make, like, a, you know, code that could redirect,
6 like, the users, the voters to other places. So,
7 for example, like, the face of the -- it is -- it
8 looks like Trump for President, but it was
9 redirected to completely different page that is
10 not the official Trump campaign. And then a lot
11 of, like, links landing page -- a lot of links are
12 broken and sometimes it goes back with a different
13 website completely. And then as a researcher, we
14 also dealing with, like, a top platform. They are
15 "like, cleaning up those pages" for a variety of,
16 you know, reasons.

17 So, at this point, we keep monitoring
18 our suspicious group. But at this point, only
19 one-third of them are active, at this point. So,
20 that posed, like, a, you know, challenge. I like
21 to -- I mean, like, just to clarify my position
22 about the indicator, but the indicator provides,

1 like, more information, but the point is that
2 there must be some minimum information which I
3 think should be the group name who is the sponsor
4 on the face of ads. It could be adapted phone,
5 adapted a name.

6 And then, you know, if users want to
7 know more about it, the motivation is a key
8 factor, like, you know, the -- if I name, like,
9 you know, one big factor that makes people click
10 through, it would be interest. So, if they want
11 to know about, like, who they are and, like, get
12 more information, they can do that.

13 So, it's not that I could, you know,
14 indicate, but my larger issue I have is that the
15 discussion of FEC proposals, I believe, like,
16 pretty much focused on a size issue and I'm not
17 sure how size issues is the real issue here. I
18 don't believe that it is going to put overburden
19 the speakers because we have to remember that,
20 like, at the cost of this advertising is a lot
21 cheaper compared to TV ads. And the way the
22 (inaudible) the way, like, that these ads are

1 charged are mostly -- majority of ad -- majority
2 of political ads are charged at the base on
3 clicks.

4 So, audience measures not like print
5 media, like, based on size of good -- it's clearly
6 different that, like, images, like, New York
7 Times, like, page, like -- or, like, Time
8 measures, like, which is a lot -- which is used
9 for a broadcast ad. So, we have to remember the
10 cost is really relatively low and that the cost to
11 measures are not based on the size.

12 And second issue of the size, like,
13 well, size might be an issue if it limits the
14 content of a speech or the options, like, speakers
15 have. I think unlike other media or other types
16 of ads, the digital advertising have a lot of
17 links and that indicator would be, like, an
18 example. But -- so if you want to put, like, more
19 information, you can put -- you can have a lot of
20 links. But the key information should be there
21 and then I think the key information is the group
22 -- the sponsor name.

1 CHAIRWOMAN HUNTER: We're -- if you can
2 be very, very brief; we're pretty much out of
3 time.

4 MR. SZOKA: Very briefly, Commissioner
5 Weintraub, smart disclosure would be the best
6 solution to your concerns because you could warn
7 users about bad links, you could get a large
8 reasonably small number of users who could collect
9 data using a browser extension to track malicious
10 actors, you could report that, you could have a
11 small community of people that alerted to the FEC
12 to abuse. And then to the point that was just
13 made, cost is not the right measure. What we're
14 talking about ultimately is art. Right?

15 Talk to any designer of any effective ad
16 -- no, it's true. Right? I mean, we may ridicule
17 it, but designing these ads really is an art. And
18 what makes them effective is good design, right?
19 And I was very attracted initially to the idea of
20 putting the name of the sponsor on the ad itself.
21 I don't see a way to do it that would be
22 consistent and scalable and would allow

1 implementation in a way that would make people
2 focus on the thing that is consistent. You'd have
3 a variable number of characters and people would
4 game that. They would put in very long names that
5 would not appear to be usable to the user.

6 I think the better approach is to focus
7 on something that could be done consistently
8 across ads, which is the signifier political ad
9 and an icon, making sure that there is effective
10 things like a hover text that can alert people to
11 what this thing is and then undergirding all of
12 that with smart disclosure so we don't have to
13 rely on industry to get it right. We can see
14 other implementations tested in the field.

15 CHAIRWOMAN HUNTER: And that's why you
16 signed onto the Freedom Partners comment which
17 provides a specific reg text for doing just that.

18 MR. SZOKA: Plus the idea of smart
19 disclosure.

20 CHAIRWOMAN HUNTER: Right. Okay.
21 Great. Thank you very much. This was a
22 incredibly helpful panel. I think we could

1 actually go -- keep talking for about another
2 hour, but we have another panel behind you, so
3 we'll conclude for the day. Thank you to all of
4 you for joining us today. It was very, very
5 helpful. Thanks.

6

7 (Recess)

8 CHAIRWOMAN HUNTER: Okay here, we are
9 back in session, everybody. Good afternoon and
10 we'll reconvene with Panel 3 of the day. Thank
11 you all very much for joining us this afternoon:
12 Mr. Dan Backer, counsel for the Coolidge-Reagan
13 Foundation; Mr. Victor Bernson, vice president and
14 general counsel for American for Prosperity, who
15 just took Lindsey Melody away from us; and Craig
16 Holman, government affairs lobbyist, Public
17 Citizen; Ian Vandewalker, senior counsel,
18 Democracy Program, Brennan Center for Justice.
19 Thank you all for joining us this morning.

20 The way we've been doing the hearing, as
21 some of you know from watching, is each panelist
22 has five minutes to give an opening statement.

1 The yellow light will come on when you have one
2 minute left and then the red light will come on
3 when it's time to wrap up. And then after that
4 we'll questions from the commissioners.

5 So we'll go alphabetical, so we'll start
6 with Mr. Dan Backer. Please, whenever you're
7 ready.

8 MR. BACKER: Thank you for the
9 opportunity to be here today.

10 CHAIRWOMAN HUNTER: Thank you.

11 MR. BACKER: As some of you have heard
12 me say, and I've often said, that no one should
13 have to hire a lawyer to engage in political
14 speech, but this stuff is crazy. And to the vast
15 majority of Americans the rules proposed here will
16 only make it crazier.

17 The Internet is a ubiquitous and unique
18 democratic means of political communication. It
19 gives every American the same opportunity to reach
20 a nationwide audience previously available only
21 for the wealthy, the powerful, and the connected
22 political elites. For those elites who can afford

1 to hire lawyers and well-paid commercial vendors,
2 the rules you are considering at at most a
3 nuisance in their ability to continue delivering
4 their message. It's individual Americans who
5 benefited the most from virtually unlimited
6 ability to disseminate their own political ideas
7 that will be burdened by these rules.

8 At the end of the day, bad actors will
9 always act badly, but the proposed regulations
10 will really only impact the ability of the vast
11 majority of Americans to engage in political
12 speech on the Internet. And this will not deter
13 bad actors or prevent corruption. It will only
14 prevent the public speech of regular Americans.

15 Consequently, we would encourage the
16 Commission to refrain from imposing new disclaimer
17 regulations on Internet-based communications.
18 The proposed regulations threaten to burden and
19 chill individual and grass-roots political
20 activity and exacerbate the digital divide between
21 those who can afford to hire lawyers to navigate
22 the compliance with FEC's intricate, detailed, and

1 not particularly intuitive web requirements and
2 everybody else.

3 However, in the event that the
4 Commission cannot stop itself from needlessly
5 regulating in this space, it should use
6 Alternative B as the basis to do so. And I'd like
7 to make a few brief points about Alternative B.

8 First, the Commission should protect
9 political speech by ordinary Americans and small,
10 individual, and grass- roots activities by
11 applying the disclaimer requirements to Internet
12 communications only if they exceed a reasonable
13 threshold level. For example, communications that
14 cost more than \$1,000 or made by speakers who
15 spend more than \$2,500 individually on such
16 political speech in a given year.

17 And the regulations should specify that
18 any enforcement targeted at individuals should
19 focus on education and correcting future behavior
20 rather than the speeding ticket approach of the
21 administrative fine system that I think some of us
22 are familiar with. These safe harbors are

1 essential to ensure the vast majority of
2 Americans, who have no idea what the FEC is, but
3 may have very strong opinions on their government,
4 do not inadvertently violate federal law or need
5 to hire lawyers just to engage in modest levels of
6 political speech.

7 Secondly, one of the most important
8 facets of any disclaimer rule is the flexibility
9 to use alternative disclaimers when default
10 disclaimers would otherwise occupy more than 10
11 percent of the time or the space of an underlying
12 communication. People who engage in political
13 speech want to convey a message. They're not
14 looking to convey the FEC's message, and they
15 ought to be able to do so, convey their message,
16 with the least amount of disruption to it. So we
17 would ask that the FEC needs to make sure
18 disclaimers do not swamp and crowd out the
19 political communications to which they are
20 included.

21 An alternative disclaimer provision, for
22 example, could be satisfied either by the very

1 common approach of an online ad being clickable to
2 a resulting page that contained all the required
3 FEC identifying information or that contained a
4 hyperlink text or URL on the ad that linked to
5 such information or, as I believe we've argued
6 previously, simply includes the URL identifying
7 the speaker. For example, one of my clients that
8 I've been here before has www.GreatAmericaPAC.com
9 as its URL, which identifies that particular
10 speaker.

11 Finally -- and actually, before I move
12 on, I just want to point out that we recently had
13 a question, a vendor offered a client of mine
14 six-second audio ads on radio. And we thought
15 about this and we actually tested the recording,
16 and it's 3.4 seconds just to say the disclaimer.
17 And I'm a fairly quick-talking New Yorker, so this
18 is a serious problem that forecloses a particular
19 piece of communication as is and we don't want to
20 extend that burden into the Internet where right
21 now it's not experienced.

22 Finally, any regulation must recognize

1 there are virtually limitless combinations of
2 hardware, software, and individual user settings
3 through which Internet-based political
4 communications may be received by a variety of
5 recipients. Depending on what device, whether
6 it's an Apple or a Samsung, what version the
7 operating system involve, the size of your screen,
8 the layout, whether you're holding the phone this
9 way or this way, that orientation, and any number
10 of other individualized settings, disclaimers
11 might not be clearly and completely visible.

12 For example, on the common Chrome
13 browser on your phone, on iPhones, there's a
14 function on the browser that lets you strip out a
15 lot of the imagery. And if a disclaimer is
16 contained as images, it would be stripped out of
17 an ad if a user selected to do so. It's
18 impossible to ensure disclaimers will always
19 appear on the receiving device under all
20 circumstances.

21 Speakers should not be subject to
22 administrative, civil, and potentially criminal

1 liability so long as they have made a reasonable,
2 good faith effort to comply with disclaimer or
3 adapted disclaimer requirements.

4 As I said at the outset, no one should
5 have to hire a lawyer to engage in political
6 speech and this Commission should avoid regulating
7 in a way that makes that witticism a reality.

8 Thank you.

9 CHAIRWOMAN HUNTER: Thank you. Mr.
10 Bernson. Thank you.

11 MR. BERNSON: All right, I managed.
12 Good afternoon, Commissioners. My name is Vic
13 Bernson. I'm vice president, general counsel, and
14 secretary for the nonprofit organizations
15 Americans for Prosperity and Americans for
16 Prosperity Foundation.

17 Earlier this month, Americans for
18 Prosperity submitted a written comment concerning
19 your proposed rulemaking and requested the
20 opportunity to address you at this hearing today.
21 And on behalf of AFP, I'm very grateful for your
22 invitation to testify before all of you. Honored

1 and, once again, thank all of you.

2 In the written comment we submitted to
3 you, we expressed two key interests in this
4 rulemaking. First, and like all of you, believe
5 that freedom of speech is a necessary and integral
6 part of a free and open society. The First
7 Amendment is first for a very good reason. And we
8 all recognize it has been instrumental to the
9 flourishing and prosperous nation we're blessed
10 with today.

11 Second, we expressed our concern that
12 the two proposed alternatives, both A and B, would
13 have burdensome impact on our First Amendment
14 protected grass-roots activity. Unlike many of
15 the previous panelists, I'm not a constitutional
16 law specialist. I'm a general counsel residing in
17 a very practical world. My appearance today is on
18 behalf of my organization. It's thousands of
19 volunteers and millions of activists who
20 ultimately will be impacted in very real ways by
21 this rulemaking, mom and pop, if you will.

22 I'm certain you share our view that our

1 founders intended political speech to receive the
2 highest protection from government interference.
3 Knowing that and given the very limited time that
4 I have to address you today, I plan to focus my
5 remarks on the second stated concern: The
6 burdensome impact that the proposed rules would
7 have on our First Amendment protected grass-roots
8 activity.

9 I believe most of you are aware that our
10 organization Americans for Prosperity is one of
11 the largest and most influential grass-roots
12 organizations in our great nation. We have
13 chapters in 36 states and thousands of volunteers
14 who give freely of their time to attend events and
15 contact fellow citizens to promote our shared
16 vision of a more free and open society. We also
17 have roughly 3.2 million activists who regularly
18 receive our communications and, at our prompting,
19 routinely reach out to elected officials of all
20 stripes to ensure the voices of constituents are
21 heard.

22 Now, it goes without saying that

1 maintaining a stable of thousands of volunteers
2 and millions of activists is no easy feat. At AFP
3 we rely on every communication vehicle at our
4 disposal to maintain our connection with the
5 American people and in this modern age none of
6 these communication vehicles features as
7 prominently as the Internet.

8 As you well know, Internet
9 communications are unique to garner attention.
10 There is rarely time or space for anything but the
11 most simple and direct messages. Banners,
12 pop-ups, and the like are the new modern means of
13 connecting with the populace. Mandatory lengthy
14 disclaimer requirements on the fact of such
15 communications in our view would not only be
16 burdensome to the extreme, but they would likely
17 render them entirely meaningless, as meaningless
18 as the absurd disclaimers on television
19 accompanying pharmaceutical ads, and that really
20 must not be the outcome of this hearing.

21 All around us every day we hear non-stop
22 complaining about the lack of citizen involvement

1 in our politics. Many say it's the crisis of our
2 time. Well, dear Commissioners, the organization
3 I represent, Americans for Prosperity, is not part
4 of that problem, but part of the solution. Every
5 day we are busy engaging in the citizenry and
6 educating them about the importance of public
7 policies on their own lives, on the lives of their
8 children, and on the lives of their neighbors. We
9 are the actual, honest to goodness grass-roots
10 that most people in the country say they're pining
11 for.

12 Now, speaking on behalf of these
13 grass-roots, everyday people, we believe the
14 proposed Alternatives A and B would make it more
15 difficult for AFP to communicate. Long and boring
16 disclaimers on the face of our communications, as
17 I said before, would only chase away our fellow
18 citizens, and that's an entirely unacceptable
19 outcome and that's what we fear about this
20 rulemaking.

21 At AFP, we never, ever hide the fact
22 that we're behind a communication. We take great

1 pride in our public positions and stand by our
2 ads. Every public communication we make contains
3 clear and unequivocal information identifying our
4 organization.

5 I stated in our written comment to you
6 we don't believe additional regulation of
7 political speech is necessary or warranted.
8 Express advocacy communications on the Internet
9 are already regulated by this Commission and
10 require disclaimers.

11 But if you do move forward with a new
12 rule we ask you, on behalf of millions of
13 grass-roots activists we plead with you to please
14 tailor your rulemaking narrowly and make it the
15 least restrictive approach possible to safeguard
16 freedom of speech. Utilize and anticipate the
17 best technology so that people who wish to move
18 beyond simple and direct messages can take an easy
19 extra step to identify the author of the message.
20 The attachment to our comment provides just such
21 an approach.

22 In sum, we ask that you please keep it

1 simple. As Ilya Shapiro stated earlier today, in
2 this context we believe less is more. Please
3 don't interfere with the basic grass- roots
4 activism we all desire to promote and see
5 flourish. And please, please don't burden our
6 fundamental right to engage in political speech
7 free from unnecessary and burdensome government
8 regulation. The First Amendment has safeguarded
9 grass-roots political activism for more than 225
10 years. Let's keep it that way.

11 Once again, I wish to thank you for your
12 time and attention today. I'm very happy to take
13 any questions that you might have. Thank you.

14 CHAIRWOMAN HUNTER: Thank you very much.
15 Mr. Holman.

16 MR. HOLMAN: All right, I can go with
17 this one. Chair and Commissioners, thank you very
18 much for letting me testify here. I'm delighted
19 that the FEC is undertaking this rulemaking,
20 which, you know, many of us have been encouraging
21 for decades.

22 You've heard over and over already, with

1 the exception apparently of the two people who
2 preceded me, that disclosure is the bedrock
3 principle of democracy. I don't want to repeat
4 what you've already heard by others. I want to
5 focus on what else is important and what brought
6 the four commissioners together to this table, and
7 that is the lack of appropriate disclosure on
8 Internet ads has been abused and allowed foreign
9 intervention in the U.S. elections. That concerns
10 everybody and it requires some sort of new
11 decisive action.

12 We now know that the means that allowed
13 this foreign intervention was the lack of
14 disclosure on the Internet ads, and that allowed
15 an opening for Russian involvement in our
16 elections. So this has to be addressed. This, to
17 me, is the key issue, more so than just simple
18 transparency for transparency's sake.

19 There are four key steps that I would
20 like to see the FEC take. One is to make sure
21 that all forms of Internet campaign ads must have
22 a disclaimer of some sort. You know, obviously

1 perhaps because of the federal law it has to be
2 limited to express advocacy ads on the Internet.
3 But all forms must have some form of disclaimer.

4 The Internet is a source of innovation,
5 not limitation. And so by mandating some form of
6 disclaimer on all forms of Internet ads, the
7 Internet program producers will find a way to
8 ensure that they get adequate disclosure going.

9 I strongly recommend carrying over the
10 same types of disclosure requirements that apply
11 to traditional ads, but there obviously are going
12 to be cases in which that type of full disclosure
13 is not going to be possible. But in order to
14 fulfill the mission of making sure that there is
15 adequate disclosure behind these Internet ads, it
16 must have at the minimum "Paid for by" on those
17 particular Internet ads. If it does not say it's
18 paid for, many viewers aren't going to understand
19 that they're not viewing news, that they're
20 actually viewing paid propaganda. And it must
21 identify the source or a sponsor of that ad.

22 A study by Columbia University

1 discovered that 59 percent of all Internet ads
2 with links are never, ever clicked. The
3 Electronic Privacy Center I believe has already
4 testified that on average a viewer only about 1
5 percent of the time actually clicks onto those
6 links. And so if there isn't that "Paid for by"
7 as a minimum floor in the Internet campaign ads,
8 most people are going to miss that message.

9 I also encourage you to move
10 expeditiously. There are rumors that Russian
11 involvement is already proceeding for the 2018
12 elections. I know we're already into the election
13 cycle, but if we want to address this very serious
14 problem, you've got to do so very quickly.

15 Finally, and I know this is not part of
16 this rulemaking necessarily, but it really should
17 be, federal law charges the FEC with enforcing the
18 ban on foreign intervention in elections as well
19 as imposing disclaimer requirements. As a matter
20 of fact, the FEC's own rule prohibits
21 disbursements by foreign nationals in connection
22 with elections.

1 In order to get to the heart of this, I
2 would recommend that the FEC mandate the
3 establishment of some type of library of all
4 Internet paid advertisements, political
5 advertisements. This is recommended in the Honest
6 Ads Act, but it is also within your purview to do.
7 The Federal Communications Commission has set up
8 such an ad -- I mean, such a library of all ads in
9 conformance with the Federal Communications Act
10 even though the law does not require such a
11 library. This is something you can do.

12 So in conclusion, I just want to make
13 sure that we focus on the Russian meddling.
14 That's the problem that we're trying to address.
15 And there's widespread agreement across the
16 public, you know, that this is a problem. You've
17 received 160,000 comments urging you to move ahead
18 with rulemaking.

19 I would strongly recommend, I want to
20 conclude, please move swiftly on this and try to
21 be broader in the perspective to address the
22 foreign intervention problem.

1 CHAIRWOMAN HUNTER: Thank you. Mr.
2 Vandewalker.

3 MR. VANDEWALKER: Thank you. Good
4 afternoon and on behalf of the Brennan Center for
5 Justice I'd like to thank the Commission for the
6 opportunity to testify today. The Brennan Center
7 is a nonpartisan think tank and advocacy
8 organization that focuses on democracy and justice
9 and has studied campaign finance issues for 20
10 years.

11 The FEC's disclaimer rule for online ads
12 dates to 2006 and is in dire need of an update.
13 Since that time the Internet has changed
14 dramatically as has been discussed today.
15 Meanwhile, online political advertising has
16 exploded and is sure to continue to increase.
17 Campaigns, parties, and domestic advocacy groups
18 are spending more online than ever, but so are
19 foreign powers intent on manipulating American
20 elections. Russia started meddling online in 2014
21 and the effort continues today. The next attack
22 could come from North Korea, Iran, China, or any

1 number of other potential adversaries.

2 Transparency is a minimal commonsense
3 form of regulation to protect against the threat
4 of corruption and foreign interference. Yet much
5 ad spending on the Internet is effectively exempt
6 from the FEC's disclaimer requirements. This is
7 not healthy for democracy.

8 Audiences have a right to know who paid
9 for advertisements intended to influence their
10 political activity and to know it at the time that
11 they're exposed to ads. This enables the
12 electorate to make informed decisions and give
13 proper weight to different speakers and messages.
14 Part of that decision-making requires knowing
15 whether the message originated with a foreign
16 power.

17 Disclaimer requirements can enhance the
18 deterrent effect of the foreign spending ban.
19 Obviously, Russian trolls proved willing to
20 violate the ban in 2016, since at least some of
21 the paid ads that have been revealed were
22 undeniably bought in connection with an election.

1 But a disclaimer rule with broad enough scope to
2 reach all forms of spending on online
3 communications would leave fewer places for
4 foreign agents to hide their identities while
5 talking about elections, deterring illegal
6 activity.

7 In addition, a spender's failure to
8 include disclaimers can be a red flag that can
9 lead to an investigation, whether by the public,
10 journalists, or law enforcement. Of course,
11 again, foreign operatives have the option of lying
12 in a disclaimer, but even fictitious identities
13 provide clues for law enforcement, as illustrated
14 by the Special Counsel's indictment of the
15 Internet research agency, its employees, and
16 affiliates which tracked back fake identities that
17 were consistently used over time.

18 For these reasons disclaimers rules
19 should be robust, have broad application to the
20 many ways of spending on the Internet, and be
21 vigorously enforced. The Brennan Center has
22 embraced three key principles for Internet

1 disclaimer rules.

2 We recommend, first, the Commission
3 should not apply exemptions like those for small
4 items or impracticability to online ads.
5 Technical innovation by online ad sellers can
6 facilitate disclaimers even for ads that are very
7 small or of very short duration.

8 Second, a substantial amount spent on
9 the production of content, like production costs
10 for filming a video or polling costs for messaging
11 research, should also be part of triggering
12 disclaimer requirements even if the content is
13 posted for free given the enormous power of the
14 Internet to distribute things for free, as on
15 YouTube and Twitter and other social media sites.

16 And third, disclaimer rules should
17 address social media users' ability to share
18 advertisers' paid posts to ensure the disclaimers
19 stay on messages as much as possible even as they
20 are disseminated through unpaid shares by other
21 users.

22 Turning to the specific proposals in the

1 NPRM, the Brennan Center supports Alternative A,
2 which carries the essential feature of disclaimers
3 into the Internet context, applying longstanding
4 rules for television and radio. We prefer
5 Alternative A in part because it does not include
6 Alternative B's exception for ads that cannot
7 provide a disclaimer on the face of the Internet
8 communication. As noted previously, we oppose the
9 application of the small items exception or
10 similar exemptions to online communications.

11 Businesses that sell ads on the Internet have the
12 incentive and technological expertise to ensure
13 that ads can conform to disclaimer requirements.

14 Thank you and I'm happy to answer any
15 questions that you may have.

16 CHAIRWOMAN HUNTER: Thank you very much.
17 Perhaps we should see if Steve or Petersen have
18 any questions. Commissioner Walther or
19 Commissioner Petersen, do you want to --

20 COMMISSIONER PETERSON: I think I led
21 off last time.

22 CHAIRWOMAN HUNTER: Okay.

1 COMMISSIONER PETERSON: So happily give
2 it someone else.

3 CHAIRWOMAN HUNTER: Commissioner
4 Walther?

5 COMMISSIONER WALTHER: Let me go back a
6 little bit. Early on your comments were, Mr.
7 Backer, about the criticism you have regarding the
8 -- I'd like to get some clarification regarding
9 that criticism because I heard you say all the
10 negative things that are involved in the conduct
11 of what we're doing, but unless the statute is
12 changed, we have to have provisions that comport
13 with the law. And that's what, you know, I see us
14 as doing here. If you think we're varying from
15 that, let me know, but I think what we're trying
16 to do here is simply provide a methodology for
17 communication that meets current electronic
18 sophistication. But if you think we should go a
19 different direction, I'd be interested to hear
20 what you have to say.

21 MR. BACKER: Well, I'd like to start
22 with a little example. If I wanted to go online

1 right now and say, hey, I support Walther for
2 Congress, and posted it on my Facebook page, I
3 can. And if I decide to press the little button
4 on there that says "Promote," which anyone can do,
5 you can pay to promote your own personal post, and
6 try to do so, I would be unable to do so by
7 Facebook because they've implemented a political
8 ad disclaimer model now, which essentially
9 requires, as I understand it, to verify the
10 identity of anyone engaging in political ads,
11 which to them is candidate speech, but also issue
12 advocacy, however they choose to define it, which
13 I think is fairly broad and extensively broad. So
14 I now have to wait a couple of days after having
15 this desire to do this for me to mail me a
16 postcard, to go back online, to type in the code
17 on the postcard to verify my identity.

18 But having done this, now I've got this
19 ad that I want to promote. And on the ad now
20 there's this -- you know, my image, the image I
21 want to put there, say, of you, of an American
22 flag, and there's now a little icon on this ad

1 that says -- that starts giving out information.
2 And it's actually the information that is required
3 in the disclaimer. But because that information
4 is truncated in that little icon in that space, I
5 have to still include that information in the
6 disclaimer. And so, in essence, I have the same
7 information now on the ad itself and in this thing
8 that's occupying some of the space of my ad.

9 And I think the concern that I have is
10 that I think it's important that there be absolute
11 clarity from this Commission on what it will and
12 will not -- or how Internet ads will be treated.
13 I think it's a real problem when I have to advise
14 a client and stepping outside of my role on behalf
15 of the Coolidge-Reagan Foundation, I have to
16 advise a client that, no, even though this is
17 going to take up more space, you can't do this
18 because it's not the ad on the face of this
19 communication which you are paying to put on
20 somebody else's website and, therefore, you have
21 to have the disclaimer on it.

22 And so I think, you know, if it were me,

1 I would want to know very clearly what would
2 qualify. So when we start looking at the specific
3 proposals that we put there, is information that's
4 clickable out? Is information that is truncated
5 the way Facebook truncated it, is that enough? As
6 the last panel, someone noted that, you know, this
7 art form of creating these ads, is that something
8 that we can have out there, that we can uninhibit
9 the art in order to allow the communication, the
10 political message to occur fully and minimize the
11 burden on speakers? And maybe that's the
12 impracticability exemption, maybe it's a small
13 items exception.

14 But in any event, I think there needs to
15 be a lot of clarity because Facebook is regulating
16 largely because they don't want to get sued. They
17 don't want to get hauled in front of Congress and
18 yelled out again, and there's a lot of
19 uncertainty.

20 So I would welcome certainty here. I
21 think the certainty ought to be for the least
22 burdensome application. It should allow people to

1 use commonsense approaches. If I have a small ad
2 and I can't fit the disclaimer on it -- and by the
3 way, any news function that you're looking on a
4 browser has that little pop-up from about eight
5 different vendors on it now. There's no way you
6 could fit the disclaimer on a political ad down
7 there. And so I would want to be able to have
8 that clickable to a page that has the appropriate
9 disclaimers.

10 If I get one of those incredibly
11 annoying pop-ups that blocks you from actually
12 seeing the thing that's there until you click on
13 the X button, I would probably -- you know, as a
14 user I want to get out of that as quickly as
15 possible. But as somebody who represents
16 political advertisers I want to have as clean a
17 system as possible. So if my ad is Walther for
18 Congress, I want that to be the message. Click
19 here, you know, here's the link. Click the box,
20 it will take you to the page.

21 So I think my approach is one of -- I
22 think I take a more deregulatory approach, but I

1 would encourage that there be clarity that comes
2 out of the process so when I'm giving advice to
3 clients it's not a 30-page memo. I can say, no,
4 you have a link, you're good. You have clarity,
5 you're good. And that way people who aren't able
6 to pay for me can come and decide, hey, I want to
7 spend \$1,000 on this Internet ad because I want to
8 see Walther for Congress elected.

9 COMMISSIONER WALTHER: Well, you're
10 saying basically what we've been talking about all
11 day and that's having something clickable.

12 MR. BACKER: I think clickability is
13 hugely valuable and I don't think you necessarily
14 need to have the language on the ad itself where
15 it's not feasible, it's not practical, it drowns
16 out the messaging. You know, the six-second radio
17 ad is a great example. The bottom pop-ups on
18 pretty much every single news site that I go to
19 day-in and day-out, they have those little -- I
20 think you know what I'm referring to, these little
21 pop-ups that come out of the bottom. There's no
22 way that you could fit a disclaimer in there. And

1 so clickability I think is essential.

2 And so if there's going to be a
3 rulemaking, rather than relying on
4 impracticability or small items, then I would hope
5 that the rule would tend towards the broadest
6 possible application. Let me rephrase that, would
7 tend towards allowing the flexibility so that it's
8 not going to impede individuals' ability to
9 communicate a political message. Nobody should
10 have to listen to me say, no, you can't run an ad
11 because the disclaimer has to be there, and that's
12 more than half your time.

13 COMMISSIONER WALTHER: Well I appreciate
14 that. I just wanted to get some clarity on what
15 your situation was. I think a lot of what you're
16 complaining about is under discussion right now,
17 so I just wanted to get that clear.

18 Go ahead. I'm going to look this over.

19 CHAIRWOMAN HUNTER: Any other questions?
20 Okay. Then I have a question for Mr. Holman and
21 Mr. Vandewalker. Both of you talked about the
22 Russian influence on the election in 2016. And If

1 I thought that there was something that we could
2 do here that would eliminate that threat or
3 largely address it, I would have done so
4 immediately. I just don't see, and I think you
5 said, Mr. Holman, that everybody agrees with this,
6 it's a huge problem.

7 You know, my understanding based on what
8 the House Democrats released a few weeks ago, they
9 released approximately 3,500 ads and there were
10 100 out of those that referenced a federal
11 candidate. And I haven't taken the time to look
12 at those 100 ads, but I would be surprised if all
13 100 of them had expressed advocacy. So we're
14 talking about let's just say 50 ads at the most
15 that would have required a disclaimer on there.

16 And we know, based on the indictment,
17 that the Russians masked themselves as Americans.
18 And so even if they were concerned about the
19 disclaimer rules, which there's obviously no
20 evidence that they were, they would probably have
21 put a fictitious American name on those ads if
22 they even had expressed advocacy.

1 So the notion that because of this issue
2 we need to do something and we need to do
3 something quickly and we need to act, you know,
4 with a lot of -- you know, make sure we cover all
5 this and there's a new election coming up, I think
6 it's just the foundation of that is weak. And we
7 talked about that a little bit on the first panel.
8 But I wanted to give you a chance to respond to
9 that.

10 DR. HOLMAN: Yes, I'd like to respond
11 very much. I do understand it's a concern of
12 yours, you know, because the Republicans on this
13 Commission have rather consistently wanted not to
14 start requiring disclosure of Internet ads until
15 suddenly it turned into this problem of foreign
16 intervention. And I think we all alike understand
17 that this is a problem that we would like to
18 prevent from happening.

19 Now, it is correct when it comes to the
20 disclaimers that we're talking about under the
21 disclaimer rule here that it would probably have
22 to apply to express advocacy. And most of the

1 Russian ads were not express advocacy ads.
2 However, merely taking that step and requiring
3 that type of disclaimer and greater disclosure
4 across the board on the Internet will help put
5 everyone on alert that this is a concern that the
6 Federal Election Commission and others are trying
7 to address.

8 I believe it would help promote the
9 social media websites to take a more proactive
10 role at regulating this. And it would just help
11 provide the momentum forward.

12 CHAIRWOMAN HUNTER: The social media
13 websites regulating what?

14 DR. HOLMAN: Coming up with programs of
15 like creating a library, a database of the types
16 of ads, what Facebook is trying to move into to
17 try to address --

18 CHAIRWOMAN HUNTER: Are you talking
19 about just express advocacy or broader than that?

20 DR. HOLMAN: They're going broader than
21 that.

22 CHAIRWOMAN HUNTER: But are you saying

1 that they should go broader than that?

2 DR. HOLMAN: They should try to identify
3 any sort of foreign-paid ads that are in
4 connection with the election as your own
5 regulation tries to address. Yes, they should go
6 beyond express advocacy.

7 CHAIRWOMAN HUNTER: Okay. And do you
8 think, I mean, this is probably not a fair
9 question, but do you think that the Russians would
10 identify themselves? I mean, it just seems like
11 that's not their primary concern is comports
12 with the disclaimer requirements at the FEC. And
13 we do have disclaimer requirements now, as you
14 know. That is the governing rule.

15 And we have multiple -- you know, we've
16 all discussed this and I know, I'll give you a
17 chance to respond Mr. Bernson and Mr. Backer, you
18 guys both in your practice and in your group have
19 to advise your group and your clients to include
20 disclaimers. Do you advise them to include
21 disclaimers on Internet ads?

22 MR. BACKER: Yes, any time my clients

1 are paying to put a communication calling for the
2 election defeat of a clearly identified federal
3 candidate on a website of another, which is pretty
4 often to the tune of hundreds of thousands of
5 dollars a month, I'm telling them to put a
6 disclaimer on there if it's at all possible.

7 CHAIRWOMAN HUNTER: Okay. And if it's
8 possible do they follow that advice?

9 MR. BACKER: Yes, thankfully my clients
10 are adequately scared by the threat of FEC
11 enforcement that they are listening to that
12 advice.

13 CHAIRWOMAN HUNTER: Okay. And when you
14 say if it's not possible, are you referring to the
15 Google AO which says, you know, if you're not able
16 to fit it all on there, you can provide a link to
17 a landing page with the additional information?

18 MR. BACKER: I've had two outcomes from
19 this. When I've advised them that they have to do
20 this and there's not a practical means of doing so
21 because the ad is too small, I've said, look, you
22 have two choices.

1 One is run the ad, make it clickable.
2 You obviously can't put the disclaimer in, for
3 example, in those little pop- up news feeds, and
4 have it link to a web page that actually has all
5 the appropriate and correct normal disclaimers.
6 Or two, don't run the ad. And the difference
7 being that if don't run the ad, you're minimizing
8 the risk of potentially drawing an FEC complaint
9 that even if frivolous and pointless is going to
10 waste your time and energy.

11 And the reality is that some clients
12 have listened to first advice and have the
13 click-through and some have chosen not to engage
14 in a particular form of political speech because
15 they don't want to incur the costs.

16 CHAIRWOMAN HUNTER: Well, that's
17 unfortunate. Mr. Bernson?

18 MR. BERNSON: Yes, I would say that our
19 compliance rate is 100 percent. We have roughly
20 about 85 percent of our ads are in the issue
21 advocacy category and we always have a disclaimer
22 of some sort. Now, depending on the place and

1 size of the advertisement, some will be on the
2 face, others, you know, you can with one stop get
3 right to a landing page and then all the
4 information will be there. But we always stand by
5 every one of our public communications.

6 When it comes to express advocacy, which
7 is probably in the realm of 15 percent of what we
8 do, we always 100 percent comply with the full
9 disclosure requirements mandated by this
10 Commission.

11 CHAIRWOMAN HUNTER: Thank you. Any
12 other questions from this panel? Commissioner
13 Petersen? I'm sorry.

14 COMMISSIONER PETERSON: Okay. Mr.
15 Vandewalker, you talked about the issue of having
16 the disclaimer kind of travel with the ad as it
17 gets shared. How would you suggest that we go
18 about making that happen?

19 MR. VANDEWALKER: I would want to ask
20 the platforms how to do that because they're the
21 ones who create the ability for advertisements to
22 be shared. You know, there are sort of new

1 questions here. If somebody cut out a newspaper
2 ad and put it through a Xerox machine, whatever
3 disclaimer was on it would be in the cut-out
4 Xeroxed thing.

5 VICE CHAIR WEINTRAUB: Depending on
6 where they cut it.

7 MR. VANDEWALKER: Right, I guess that's
8 true. So just to take Facebook as the big visible
9 example, Facebook creates the ability for any user
10 to share any ad. So in creating that possibility
11 they should create a way for disclaimers to follow
12 it. Right now Facebook has its own disclaimer
13 that essentially says this is a paid ad, but once
14 somebody shares something that disclaimer
15 disappears because their logic is that share, say
16 if I share an ad from Home Depot, my share is not
17 a paid ad, it's just me sharing something on
18 Facebook, so the disclaimer disappears.

19 I think where the message originates as
20 a paid political ad something should follow it
21 along saying where the original payment came from
22 because as much as it's a benefit that things

1 should be shared, it multiplies the audience of a
2 paid political ad in a way that, again, audiences
3 need to know where messages are coming from for
4 sort of democratic reasons.

5 VICE CHAIR WEINTRAUB: So you think we
6 could impose a requirement that the disclaimers
7 have to be portable with the ad and then the
8 platforms would figure out how to do it?

9 MR. VANDEWALKER: Yeah, because, I mean,
10 frankly, there are a lot of different platforms in
11 the world and tomorrow there will be more. And I
12 think the principle of having shareability not
13 interfere with the transparency that audiences in
14 the voting electorate needs is the important thing
15 and the logistics of it maybe need to work out
16 differently for different technologies or
17 different platforms.

18 VICE CHAIR WEINTRAUB: Mr. Holman, you
19 said as one of your core principles it should say
20 "Paid for by." Should I infer from that that you
21 mean "Paid for by" and identify the sponsor or the
22 ad?

1 DR. HOLMAN: Yes, paid for by the
2 sponsor. Paid for by Craig Holman, for instance.
3 And then you could have a link to identify the
4 wealthy special interest that is footing my bill.

5 VICE CHAIR WEINTRAUB: Do you have a lot
6 of wealthy special interests supporting your ads,
7 Mr. Holman? You don't have to answer.

8 DR. HOLMAN: But I do want to emphasize
9 it's got to be that minimum because people do not
10 click on those links. They just don't do that.
11 And if it doesn't say "Paid for," the reader very
12 frequently is not going to understand this is an
13 ad and then if it doesn't identify the sponsor,
14 the reader just isn't going to get that. It's got
15 to be a minimum floor.

16 VICE CHAIR WEINTRAUB: I hear you. I
17 just wanted to clarify that because we had an
18 earlier witness who said that we should just have
19 on the face of the ad "Political ad." And then
20 you would click on that and get to the place that
21 identified who was behind the political ad. But
22 in saying "Paid for by," you don't mean just that

1 you want us to make sure that it's identified as a
2 paid ad, but also the sponsor on the face of it.

3 DR. HOLMAN: Yeah, the sponsor. Both
4 elements are critical.

5 VICE CHAIR WEINTRAUB: Yeah. Mr.
6 Backer, you raised an interesting idea that I
7 don't think anybody else raised out of the 160,000
8 people that weighed in on that, so good for you
9 for coming up with a unique idea of having a
10 dollar threshold. And I'm going to ask a question
11 that I asked somebody else earlier, where does the
12 statutory authority come from for doing that?
13 It's an intriguing idea. In general I've been
14 advocate of threshold, of reasonable thresholds,
15 but where would the statutory authority come from?
16 Would that be a cumulative total as opposed to,
17 you know, you one could buy a whole lot of small
18 ads and it would add up or each one of them could
19 be de minimis?

20 MR. BACKER: Well, you ask a fascinating
21 question and I probably could give you a good
22 statutory source, but my thinking is more that if

1 you are regulating these particular
2 communications, Internet disclaimers, to the
3 extent that you are already doing so, I don't
4 think you need to do so for this de minimis level
5 of activity at all.

6 And again, I tend to think that we don't
7 need any increase in regulation, but if you are
8 going to regulate, you know, my personally
9 promoting an idea or a thought for 20 bucks, \$30,
10 I should not have to file an FEC report or care
11 about disclaimers to adopt, you know, Mr. Holman's
12 idea of, hey, you know, Walther for Congress. I
13 like that. I'm adopting that idea for my own and
14 I'm going to promote that, \$20. I shouldn't have
15 to worry about that.

16 I think when you get to the point of
17 people who are -- I don't know that you really
18 have to worry about people who are trying to game
19 the system to do a lot of \$20 expenditures on
20 behalf of different individual candidates that
21 they're trying to support. I think that level of
22 de minimis grass- roots participation is healthy,

1 normal, not particularly meaningful and isn't
2 worth cluttering our system up.

3 VICE CHAIR WEINTRAUB: So it's not going
4 to be cumulative.

5 MR. BACKER: Again, but I don't have a
6 really good statutory basis for it. I just think
7 if you're going to move in that direction, the
8 threshold ought to be communications that are
9 going to have some level of impact on political
10 discourse. And I chose \$1,000 because that's the
11 amount of the 24-hour reporting minimum for
12 independent expenditures. There wasn't a
13 statutory basis for it.

14 VICE CHAIR WEINTRAUB: So no particular
15 statutory basis and not cumulative.

16 MR. BACKER: You could do it as a
17 cumulative, \$1,000 for an individual candidate,
18 \$2,500 for all candidates over the course of a
19 year. But, again, that's only if you were --
20 that's a for -- or rather, that's a carve-out so
21 people who are underneath that, which is probably
22 the majority of people who engage in personal,

1 independent political speech, they're not going to
2 really have to worry about disclaimers and filing
3 FEC reports and having to worry about that. And
4 more importantly, they're not going to be subject
5 to potential enforcement because, you know, their
6 neighbor, rather than tackling them off their yard
7 tractor decides I'm going to file a complaint with
8 the FEC because I saw you do that. I don't think
9 we want to interfere with people engaging in
10 relatively de minimis speech.

11 VICE CHAIR WEINTRAUB: Yes, when I asked
12 about cumulative I wasn't thinking necessarily
13 about cumulative -- I mean, I presume if you're
14 spending over a certain threshold to promote a
15 particular candidate that that would count. But
16 what if you're just spending a lot of money in a
17 lot of individual small ads?

18 MR. BACKER: I don't think that requires
19 any sort of disclaimer or disclosure. I think if
20 you're an individual and you're spending \$20
21 because you like Walther for Congress and \$20
22 because you like Hunter for Congress, who cares?

1 It's such a de minimis level of personal
2 grass-roots activity, it's buying a \$20 soap box
3 and standing on a corner and speaking. I don't
4 think that --

5 VICE CHAIR WEINTRAUB: Well, it's de
6 minimis until it's not. I mean, if you're
7 spending \$20 a million times, then suddenly it
8 starts to look like you're spending a lot of
9 money.

10 MR. BACKER: And then perhaps there
11 ought to be -- if you're going in that direction,
12 and some aggregate across all candidates, again, I
13 chose a random number of \$2,500. I think we
14 discussed that a little in our first or second
15 comment. But, again, it's less about what the
16 specific floor should be and more about we really
17 don't want to be involved as a government, as a
18 society, and say everyone who does anything online
19 needs to comply with this particular law that
20 really matters only when you're dealing with
21 substantial actors.

22 VICE CHAIR WEINTRAUB: Because I have a

1 question for everybody. Mr. Bernson, you actually
2 went and marked up a proposed rule text for us,
3 which was very proactive of you. And I'd like you
4 to invite you, since you took a little bit from A
5 and a little bit from B and then you made your own
6 edits, I'd like to invite you to explain what your
7 thinking was in doing that and what you think you
8 were accomplishing by the edits that you made and
9 combining it the way you did.

10 MR. BERNSON: Certainly. In a nutshell,
11 we weren't thrilled with Alternative A and we
12 weren't thrilled with Alternative B. So as we
13 broke them down, we figured with a little bit of
14 editing here and a little bit of editing there, we
15 might get to a better solution that would address
16 specifically what, you know, Commissioner Walther
17 was talking about, which is, I'm quoting, "the
18 technological sophistication" recognizing what's
19 out there today.

20 And I think the Alternative A and
21 Alternative B were just, in our view, too
22 limiting. There was too much of a straitjacket

1 with that language. And, you know, the hybrid
2 that we proposed is specifically designed to
3 address the possibility of having a rule that's
4 going to be flexible enough to address not only
5 existing technological sophistication, but future
6 technological sophistication.

7 And if I could, there's one other thing,
8 you know, I just wanted to jump in with here. And
9 that is, you know, obviously this is a hearing
10 about disclaimers and that is your purview and
11 it's very important. But, again, going back to,
12 you know, why I'm here and talking on behalf of
13 our activists, the disclaimer I really don't think
14 should be, you know, overstated in its importance.
15 It is important, but it's not everything.

16 And the vast majority of people that I
17 know and that I've spoken with, who when they are
18 clicking on one of these, you know, smaller ads
19 that does not have a full disclaimer on it and
20 they're looking for information, they're not
21 looking for who it's coming from. They want to
22 know more about whether the claim in the ad is

1 true. Now, that's very difficult to regulate.
2 But the average person is not all caught up and
3 wound up about disclaimers. They want to know,
4 yeah, did that Congress mate of mine, did she vote
5 to raise my taxes? Did she vote in favor of
6 criminal justice reform? That's what they want to
7 know.

8 So if we're taking an approach that is,
9 you know, really just solely focused on
10 disclaimers here, we're going to be pushing those
11 folks away because there's going to be way too
12 much language. And the example I'll cite is a
13 very simple one.

14 If I'm communicating with my daughter,
15 right, and I have seen an amazing article by the
16 late great Charles Krauthammer and I want to send
17 it on to her, if I send a link there's a very good
18 chance she'll click on the link, read it, and
19 then, you know, Dad, you're wrong because
20 whatever. All right. If I do her the favor, the
21 courtesy, of cutting and pasting the whole article
22 and then putting it in the email, she's not going

1 to read it. And I know why. Because she's going
2 to go, oh, it's too long, it was too wordy, I
3 didn't have time for that. It's the exact same
4 article, but one was the link, one is all the
5 words.

6 And I use that as an analogy here to
7 disclaimer language. It's important, but it's not
8 the be-all and end- all. What folks really care
9 about when they're getting at these ads is, hey,
10 is that stuff true? Because, you know, they're
11 going to the ballot box to vote for or against a
12 person, not for or against an organization or an
13 entity that is running ads behind it. They're
14 looking at the individuals.

15 VICE CHAIR WEINTRAUB: I actually would
16 like to dispute that and I think that part of what
17 you said undermines the point you're trying to
18 make. The reason that your daughter clicks on
19 something that you send her is because it comes
20 from you. Okay, this is my dad sending me
21 something that might be interesting or maybe not,
22 depending on your relationship with your kids. I

1 know my kids sometimes they click and sometimes
2 they don't. But she would have a different
3 reaction if I sent her something because she's
4 say, well, who the heck is Ellen Weintraub and why
5 should I care what she has to say?

6 I think the source of the information
7 actually does matter to people. If I click on an
8 ad and I see that it was posted by the Sierra Club
9 or the NRA, that tells me something about what
10 perspective that advertiser has and I will draw my
11 own conclusions about whether I trust that ad or
12 not based on who's behind it. So I think it
13 informs the decision, and the Supreme Court seems
14 to agree with this notion, it informs the decision
15 of whether you're going to trust the veracity of
16 the information based on who it's coming from.

17 MR. BERNSON: I don't dispute that point
18 from your perspective, but I think that's a
19 dangerous path to go down because making
20 assumptions about where an organization stands
21 just because of its name can often be wrong, and
22 our organization is a classic example of that.

1 You know, there's a lot of folks out there who
2 disagree with us on certain policies and then
3 would go what are Earth are they doing supporting
4 criminal justice reform? What on Earth are they
5 doing supporting immigration reform? They've
6 already leapt to a conclusion about us just by
7 looking at the name, so I don't think that's
8 necessarily fair or the way that a healthy
9 democracy should work. I think it's much more
10 important to be able to, yeah, look, look at our
11 website. Go in and read where we actually stand
12 and you may reach a different conclusion about the
13 merits of our policy positions.

14 VICE CHAIR WEINTRAUB: Well, that's an
15 interesting idea, but the whole point of
16 disclaimers and the reason that we're talking
17 about disclaimers, because we have an obligation
18 under the law to provide them, is to provide
19 information about where the information is coming
20 from. I don't think that we are in a position,
21 you say, of what people really ought to be focused
22 on or you think they're focused on is whether it's

1 true or not, the information that they're getting,
2 I don't think we're in a position to provide that
3 kind of verification to anybody or to try and
4 monitor truth. I doubt if you want us to set
5 ourselves up as the truth commission.

6 MR. BERNSON: No, ma'am. No, ma'am, no.
7 I'm not asking for that at all.

8 VICE CHAIR WEINTRAUB: I don't know
9 whether Mr. Vandewalker or Mr. Holman had a chance
10 to look at the proposed regulation that your
11 colleague there on the panel provided to us. I'll
12 invite you to comment on it if you have it in
13 front of you or know what I'm talking about. And
14 if not, that's fine.

15 MR. VANDEWALKER: I don't have specific
16 comments on it. I would just say I think that
17 what has perhaps been said enough times already
18 that there's a principle there that source
19 transparency is important. And the indicator idea
20 has been discussed a lot, you know, and indicator
21 may be better than nothing in terms of disclosure
22 about the source. But care should be taken to

1 make sure that the indicator actually communicates
2 information to the audience. Because as much as
3 we've talked about First Amendment principles and
4 free speech principles, there are constitutional
5 principles in favor of audiences knowing who is
6 speaking to them. That is an essential part of
7 democracy and the idea of a disclaimer is intended
8 to get at that.

9 And so without getting into the details
10 of the regulatory tax proposed by AFP, I think we
11 would just point to that principle and the need
12 for audiences to know who's speaking to them.

13 VICE CHAIR WEINTRAUB: I yield to
14 Commissioner Petersen.

15 COMMISSIONER PETERSON: Thank you, Madam
16 Chair. I will second what Commissioner Weintraub
17 -- the Vice Chair said earlier about what -- Mr.
18 Backer, what you said about some sort of monetary
19 threshold that I hadn't really thought about
20 before. When you think about political
21 advertising, especially traditional political
22 advertising -- radio, television, printed -- we're

1 thinking generally about somewhat sophisticated
2 operations with at least a certain amount of
3 resources available to them. And I think that to
4 a large extent we're still focused on those in the
5 online realm, as well.

6 Organizations that have at least enough
7 resources to put together decently sophisticated
8 graphics for ads or a short videos or long videos,
9 the notion of promoted Tweets and posts on
10 Facebook getting caught up in the disclaimer
11 morass is a little bit different. You mentioned
12 that you could promote a post for as little as
13 \$20.

14 MR. BACKER: As little as a dollar.

15 COMMISSIONER PETERSON: Little as a
16 dollar. In that case, we truly are talking about
17 grass-roots speech, where an individual who might
18 have felt like I put together paragraph about why
19 this candidate's great or why this candidate's
20 not, and I want to pay a dollar to -- I don't know
21 how much a dollar buys you, how much \$20 buys you,
22 what the mechanisms are by the way that that might

1 be disseminated. But in that particular realm, we
2 can't always expect those who just decide that
3 they're going to pony up that kind of money, you
4 know, for a relatively small communication, to
5 have a lawyer, to have the sophistication of how
6 the Federal Election Act and the Disclosure
7 Requirements applies to that particular post or
8 that Tweet. Because I think that that's a
9 category of speaking that's a little bit different
10 than the category that we normally think about
11 when we're thinking about political advertising.

12 And I think that -- I share Commissioner
13 Weintraub's concern about the statutory authority
14 that we have. You know, it could be -- the
15 Commissioner could adopt a policy based on his
16 prosecutorial discretion that certain political
17 activity under a certain threshold would just not
18 be a priority for the Commission to go after. But
19 I think that raises an interesting point and,
20 also, just I think raises the larger point that
21 this rulemaking and this addressing, which is the
22 difference between running ads and engaging in

1 political communications on the Internet than
2 through traditional media. So I think that that's
3 something for us to consider and I found that
4 intriguing, as well.

5 Mr. Vandewalker, I just want to clarify
6 something and maybe I misheard you during your
7 opening remarks, but I thought I heard you say
8 that much -- that's there's much political
9 activity or many political ads that are exempt
10 from the disclaimer requirement that are run on
11 the Internet? Is that a fair --

12 MR. VANDEWALKER: There are ads that are
13 effectively exempted by the Google AO and the sort
14 of understanding that certain social media posts
15 or other Internet activity need not include the
16 disclaimer.

17 COMMISSIONER PETERSON: Okay. So you're
18 talking about exempt from disclaimer on the face
19 of the ad?

20 MR. VANDEWALKER: Right.

21 COMMISSIONER PETERSON: Okay. Because
22 the way the Commission decided that was that if

1 you are running an ad that, you know, through some
2 sort of a limitation cannot accommodate the full
3 disclaimer on its face, then there's the one click
4 to a landing page. And so the disclaimer
5 requirement is in effect. You may have to click
6 to it to get there. But just for purposes of
7 clarity, the disclaimer requirement hasn't been
8 lifted for that category of ads.

9 MR. VANDEWALKER: Right.

10 COMMISSIONER PETERSON: And you said
11 that there shouldn't be the application of the
12 small items exception or the impracticability
13 exception in the online environment, but I think I
14 heard you indicate that some sort of adapted
15 disclaimer or an indicator would be appropriate
16 under certain circumstances. I think across the
17 board in all the panels today, I think everyone's
18 agreed that at some level there are certain types
19 of either character-restricted text, small graphic
20 ads, six-second YouTube ads that really can't
21 accommodate a full -- you know, kind of a
22 traditional disclaimer. And that there should be

1 some allowance for an adapted disclaimer or some
2 sort of an indicator in those circumstances, so
3 that those forms of communication are still
4 available, especially to individuals, candidates,
5 committees that may not be as well resourced.

6 But as we've talked about that there's
7 been a wide variety of opinion about what should
8 be the trigger for the allowance of such an
9 indicator. The first panel there wasn't much
10 agreement. I think in the second panel, except
11 for Professor Kim, I think everyone said that an
12 indicator should, in and of itself, regardless of
13 how much a disclaimer takes up of an online ad,
14 that should be sufficient to meet the disclaimer
15 requirements of the act.

16 What do you think should be the -- and
17 after I ask you I'll ask the others because I
18 think this is a question that the Commission is
19 puzzling over very intently, is trying to figure
20 out what is an objective trigger that is easily
21 administered, that would be easily understood by
22 those who would be subject to the disclaimer

1 requirements, so that we don't have to have
2 numerous speakers coming to the Commission to seek
3 an advisory opinion?

4 The proposals, Proposal A talks about
5 that you can only go to that adapted disclaimer or
6 an indicator if there are technological
7 limitations that are intrinsic to the technology.
8 Many of the comments push back on that.

9 Alternative B talks about a 10 percent
10 threshold. If it goes above that, then you can go
11 to an adaptive disclaimer; and if it still takes
12 over 10 percent, then you can go to an indicator.
13 There's been a lot of pushback on that, that that
14 would not be a very easily implemented standard
15 either.

16 So I'll start with you, but also any
17 others who might want to weigh in. If we're going
18 to have some sort of threshold for when an
19 indicator is going to be permissible, what do you
20 think would be the best threshold?

21 MR. VANDEWALKER: Well, I'll say that
22 generally the Brennan Center supports Alternative

1 A. And I think that it's important that
2 disclaimers be disclaimers and that adapted or
3 indicator or some lesser form be a sort of
4 absolute backstop, last resort.

5 In terms of inherent limitations, you
6 know, Tweets used to be 140 characters and Twitter
7 said, well, we can't put disclaimers in it because
8 it's 140 characters. But now Tweets are 280
9 characters, right? There's no inherent limitation
10 on the number of characters in Tweets. That's
11 Twitter's policy because they've decided that's
12 where they're going to make money or whatever. I
13 don't know why they chose that, but I assume it
14 has to do with making money.

15 So I think there are few inherent
16 limitations in this space. There are places where
17 companies have decided to create a limitation
18 because that's their business model. And they
19 probably have some of the smartest, most creative
20 on the planet working on how to write code. And I
21 feel like if they want to make money given that
22 this is the law instead of that's the law, they're

1 going to figure out a way to do that.

2 And so as a principle matter we think
3 that alternatives to sort of actual disclaimers
4 should be a last resort, sort of backstop
5 alternative.

6 COMMISSIONER PETERSON: Do you have any
7 idea -- so you want the kind of truly impossible
8 standard? Because, I mean, the way I understood
9 what you were saying would indicate that we'd
10 almost never get there. Because almost any
11 communication technology could evolve, whether it
12 be -- you know, Tweets could be 10,000 characters.
13 Six-second YouTube ads could be six minutes. I
14 mean, everything ultimately could be altered, but
15 that's the way in which we find the nature of the
16 technology right now and there are those
17 limitations for a reason.

18 I think that, like you said, it may be a
19 business decision, but that's the way that
20 technologies evolve and it's proven to be fairly
21 useful for many people who are out there
22 communicating. So you would draw a pretty narrow

1 allowance for the use of an indicator. Let me
2 open it to any of the others on the panel who
3 might want to weigh in.

4 Mr. Backer?

5 MR. BACKER: Sure. So I think it's not
6 so much a limitation on the technical aspect, but
7 it's a limitation on the message itself. You
8 know, the purpose of the communication is to
9 convey an idea and a thought, and if you were
10 doing it in a 6- or 10-second video and you're
11 having to occupy a portion of that bandwidth with
12 a disclaimer, whether it's audio or just a printed
13 disclaimer, you're impeding upon the speech that
14 you're trying to convey. And I think the 10
15 percent rule seems like a really good, reasonable
16 measure in order to do that.

17 I mentioned earlier, you know, in a
18 six-second radio spot, which we're now able to
19 buy, three and a half seconds of disclaimer is
20 really problematic and it makes it pointless to
21 do. But that's an incredibly valuable thing for
22 small organizations that can't afford a 30-second,

1 60-second ad. Six seconds is pretty cheap, but
2 you lose the value of being able to communicate
3 that way.

4 I'm also on some level really
5 uncomfortable with the idea that we're going to
6 start burdening both the political and the
7 commercial speech of people in order to decide
8 that, hey, you know, Mr. Vendor, you're just going
9 to have to come up with a system that complies
10 with this standard in order to run your business.
11 That troubles me greatly. I think it gets into a
12 lot of issues outside of just the question of
13 disclaimers and the ability of people to start and
14 run businesses. So I think the 10 percent rule
15 is, you know, a pretty good place to start that
16 conversation from.

17 Can I make one comment?

18 COMMISSIONER PETERSON: Sure.

19 MR. BACKER: Because I don't want to
20 forget this. So Mr. Vandewalker made a point
21 earlier about the shareability of messages and
22 maintaining that, I just want to point out before

1 I forgot that it's one thing to require a paid
2 speaker to put in a disclaimer, I think it's
3 another to require somebody who's just personally
4 adopting the political speech as their own speech
5 and then recommunicating it to then also have to
6 adopt the government-mandated speech that's
7 involved there. And I think that conveyance from
8 the paid speech to the purely voluntary, I'm
9 choosing to do this, really needs to not include
10 the conveyance of that disclaimer. And I think
11 that proposes tremendous constitutional infirmity.
12 So I just wanted to add that in.

13 COMMISSIONER PETERSON: Mr. Holman and
14 Mr. Bernson, do you have thoughts on the threshold
15 issue?

16 DR. HOLMAN: Yes, very quickly. I mean,
17 I fully understand that the Commission wants to
18 and needs to develop some sort of threshold when
19 you go from the full disclosure to the minimal
20 disclosure. That is a question that really you've
21 got to ask more of the techie people.

22 What I want to make the sure the

1 Commission recognizes is the danger of anonymous
2 ads and we can't have anonymous Internet ads, so I
3 want that minimum floor in there. And then, you
4 know, talk to the people who actually develop
5 these types of programs as to where to draw that
6 threshold.

7 COMMISSIONER PETERSON: Mr. Bernson?

8 MR. BERNSON: We think it's less about
9 establishing a set threshold that could change.
10 And so in the proposed rule text that we provided
11 to you we basically said, look, folks can do it
12 either one of two ways. And that way, if they
13 want to put it on the face, so be it, put it on
14 the face.

15 But there is an alternative and the
16 alternative is using a technological mechanism
17 with an indicator. And rather than have -- if the
18 ad is this big or that big, it's just one of two
19 options. You can do it either way, but at the end
20 of the day, when it's all said and done, folks are
21 going to be able to see disclaimer language,
22 either on the face or via the technological means

1 and the indicator. How and exactly what that
2 threshold is for the technological means and the
3 indicator, I think we let the market decide.

4 COMMISSIONER PETERSON: Okay. Well, I
5 just want to finish my remarks by just making one
6 point, that, as I said earlier, I hope that there
7 can be a win-win solution. This statute speaks
8 clearly about disclaimers. The Supreme Court has
9 upheld disclaimers and that the public's entitled
10 to know who is paying for ads that they're
11 viewing.

12 But what shouldn't also get lost in the
13 mix is the importance of the speech that's being
14 conveyed by the ad, as the Supreme Court has
15 reiterated over and over political speech about
16 candidates, about those who govern us is at the
17 very core of the First Amendment, and so there is
18 tremendous value in the speech itself. And if we
19 could develop some form of a system that was easy
20 to administer, that was objective, that wouldn't
21 require anyone who wants to engage in online
22 advertising to come to the agency for an advisory

1 opinion every time that there was a small
2 question, that would both enhance the speech
3 itself and also provide enhanced disclosure
4 information.

5 I've been impressed by some of the
6 discussion that we've had about indicators and the
7 ability of information to be there, the full "paid
8 for" information, as well as information you would
9 never get on a radio or a television ad that would
10 provide direct links to whether it be the FEC
11 website for that committee, whether it might be a
12 link to databases that are run by that particular
13 platform. There are tools in place that can give
14 online users who view ads tools to understand who
15 is paying for those ads in ways that traditional
16 media could never provide.

17 And so, you know, I think that the
18 discussion that we've had today on all the panels
19 and with this one, as well, I think has helped us
20 further along this thought process so that we can
21 find some ways that, like we said, that the public
22 can get the disclosure information that it

1 demands, but it also can get the speech; and that
2 one doesn't detract from the other. Because when
3 you look at some of the sample ads, I look at the
4 speech seems to be obscured by the disclaimer, the
5 disclaimer seems like a jumble in connection with
6 the speech. And if we could have a way in which
7 the speech is clearly conveyed and the disclaimer
8 information is adequately conveyed, I think that
9 we'll be in a much better place.

10 So thank you for the very helpful
11 additions you've made to the discussion and the
12 thought process we're having here at the
13 Commission.

14 CHAIRWOMAN HUNTER: Thank you. Any
15 other questions? Vice Chair?

16 VICE CHAIR WEINTRAUB: This is an idea
17 that I think is in use in California, where if
18 they have very limited space sometimes the
19 information that is required is just a political
20 committee's ID number, so somebody could -- and
21 I'm not 100 percent sure whether it needs to be a
22 click-through or whether you're just supposed to

1 use that in order to go to the Fair Political
2 Practice Commission website and find out whatever
3 you can find out about the committee with that ID
4 number.

5 So I just want to toss that out. What
6 do you think of that idea? I mean, that number
7 does not convey a lot of information to somebody
8 who's just going to look at it, although it is a
9 portal perhaps to finding out a whole lot of
10 information about that particular committee
11 because you'd have access to all their reports.
12 And, of course, it would only work if the
13 advertiser was, indeed, a political committee
14 unless you set up some system of voluntary
15 registration. People who want to do this could
16 apply for a number, although it's not clear how
17 informative that would be then to people because
18 then they wouldn't be filing reports, so you
19 wouldn't have all that information. I'm not sure
20 what the number would mean anymore.

21 Anyway, I just thought that since that
22 is a system that's in existence somewhere else, I

1 thought I'd toss that out to the panel and see if
2 anybody has any thoughts about that option.

3 DR. HOLMAN: Well, I wouldn't support
4 it. Even I would blow over an ID number without
5 checking it out.

6 VICE CHAIR WEINTRAUB: So it's Craig
7 would do that.

8 DR. HOLMAN: I really do think the
9 minimum standard has to be both identifying that
10 as a paid ad and the name of the sponsor.

11 VICE CHAIR WEINTRAUB: Anybody else want
12 to comment?

13 MR. BACKER: I would point out a couple
14 months ago we were here talking about is
15 @GreatAmericaPAC adequate identification? And
16 that would seem to be better identification than
17 an FEC ID number.

18 And to Craig's point, does it matter
19 that it said "Paid for by" if it says Great
20 America PAC on it. Does it actually need to have
21 that magic word "Paid for by?" If the goal is to
22 minimize it, maybe just the name of the

1 organization. Again, like @GreatAmericaPAC would
2 seem to be a great way to do it. Click to the
3 organization, it's identifying, and it at least
4 removes that small piece of additional constraint
5 on the underlying message. And I think that would
6 probably not be something that we would be able to
7 achieve through the statute.

8 I don't know that the ID number would
9 work really well, but I would love it if we could
10 get to at least @GreatAmericaPAC.

11 VICE CHAIR WEINTRAUB: So that's what
12 you want to do, but you don't think we have
13 statutory authority to do that?

14 MR. BACKER: Well, you guys told me you
15 don't have statutory authority to do that, so I'm
16 going to take you at your word.

17 VICE CHAIR WEINTRAUB: Okay.
18 Commissioner Walther, do you have any other
19 questions?

20 COMMISSIONER WALTHER: No. I just have
21 one last quick comment or question. Mr. Bernson's
22 proposed rule is the same one, I believe, that Mr.

1 Szoka proposed at the previous panel. And I think
2 it's an excellent rule that is a good amalgamation
3 of both Alternative A and Alternative B. And I
4 think it may even solve some of the concerns that
5 Mr. Backer was raising in his opening statement
6 about the platforms that already require a certain
7 amount of information.

8 Obviously, Facebook could change its
9 policy, but right now my understanding is it
10 requires at the top and the bottom of the ad, I
11 don't know what's that called, the wraparound or
12 something, information about who paid for the ad.
13 If we adopted the proposed rule in Mr. Bernson's
14 comment it allows for the information for the
15 disclaimer or the indicator. So the indicator
16 would be within the face of the text and you
17 wouldn't need to have it in both places. So I
18 think that solves the issue that Mr. Backer is
19 bringing up. I think it's a proposal that I'd
20 like to consider even further, so thank you for
21 that.

22 I don't have any other additional

1 questions. Does anybody else? Commissioner
2 Weintraub?

3 VICE CHAIR WEINTRAUB: Well, I just want
4 to invite the other panelists who obviously didn't
5 have that in front of them. I'm not sure this is
6 the same thing that Mr. Szoka was talking about.

7 CHAIRWOMAN HUNTER: I think it is. I
8 was just comparing the two comments. I think it
9 is.

10 VICE CHAIR WEINTRAUB: Did he
11 specifically say and we endorse that proposal?

12 CHAIRWOMAN HUNTER: I asked him about it
13 and he specifically said we endorse the proposal
14 by --

15 COMMISSIONER PETERSON: Freedom
16 Partners.

17 CHAIRWOMAN HUNTER: Oh, thanks, Freedom
18 Partners and the Chamber of Commerce. And that
19 proposed rule text is the same one that Mr. -- am
20 I correct?

21 MR. BERNSON: You are correct.

22 CHAIRWOMAN HUNTER: Okay, yeah.

1 VICE CHAIR WEINTRAUB: Okay. Well,
2 thank you for that clarification. I assume at the
3 end of this hearing we will, as we ordinarily do,
4 leave the record open for a certain number of
5 days, so I would invite the other panelists to
6 take a look at that since the Chair wants to
7 consider that. And you can mail us or email us or
8 Tweet at us or whatever mechanism you choose for
9 submitting your comments. It does, I will note,
10 perpetuate the exception, which I think --

11 CHAIRWOMAN HUNTER: Perpetuate what
12 exception?

13 VICE CHAIR WEINTRAUB: That there would
14 be an exception to the requirement.

15 CHAIRWOMAN HUNTER: I might have missed
16 that. Where's that?

17 VICE CHAIR WEINTRAUB: That is -- Mr.
18 Bernson will correct me.

19 CHAIRWOMAN HUNTER: Oh, here. You're
20 right, it does still have it in Section 4. Is
21 that what you're talking about?

22 VICE CHAIR WEINTRAUB: Yeah -- well, F.

1 CHAIRWOMAN HUNTER: Sorry, F, yeah.

2 VICE CHAIR WEINTRAUB: F, Exceptions.

3 It has a slight editing, but basically adopts the
4 exception from Alternative B.

5 CHAIRWOMAN HUNTER: Okay. I didn't
6 realize that. I was mostly focused on the
7 subsection, I guess it's D(ii). So it's 5D(ii),
8 "Every Internet communication for which a
9 disclaimer," it's at the bottom of page 10 of --
10 wait, I have so many comments in front of me, but
11 that's the section I was talking about.

12 VICE CHAIR WEINTRAUB: This one. The
13 one that they completely added in -- that one?

14 CHAIRWOMAN HUNTER: Yes. Yes, that's
15 the one I'm talking about.

16 VICE CHAIR WEINTRAUB: All righty.

17 CHAIRWOMAN HUNTER: Yes, we welcome any
18 additional comments for this panel and the panels
19 that preceded you today. Thank you very much for
20 all of you to come today. Your written comments
21 and your oral comments and answers to our
22 questions were very helpful, so thank you so much.

1 And we'll reconvene our hearing tomorrow
2 morning at 9:30.

3 DR. HOLMAN: Thank you.

4 (Whereupon, at 4:14 p.m., the
5 HEARING was adjourned.)

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