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Via Electronic Filing

Mr. Neven F. Stipanovic  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

**RE: Comments on Advanced Notice of Proposed Rulemaking, Internet Communication Disclaimers (Notice 2017-12)**

Dear Mr. Stipanovic:

Asian Americans Advancing Justice | AAJC, Color of Change, and the National Hispanic Media Coalition (“NHMC”), by their counsel, the Institute for Public Representation, urge the Federal Election Commission (“FEC” or “Commission”) to promptly begin a rulemaking to promulgate effective, up-to-date disclosure regulations for internet communications.<sup>1</sup> As

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<sup>1</sup> Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”) is dedicated to civil and human rights for Asian Americans and to promoting a fair and equitable society for all. Advancing Justice | AAJC provides the growing Asian American community with multilingual resources, culturally appropriate community education, and public policy and civil rights advocacy. In the communications field, Advancing Justice | AAJC works to promote access to critical technology, services, and media for our communities.

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

Congress recognized in passing and amending the Federal Election Campaign Act (“Act”), voters need to know who paid for and authorized political advertisements so they may make informed decisions. Insufficient disclosure in political communications undermines the election process.

In recent years, the amount of online political advertising has increased dramatically. The FEC’s existing regulations, which were adopted in 2006, do not explicitly require disclosure of the sponsors of political advertisements delivered on smartphones and through social media. A rulemaking proceeding is needed to update the FEC’s disclosure rules in light of technological changes and the increased use of online communications for political advertising.

Moreover, without disclosure, voters are susceptible to deceptive campaign practices that attempt to spread confusion, discourage voters, or disseminate false information. During the 2016 election, some advertisers used targeted online communications to inflame racial hatred and divide the voting public. The online advertising ecosystem has developed sophisticated methods for profiling individuals based on race, ethnicity, gender, income, voting patterns, and many other factors. Advertisers can target ads to specific individuals or groups in a variety of ways, including sponsored stories on Facebook, Twitter feeds, and interactive television. Advertisers are also increasingly able to track users’ behavior across their devices.<sup>2</sup> By connecting a person’s activities across his or her smartphones, tablets, desktop computers, and other connected devices, advertisers can even more comprehensively track, profile, and target people.

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

<sup>2</sup> Fed. Trade Comm’n, *Cross- Device Tracking* (2017), [https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc\\_cross-device\\_tracking\\_report\\_1-23-17.pdf](https://www.ftc.gov/system/files/documents/reports/cross-device-tracking-federal-trade-commission-staff-report-january-2017/ftc_cross-device_tracking_report_1-23-17.pdf).

Persons of color are particularly hurt by the lack of online disclosures because they are more likely to depend on a smartphone to access information about elections and political campaigns. Thus, the Commission should promptly begin a rulemaking to update its rules to ensure adequate disclosure of political advertising and to deter abuses of online political advertising.

## **I. CURRENT FEC REGULATIONS DO NOT ADEQUATELY ADDRESS ONLINE POLITICAL COMMUNICATIONS**

### **A. The Commission's 2006 Rulemaking Did Not Anticipate Current Online Advertising Practices**

The Act requires certain communications made by persons or committees to contain a disclosure revealing the identity of the entity paying for and authorizing the communication.<sup>3</sup> The purpose of this disclosure is to provide voters the ability to fully evaluate the content of the communication, allow voters to make informed decisions, and prevent deceptive campaign practices.<sup>4</sup>

After passage of the Bipartisan Campaign Reform Act amending the Act, the Commission promulgated rules concerning the *types* of communications that required disclosures. Initially, those rules did not require disclosure of any political advertising on the internet. Members of Congress challenged those rules. After the court found that the exclusion of internet ads contradicted congressional intent,<sup>5</sup> the Commission initiated a proceeding to revise its rules in compliance with the court's decision. The amended rules now require

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<sup>3</sup> 52 U.S.C.A. § 30120 (West).

<sup>4</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368 (2010) (“[D]isclaimers provide information to the electorate and insure that the voters are fully informed about who is speaking. At the very least, they avoid confusion by making clear that the ads are not funded by a candidate or political party.”)

<sup>5</sup> *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd sub nom. Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005).

disclosure for internet communications only if they are “placed for a fee on another person’s Web site.”<sup>6</sup>

In publishing its final rules, the Commission explained that paid advertising on another person’s “Web site” included “all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements and directed search results.”<sup>7</sup> Although this may have been true in 2006, today there are many more ways to communicate using the internet. The rise of social media, mobile applications, over-the-top video services, and online political advertising has rendered the 2006 rules ambiguous and ineffective.

The use of social media has grown tremendously since 2006. At the time of the Commission’s last rulemaking, approximately one in ten American adults used social media.<sup>8</sup> Today, more than one in three Americans is on social media.<sup>9</sup> In 2006, Facebook had about 12 million monthly users.<sup>10</sup> It now has over 2 billion active users.<sup>11</sup> Twitter had not yet opened to

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<sup>6</sup> 11 C.F.R. § 100.26.

<sup>7</sup> Internet Communications, 71 Fed. Reg. 18589, 18593 (Apr. 12, 2006).

<sup>8</sup> Andrew Perrin, *Social Media Usage: 2005-2015*, Pew Research Center (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

<sup>9</sup> Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Social Media Update 2016*, Pew Research Center (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/>.

<sup>10</sup> *Facebook: 10 Years of Social Networking, in Numbers*, Guardian (UK) (Feb. 4, 2014), <https://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>.

<sup>11</sup> Facebook, *Company Info*, <https://newsroom.fb.com/company-info/> (last visited Nov. 7, 2017).

the public when the Commission's 2006 rules were published,<sup>12</sup> and the first video had been uploaded to YouTube only a year before.<sup>13</sup> Instagram would not launch for another four years.<sup>14</sup>

The rise of social media coincides with the decline in blogging. In 2006, blogging was at its height, and it seemed as if everyone would have his or her own blog. The FEC's NPRM and many of the comments filed in that NPRM were concerned about the effect that requiring disclosures on political advertising on the internet would have on blogging. The FEC and commenters were justly concerned that ill-considered regulations might stifle political speech on the internet. Eleven years later, although many blogs are still active, blogging has declined and is much less of a factor on the internet than are mediated social media sites like Facebook and Twitter.<sup>15</sup>

Mobile applications are another technology that was unanticipated by the FEC's rules. In 2006, the mobile "smartphone" space was dominated by Palm, Blackberry, Nokia, and Microsoft's Pocket PC, with Palm controlling 9.2% and Nokia 54.3% of the worldwide mobile device market.<sup>16</sup> Apple had not yet announced the iPhone, which would not support third-party

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<sup>12</sup> See Michael Arrington, *Odeo Releases Twtr*, TechCrunch (July 15, 2006), <https://techcrunch.com/2006/07/15/is-twtr-interesting/>.

<sup>13</sup> Richard Alleyne, *YouTube: Overnight Success Has Sparked a Backlash*, Telegraph (UK) (July 31, 2008), <http://www.telegraph.co.uk/news/uknews/2480280/YouTube-Overnight-success-has-sparked-a-backlash.html>.

<sup>14</sup> Raisa Bruner, *A Brief History of Instagram's Fateful First Day*, Time (July 16, 2016), <http://time.com/4408374/instagram-anniversary/>.

<sup>15</sup> See, e.g., Kevin Drum, *Blogging Isn't Dead. But Old-School Blogging is Definitely Dying*, Mother Jones (Jan. 31, 2016), <http://www.motherjones.com/kevin-drum/2015/01/blogging-isnt-dead-old-school-blogging-definitely-dying/>; Omar Kabadayi, *Blogging is Dead, Long Live Blogging*, Guardian (UK) (July 16, 2014), <https://www.theguardian.com/media-network/media-network-blog/2014/jul/16/blogging-dead-bloggers-digital-content>.

<sup>16</sup> *Highlights from the Canalys Q4 2006 Global Smart Mobile Device Research*, Canalys (Feb. 12, 2007), <https://www.canalys.com/newsroom/64-million-smart-phones-shipped-worldwide-2006>.

applications until 2008.<sup>17</sup> The first Android phone was also two years away.<sup>18</sup> Today, 77% of U.S. adults own a smartphone, including 92% of Americans between 18 and 29.<sup>19</sup> Mobile internet users now outnumber desktop users in the U.S.<sup>20</sup> Mobile app advertising is a \$33 billion business in the U.S. alone.<sup>21</sup>

Americans are also watching video content in different ways than they did in 2006. Cable and satellite TV subscriptions are in decline. In 2017, 22 million people in the U.S. “cut the cord” and 34 million more have never subscribed to traditional pay TV.<sup>22</sup> By 2021, experts predict, 30% of American adults will not have cable or satellite paid TV. Americans are increasingly watching TV over the internet on streaming applications using their mobile devices or set-top boxes such as the Apple TV, Roku, or Amazon Fire. Over 220 million people will watch digital video content from the likes of Netflix, Hulu, and Amazon this year.<sup>23</sup> Netflix alone now has more U.S. subscribers than the six largest cable companies combined.<sup>24</sup>

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<sup>17</sup> Verge Staff, *iOS: A Visual History*, Verge (Sept. 16, 2013), <https://www.theverge.com/2011/12/13/2612736/ios-history-iphone-ipad>.

<sup>18</sup> Kent German, *A Brief History of Android Phones*, CNet (Aug. 2, 2011), <https://www.cnet.com/news/a-brief-history-of-android-phones/>.

<sup>19</sup> Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, Pew Research Center (Jan. 12, 2017), <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/>.

<sup>20</sup> Adam Lella, *Number of Mobile-Only Internet Users Now Exceeds Desktop-Only in the U.S.*, comScore (Apr. 28, 2015), <https://www.comscore.com/Insights/Blog/Number-of-Mobile-Only-Internet-Users-Now-Exceeds-Desktop-Only-in-the-U.S>.

<sup>21</sup> Artyom Dogtiev, *App Revenues 2017*, Business of Apps (Oct. 31, 2017), <http://www.businessofapps.com/data/app-revenues/>.

<sup>22</sup> Todd Spangler, *Cord-Cutting Explodes: 22 Million U.S. Adults Will Have Canceled Cable, Satellite TV by End of 2017*, Variety (Sept. 13, 2017), <http://variety.com/2017/biz/news/cord-cutting-2017-estimates-cancel-cable-satellite-tv-1202556594/>.

<sup>23</sup> Dana Feldman, *Netflix Remains Ahead of Amazon and Hulu with 128M Viewers Expected this Year*, Forbes (Apr. 13, 2017), <https://www.forbes.com/sites/danafeldman/2017/04/13/netflix-remains-ahead-of-amazon-and-hulu-with-128m-viewers-expected-this-year/>.

<sup>24</sup> Tom Huddleston Jr., *Netflix Has More U.S. Subscribers than Cable TV*, Fortune (June 15, 2017), <http://fortune.com/2017/06/15/netflix-more-subscribers-than-cable/>.

The “Internet of Things” (“IoT”) and personal voice assistants are two more examples of developments that were unanticipated by the FEC’s 2006 rules. IoT wearable devices such as watches, “smart home” devices such as Amazon Echo, virtual assistants such as Siri or Alexa, and even smart TVs and refrigerators can be used for advertising.

Methods of advertising online also have changed. Advertisers have available a vast array of tools for tracking users online, creating detailed profiles of their preferences and habits, and targeting them with ads tailored to exploit their weaknesses and biases. When used for political advertising without disclosure, these technologies pose a threat to democracy.

Political advertising on the internet has grown exponentially since 2006. In the 2004 election cycle, the presidential campaigns spent a combined \$2.6 million on online ads.<sup>25</sup> In 2016, digital campaign ad spending had increased three orders of magnitude to \$1.4 *billion*.<sup>26</sup> And digital advertising is not merely supplementing traditional ad spending, it is replacing it. From 2012 to 2016, broadcast TV spending fell 20% while online spending increased nearly 800%.

#### **B. The FEC’s Current Regulations for Internet Communications are Ambiguous**

These developments have resulted in at least three major ambiguities with respect to the applicability of the FEC disclosure requirements to internet communications.

First, it is unclear whether “communications placed for a fee on another person’s Web site” include advertisements that appear on social media or mobile applications accessed on a smartphone or tablet. As described above, this ambiguity exists because smartphone internet

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<sup>25</sup> Michael Cornfield, *Presidential Campaign Ads Online*, Pew Research Center (Sept. 3, 2004), <http://www.pewinternet.org/2004/10/03/presidential-campaign-ads-online/>.

<sup>26</sup> Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, AdAge (Jan. 3, 2017), <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>. “Digital advertising” includes “video ads, mobile, email, social and search.” *Id.*

access was in its infancy and mobile applications had not been created when the Commission promulgated disclosure requirements for internet communications.

Today, sophisticated and varied platforms render these outdated regulations inadequate and lead to absurd results. A simple example demonstrates this inadequacy: Under current regulations, if a committee pays to place an advertisement on YouTube, a disclosure would be required if the advertisement is viewed on [www.youtube.com](http://www.youtube.com) but would arguably not be required if the advertisement is viewed on the YouTube mobile application because that is not a “Web site.” In both scenarios, the voter receives the same advertisement and has the same need for disclosure; however, disclosure is only required in the first scenario.

Second, it is unclear whether the “small items” or impracticability exceptions apply to social media and mobile applications. The “small items” exemption covers “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.”<sup>27</sup> The other exemption is for “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.”<sup>28</sup> Google and Facebook have asked the Commission to find that certain internet political communications are exempt under these exceptions.<sup>29</sup> Given advanced levels of customization available for online communications, creative means of displaying disclosures may not be impracticable at all. Such issues should be addressed in a rulemaking proceeding in which many different types of online advertising and ways of disclosing sponsors can be fully considered.

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<sup>27</sup> § 110.11(f)(1)(i)

<sup>28</sup> § 110.11(f)(1)(ii).

<sup>29</sup> See FEC Advisory Opinion 2010-19 (Oct. 8, 2010); FEC Advisory Opinion Request 2011-09 (June 15, 2011).



A third ambiguity stems from the language of the FEC rules. In addition to the rules requiring disclosure in “public communications” by certain persons,<sup>30</sup> the rules also require disclosures on *all* “electioneering communications.”<sup>31</sup> But the definition of “electioneering communications” includes only broadcast communications and does not include internet communications.<sup>32</sup> It is not clear why the same type of communication is treated differently for disclosure purposes depending upon the medium used to distribute the communications.

An example demonstrates this problem. An electioneering communication made by a person appearing on a CBS broadcast station, such as WCBS-TV, would require a disclosure. However, that same communication made by the same person on CBS All Access, an online over-the-top streaming video service that also allows viewers to watch live TV, would not require a disclosure. Voters should know who is sponsoring a political advertisement regardless of where they see it. Thus, a rulemaking is needed to address the ambiguities and to ensure voters get the information that they need.

## **II. THE LACK OF ADEQUATE DISCLOSURE HAS A PARTICULARLY NEGATIVE IMPACT ON COMMUNITIES OF COLOR**

Because persons of color access the internet differently than do whites, it is important to them that disclosure requirements apply to paid political communications regardless of the medium. A Pew Research Center study found that Hispanics and African Americans are 155% and 67%, respectively, more likely to depend entirely on a smartphone to access the internet than white individuals.<sup>33</sup> Another study found that the number of lower-income households that rely

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<sup>30</sup> § 110.11(a)(1)–(3).

<sup>31</sup> § 110.11(a)(4).

<sup>32</sup> § 100.29.

<sup>33</sup> *Internet/Broadband Fact Sheet*, Pew Research Center (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

solely on smartphones to access the internet increased by 62% between 2013 and 2015.<sup>34</sup> That study also found that the number of individuals with a high school degree or less that relied solely on smartphones to access the internet increased by 64%. Equipped with knowledge that communities of color are much more likely to access the internet using a smartphone and that smartphone internet access is influenced by income and education levels, campaigns can carry out deceptive practices that discourage or confuse voters.

Asian Americans provide another example of a group that consumes media differently from the rest of the U.S. population. Southeast Asian and Pacific Islander Americans have some of the highest rates of poverty among all racial and ethnic groups in the United States and therefore have very low rates of broadband adoption.<sup>35</sup> But Asian Americans who are connected lead the U.S. population in use of the internet, mobile digital devices, and social media.<sup>36</sup> A Pew Research study found that 91% of English-speaking Asian Americans own a smartphone, compared to 66% of white individuals.<sup>37</sup> Asian Americans spend significantly more time on the internet<sup>38</sup> and consume more video content online. A Nielsen report found that Asian Americans

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<sup>34</sup> *Smartphones Help Those Without Broadband Get Online, but Don't Necessarily Bridge the Digital Divide*, Pew Research Center (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/smartphones-help-those-without-broadband-get-online-but-dont-necessarily-bridge-the-digital-divide/>.

<sup>35</sup> Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States: 2011*, [https://www.advancingjustice.org/pdf/Community\\_of\\_Contrast.pdf](https://www.advancingjustice.org/pdf/Community_of_Contrast.pdf).

<sup>36</sup> *Asian Americans: Culturally Diverse and Expanding Their Footprint*, Nielsen (2016), [http://nielsencommunity.com/report\\_files/Asian\\_Consumer\\_Report\\_2016\\_Final.pdf](http://nielsencommunity.com/report_files/Asian_Consumer_Report_2016_Final.pdf).

<sup>37</sup> Andrew Perrin, *English-speaking Asian Americans Stand Out for Their Technology Use*, Pew Research Center (Feb. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/02/18/english-speaking-asian-americans-stand-out-for-their-technology-use/>.

<sup>38</sup> *State of the Asian American Consumer: Growing Market, Growing Impact*, Nielsen (2012), <http://www.nielsen.com/content/dam/corporate/us/en/microsites/publicaffairs/StateoftheAsianAmericanConsumerReport.pdf>; *Significant, Sophisticated, and Savvy: The Asian American Consumer 2013 Report*, Nielsen (Dec. 3, 2013),

are 38% more likely to visit YouTube, 62% more likely to spend more time on the site, and 72% more likely to visit YouTube pages than the rest of the population.<sup>39</sup> Asian Americans also spend significantly less time on traditional TV than the rest of the population.<sup>40</sup> Thus, regulations that permit deceptive political advertising online but not on broadcast media would have an outsized impact on groups such as Asian Americans who consume more media online.

As frequent targets of voter suppression tactics, communities of color need to know the identity of the entity paying for and authorizing internet communications. There is evidence from the 2016 presidential election that advertisers took advantage of the lack of disclosure requirements and used social media, with its ability to highly target individuals, to engage in deceptive campaign practices.

Because of the lack of disclosure and the often time-limited duration of online advertising campaigns, it can be difficult to assess the extent of these deceptive practices. However, some examples of efforts to suppress the vote of persons of color have come to light. For example, weeks before the 2016 general election, the Trump campaign launched, as a campaign official put it, “major voter suppression operations” aimed at discouraging turnout among black voters.<sup>41</sup> The campaign targeted certain African Americans with an ad on Facebook. This advertisement featured an animation of Hillary Clinton with audio from her 1996 speech and the cartoon text,

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<http://www.nielsen.com/us/en/insights/reports/2013/significant-sophisticated-and-savvy-the-asian-american-consumer-report-2013.html>.

<sup>39</sup> *Significant, Sophisticated, and Savvy: The Asian American Consumer 2013 Report*, Nielsen (2013), <http://www.nielsen.com/us/en/insights/reports/2013/significant-sophisticated-and-savvy-the-asian-american-consumer-report-2013.html>.

<sup>40</sup> *Asian Americans: Culturally Diverse and Expanding Their Footprint*, Nielsen (2016), [http://nielsencommunity.com/report\\_files/Asian\\_Consumer\\_Report\\_2016\\_Final.pdf](http://nielsencommunity.com/report_files/Asian_Consumer_Report_2016_Final.pdf).

<sup>41</sup> Joshua Green & Sasha Issenberg, *Inside the Trump Bunker, With Days to Go*, Bloomberg Businessweek (Oct. 27, 2016), <https://www.bloomberg.com/news/articles/2016-10-27/inside-the-trump-bunker-with-12-days-to-go>.

“Hillary Thinks African Americans are Super Predators.” This ad was visible only to the targeted users.

Another example of online voter suppression is the dissemination of false information via Twitter telling voters that they could vote from home or by tweeting a certain message. One of these tweets featured an image (see Figure 1) of an African American woman with the text “Avoid the line. Vote from home. Text ‘Hillary’ to 59925. Vote for Hillary and be a part of history.”<sup>42</sup> This tweet falsely implied that one could vote by text, thereby discouraging voters from actually going to the polls.



Figure 1

Had these paid messages been delivered via broadcast, cable, or satellite communication, disclosure of the sponsor surely would have been required. Without disclosure requirements that bring transparency to online political communications, campaigns will continue to exploit communities of color through voter suppression tactics.

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<sup>42</sup> Jeff John Roberts, *Sneaky Ads on Twitter Tell Voters to Text Votes for Hillary Clinton*, Fortune (Nov. 3, 2016), <http://fortune.com/2016/11/03/text-vote-hillary-clinton/>.

### III. CONCLUSION

The ANPRM has been pending now for some six years. It is time for the FEC to get the rulemaking process started as soon as possible. The FEC should promulgate effective, up-to-date regulations that require disclosures of all forms of internet communications regarding elections and to ensure that new advertising techniques are not used to spread false information or to hinder voter participation.

Respectfully submitted,

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\* These comments were drafted primarily by Michael Shammo and Joshua Fitterman, law students in the Institute for Public Representation Communication & Technology Clinic, under the supervision of clinic attorneys.