

Reform for Online Political Advertising: Add on to the Honest Ads Act

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TABLE OF CONTENTS

I.	INTRODUCTION	83
II.	BACKGROUND.....	85
	A. <i>The Origins of Political Advertising Regulations for Cable and Broadcast Mediums</i>	85
	B. <i>Political Advertising on Broadcast and Digital Mediums</i>	88
	C. <i>The Shift To Digital Advertising and Advent of Microtargeting</i>	90
	D. <i>Courts Support Disclosure Requirements for Political Advertising</i>	92
	E. <i>Reporting Requirements are Essential to an Informed Electorate</i>	94
	F. <i>No Uniform Approach to Political Advertising Across Online Platforms</i>	96
III.	ANALYSIS	99
	A. <i>The Loophole in Disclosure Requirements for Political Advertising on Social Media</i>	99
	B. <i>Online Platforms Should Be Required to Disclose Political Advertising</i>	102
	C. <i>The Honest Ads Act Address Many of the Issues Presented by Political Advertising on Social Media Platforms</i>	105
	D. <i>To Provide Comprehensive Reform, the Honest Ads Act Needs a Provision Addressing Microtargeting</i>	107

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E. *The Honest Ads Act, As Incorporated by the For The People Act of 2021, Should Be Amended To Restrict The Targeting Options Available To Political Advertisers*..... 108

IV. CONCLUSION..... 110

I. INTRODUCTION

Since its advent, technology has been developing faster than regulations can keep up. Big technology companies like Facebook, Twitter, and Google thus developed in an environment virtually left up to their own creation. While only 5% of adults used social media in 2005, usership jumped to 50% by 2011.¹ In 2019, that number had jumped to 72%.² Despite the massive number of Americans engaging on social media and its prevalence in modern society, the legislature has failed to significantly address the regulatory concerns that have emerged from this digital environment. What has emerged is an ecosystem rooted by user data, fueled through user engagement, and sold out to advertisers for economic gain.

Where there were voters to influence, candidates for political office were not far behind. In the 2008 Presidential election contest between Barack Obama and John McCain, the candidates' respective campaigns first waded into online forums to reach voters through email and text message.³ In the 2012 Presidential election, online campaign efforts became even more sophisticated, with President Obama going to Tumblr to remind young voters of an upcoming Presidential debate.⁴ Social media in the 2016 Presidential election, however, became much more advanced when Russian entities capitalized on social media advertising to sow division among members of the American public.⁵

The idea of foreign interference in American elections shot Congress into action in the wake of the 2016 election. Less than a year later, Senators John McCain and Amy Klobuchar introduced the Honest Ads Act aimed at increasing transparency in online advertising and preventing foreign interference in United States (US) elections.⁶ The bill died in committee.⁷ Recently, the Honest Ads Act and its provisions have been wrapped into Democrats' comprehensive, anti-corruption bill known as the For The People

1. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [https://perma.cc/W2LM-MKNS].

2. *Id.*

3. Aaron Smith, *The Internet's Role in Campaign 2008*, PEW RSCH. CTR. (Apr. 15, 2009), <https://www.pewresearch.org/internet/2009/04/15/the-internets-role-in-campaign-2008/> [https://perma.cc/XGF2-SADJ].

4. Jenna Wortham, *Campaigns Use Social Media to Lure Young Voters*, N.Y. TIMES (Oct. 7, 2012), <https://www.nytimes.com/2012/10/08/technology/campaigns-use-social-media-to-lure-younger-voters.html> [https://perma.cc/RG4U-965K].

5. Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html> [https://perma.cc/M7EL-JFN3].

6. Honest Ads Act, S. 1989, 115th Cong. (2017).

7. S. 1989 *Honest Ads Act: Actions*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1989/all-actions> (last visited Apr. 6, 2021). Senator Klobuchar reintroduced the Honest Ads Act in 2019 with Senators Lindsay Graham and Mark Warner, to no avail. See Honest Ads Act, S. 1356, 116th Cong. (2019).

Act.⁸ While the bill passed the House of Representatives in both 2019 and 2021, it has yet to receive Senate approval or a Presidential signature.⁹ Today, it has been 12 years since politics met social media, and there are still no laws regulating it.

Over the last few years, social media platforms have continued to blunder along with no regulations or guidance at the cost of the American people's confidence in our democracy. In 2018, news of Facebook's mishandling of millions of users' data in the *Cambridge Analytica* scandal broke.¹⁰ Though it seemed like new privacy laws to protect user data were just around the corner, Facebook escaped with a Congressional hearing¹¹ and a \$5 billion FTC fine¹² — a drop in the bucket for the company, which was worth \$629.6 billion at the time the fine was levied.¹³ In the aftermath of the 2020 election, unregulated social media companies have been the root of political misinformation distributed to voting consumers.¹⁴

Although tech companies have little incentive to curb the use of their platforms for political advertising—data shows that that groups like Facebook, Google, and others raked in \$1.3 billion from digital advertising in the 2020 election cycle alone¹⁵— some have taken steps toward transparency. As of 2021, a small handful of platforms are offering political “Ad Libraries” for the public.¹⁶ These efforts to stave off government regulation are

8. For The People Act of 2021, H.R. 1, 117th Cong. §4201 (as passed by House, Mar. 3, 2021); *see also* Peter Overby, *House Democrats Introduce Anti-Corruption Bill as Symbolic 1st Act*, NAT. PUB. RADIO (Jan. 5, 2019 7:01 AM), <https://www.npr.org/2019/01/05/682286587/house-democrats-introduce-anti-corruption-bill-as-symbolic-first-act> [https://perma.cc/V886-6N6U].

9. *See* For The People Act, S. 949, 116th Cong. (2019); *see also* For The People Act of 2021, H.R.1, 117th Cong. (2021).

10. Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [https://perma.cc/386W-D4UR].

11. *Facebook CEO Mark Zuckerberg Hearing on Data Privacy and Protection*, C-SPAN (Apr. 10, 2018), <https://www.c-span.org/video/?443543-1/facebook-ceo-mark-zuckerberg-testifies-data-protection> [https://perma.cc/EZK9-WRF2].

12. Press Release, Fed. Trade Comm'n, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019) (online with FTC at <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>) [https://perma.cc/GG5Y-M9JY].

13. Romain Dillet, *Facebook Officially Loses \$123 Billion in Value*, TECHCRUNCH (July 26, 2018, 9:32 AM), <https://techcrunch.com/2018/07/26/facebook-officially-loses-123-billion-in-value/> [https://perma.cc/8AJ4-3NDN].

14. Kevin Roose, *Tracking Viral Misinformation*, N.Y. TIMES (Mar. 4, 2021, 4:38 PM), <https://www.nytimes.com/live/2020/2020-election-misinformation-distortions>.

15. Kate Gibson, *Spending on U.S. Digital Political Ads to Top \$1 Billion for the First Time*, CBS NEWS (Feb. 12, 2020), <https://www.cbsnews.com/news/spending-on-us-digital-political-ads-to-cross-1-billion-for-first-time/> [https://perma.cc/76GR-SH9R].

16. *See Snap Political and Advocacy Ads Library*, SNAPCHAT, https://businesshelp.snapchat.com/s/article/political-ads-library?language=en_US (last visited Apr. 3, 2021); *see also Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US (last visited Apr. 3, 2021); *see also Political Advertising in the United States*, GOOGLE: TRANSPARENCY REP., <https://transparencyreport.google.com/political-ads/region/US> (last visited Apr. 3, 2021) [https://perma.cc/A5P7-J8K9].

insufficient to satisfy the American public's need for regulation of social media giants in its electoral process. While the Honest Ads Act may become law as part of the For the People Act of 2021, its provisions are only part of the solution to the problem created by 12 years of Congressional inaction.¹⁷

This note will first provide background on the regulation of cable and broadcast advertising and how it is currently regulated today. Second, it will provide the legal grounding for requiring disclosure of political spending in campaigns. Third, it will outline the important role that disclosure plays in public information. Fourth, it will outline the harmful effects of unregulated political advertising on online tech platforms, namely microtargeting. Fifth, it will discuss the way tech platforms have attempted to self-regulate political advertising on media platforms. Sixth, it will discuss the loophole in legislation that allows social media platforms to circumvent disclosure requirements. Finally, it will discuss the legal foundation for regulating social media platforms' political digital advertising and why the Honest Ads Act falls short of addressing the issues presented by the lack of regulation in digital political advertising.

II. BACKGROUND

A. *The Origins of Political Advertising Regulations for Cable and Broadcast Mediums*

Radio and cable have been regulated by Congress since 1927¹⁸ and 1965,¹⁹ respectively, laying the groundwork for the current regulatory scheme for political advertising seen with the Federal Communications Commission (FCC). This section will first give a brief history of the legislative responses to broadcast mediums and the origination of regulations for political advertising. This section will then discuss the FCC's current regulatory scheme for political advertising on broadcast networks and the disclosure requirements imposed on those broadcasters.

When radio became a popular form of communication in America in the early 1920s,²⁰ Congress responded by passing the Radio Act of 1927.²¹ This Act created the Federal Radio Commission (FRC),²² which was tasked with licensing radio stations, reducing interference, and regulating content "related to the broadcasting stations by legally qualified candidates and censorship over material for broadcast."²³ This power, given to the FRC in

17. Honest Ads Act, S. 1356, 116th Cong. (2019).

18. Radio Act of 1927, 47 U.S.C.A. § 119 (repealed 1934).

19. *Cable Television*, FCC, <https://www.fcc.gov/media/engineering/cable-television> (last accessed Apr. 4, 2021) [<https://perma.cc/S7KW-JP5W>].

20. Marina Koestler Ruben, *Radio Activity: The 100th Anniversary of Public Broadcasting*, SMITHSONIAN MAG. (Jan. 26, 2020), <https://www.smithsonianmag.com/history/radio-activity-the-100th-anniversary-of-public-broadcasting-6555594/> [<https://perma.cc/D9R2-M8GP>].

21. Radio Act of 1927, 47 U.S.C.A. § 119 (repealed 1934).

22. Radio Act of 1927, 47 U.S.C.A. § 83 (repealed 1934).

23. *Id.*

section 18 of the Radio Act, was seen as the precursor²⁴ to the modern “equal opportunities” rule which requires broadcasters who open the door to political advertising to give all registered candidates equal access to their facilities.²⁵

Congress replaced the Radio Act of 1927 upon its expiration with the Communications Act of 1934, which created the modern FCC.²⁶ Notably, § 315 of the Communications Act of 1934 codified the equal opportunities requirement and laid out the “political record” requirement that broadcasters disclose a “complete record of a request to purchase broadcast time” for political advertisements run on their networks.²⁷ Recently, the Bipartisan Campaign Reform Act of 2002 (BCRA) updated § 315 and broadened its disclosure requirements to include advertisements that discuss any “political matter of national importance.”²⁸

Today, the FCC requires broadcasters—which the FCC defines as “radio, television, wire, satellite and cable”—to comply with an extensive list of disclosure requirements for political advertisements purchased on their networks.²⁹ Broadcasters are required to keep and compile an online, publicly available “political file”³⁰ for any advertisement that:

- (A) is made by or on behalf of a legally qualified candidate for public office; or (B) communicates a message relating to any political matter of national importance, including—
 - (i) a legally qualified candidate;
 - (ii) any election to Federal office; or
 - (iii) a national legislative issue of public importance.³¹

The FCC was forced to clarify the parameters of § 315, as modified by BCRA, in October 2019 in response to legal action taken against broadcasters who failed to comply with the disclosure requirements for political advertisements.³² In the FCC’s opinion, referred to as the Political File Order,³³ the commissioners clarified that broadcasters were required to provide detailed disclosures for “each request to purchase political advertising

24. Sharon L. Morrison, *Radio Act of 1927 (1927)*, FREE SPEECH CTR.: FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1091/radio-act-of-1927#:~:text=Radio%20Act%20of%201927%20created%20Federal%20Radio%20Commission&text=Transmission%20facilities%2C%20reception%2C%20and%20service,%2C%20convenience%2C%20and%20necessity%3B%20> [https://perma.cc/2KDX-QPRN].

25. Communications Act of 1934, 47 C.F.R. § 73.1941 (2021).

26. 47 U.S.C. § 151.

27. 47 U.S.C. § 315(a), (e).

28. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

29. *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Apr. 4, 2021).

30. *Public Inspection Files*, FCC, <https://publicfiles.fcc.gov/> (last visited Apr. 4, 2021).

31. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

32. Complaints Involving the Political Files of WCNC-TV, Inc., Licensee of Station WCNC-TV, Charlotte, NC, et al., *Memorandum Opinion and Order*, 19 FCC Rcd 100, para. 1 (2019) [hereinafter *WCNC-TV Opinion*].

33. Complaints Involving the Political Files of WCNC-TV, Inc., Licensee of Station WCNC-TV, Charlotte, NC, et al., *Order on Reconsideration*, 20 FCC Rcd 49, para. 1 (2020) [hereinafter *WCNC-TV Order*].

time.”³⁴ The FCC mandated that those disclosures include information on “*all* political matters of national importance, including the names of *all* legally qualified candidates for federal office (and the offices to which they are seeking election), *all* elections to federal office, and *all* national legislative issues of public importance, to which the communication refers.”³⁵ Furthermore, the disclosures would have to include “*all* of the chief executive officers or members of the executive committee or board of directors of any person seeking to purchase political advertising time.”³⁶ Finally, the FCC’s opinion clarified the definitions of “legally qualified candidate,” “national legislative issue of public importance,” and “political matter of national importance”—all of which trigger the aforementioned disclosure requirements if referenced in the content of the advertisement.³⁷

The FCC revisited its Political File Order just a few months later in April 2020.³⁸ In that Order on Reconsideration, the FCC clarified that the requirements discussed in the Political File Order applied to issue advertisers’ requests to purchase political advertising time, not to requests from legally qualified candidates.³⁹ The FCC further stated that it would apply a “standard of reasonableness and good faith decision-making” to broadcasters’ efforts to comply with the Political File Order.⁴⁰

In the wake of these decisions, broadcasters have been locked into making thorough, publicly available disclosures for political advertisements made on their networks.⁴¹ Today, the FCC’s website instructs that broadcasters document each purchase request from a candidate or issue advertiser⁴² with the accompanying information:

34. *WCNC-TV Opinion*.

35. *Id.*

36. *Id.*

37. *Id.* FCC interpreted “‘the term ‘legally qualified candidate’ to mean legally qualified candidates for federal office, and the term ‘national legislative issue of public importance’ to include issues that are the subject of federal legislation that has been introduced and is pending in Congress at the time a request for air time is made. The term ‘political matter of national importance’ encompasses political issues that are the subject of controversy or discussion at the national level, regardless of whether such issues relate to a legally qualified candidate, an election to federal office, or a national legislative issue of public importance.’” *Id.*

38. Complaints Involving the Pol. Files of WCNC-TV, Inc., Licensee of Station WCNC-TV, Charlotte, NC, et al. Complaints Involving the Pol. Files of Scripps Broad. Holdings, LLC, Licensee of Station WCPO-TV, Cincinnati, Oh Complaints Involving the Pol. Files of Meredith Corp., Licensee of Station WPCH-TV, Atlanta, Ga, & Georgia Television, LLC, Licensee of Station WSB-TV, Atlanta, Ga, *Order on Reconsideration*, 35 FCC Rcd 3846, para. 1 (2020) [hereinafter *Order on Reconsideration*].

39. *Id.*

40. *Id.*

41. *Id.*

42. *The Public and Broadcasting: Online Political Files*, FCC, <https://www.fcc.gov/media/radio/public-and-broadcasting#ONLINEPOLITICAL> [<https://perma.cc/U7UY-6MW9>] (last visited Apr. 4, 2021).

whether the request is accepted or rejected, the rate charged, the date/time the ad ran or will run, the class of time purchased, the name of the candidate, the office being sought, the issues that are referenced, the name of the person or entity purchasing the time, and a list of executives of the sponsoring entity.⁴³

Broadcasters must list all issues brought up in the advertisement, whether the advertisement references multiple issues,⁴⁴ and must ensure that the advertisement properly identifies its sponsors.⁴⁵

B. Political Advertising on Broadcast and Digital Mediums

Despite the rise of digital media, candidates and third parties have still spent the most money airing their political advertisements on broadcast mediums.⁴⁶ This section will discuss the prominence of political advertising on both broadcast and digital media platforms.

The 2020 Presidential election is estimated to have cost \$14 billion,⁴⁷ an estimated \$6.7 billion of which was spent on political advertising.⁴⁸ Approximately \$4.9 billion was spent on broadcast advertising, with \$1.8 billion spent on digital advertising.⁴⁹ As of October 21st, 2020, a record 4.9 million political advertisements had been aired on television, a “volume . . . more than twice the volume of ad airings in the 2012 and 2016 presidential election cycles—and well above the previously record-setting midterm election ad volumes in 2018.”⁵⁰ As of that same date, President Biden had spent \$249,866,340 on broadcast television advertising, while former President Trump comparably spent \$174,641,694 and dedicated more to digital advertising efforts.⁵¹

The pandemic helped facilitate the shift to digital advertising in the 2020 Presidential election, as events that would once have been held in person transformed into virtual events.⁵² This could partially account for why more than twice the amount of money was spent on digital advertising in 2020 than

43. *Id.*

44. *WCNC-TV Opinion.*

45. *The Public and Broadcasting: Online Political Files*, *supra* note 42.

46. Sara Fischer, *Money Still Pouring into Election Ads*, AXIOS (May 18, 2020), <https://www.axios.com/money-still-pouring-into-election-ads-c3cd81f1-c856-486f-b0ee-996d80699524.html> [<https://perma.cc/KKY4-UGLH>].

47. OpenSecrets.org, *2020 Election to Cost \$14 Billion, Blowing Away Spending Records*, OPENSECRETS (Oct. 28, 2020, 1:51 PM), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/> [<https://perma.cc/D8WY-M8MM>].

48. Fischer, *supra* note 46.

49. *Id.*

50. Wesleyan Media Project, *Record Shattering 2020 Ad Volumes*, WESLEYAN MEDIA PROJECT (Oct. 21, 2020), <https://mediaproject.wesleyan.edu/releases-102120/> [<https://perma.cc/B627-JVZR>].

51. Wesleyan Media Project, *Presidential General Election Ad Spending Tops \$1.5 Billion*, WESLEYAN MEDIA PROJECT (Oct. 29, 2020), <https://mediaproject.wesleyan.edu/releases-102920/#table1> [<https://perma.cc/9389-WU5A>].

52. Fischer, *supra* note 46.

in 2018.⁵³ However, digital spending has been increasing for nearly a decade, as the 2016 Presidential election also saw the amount of digital spending quadruple from the 2012 Presidential election.⁵⁴

The exponential increase in digital spending mirrors the public's shift towards online news sources. In 2006, the FEC "noted that only 18 percent of all Americans cited the internet as their leading source of news about the 2004 Presidential election,"⁵⁵ but by 2016, the Pew Research Center "found that 65 percent of Americans identified an internet-based source as their leading source of information for the 2016 election."⁵⁶ A 2020 Pew Research Center poll suggested that number is even higher today, with 86 percent of people getting their news from their smartphone or tablet, and 52 percent of people actually preferring to get their news from digital platforms as opposed to television, radio, or print.⁵⁷

The 2020 Presidential campaigns updated their strategies to capture the digital voter. While President Biden spent over \$166 million on digital media, former President Trump had spent over \$200 million on digital media as of October 2020.⁵⁸ These numbers show that the Trump campaign spent a higher percentage of his advertising dollars on digital media than broadcast media, despite television media still being a reliable place for candidates to spend their ad dollars.⁵⁹

Facebook and Google Ads were the most popular recipients of digital political advertising dollars. President Biden funneled \$145.6 million to Google and Facebook advertising, while former President Trump spent \$145.1 million on the same expense.⁶⁰ In the 2020 Senatorial elections, candidates Amy McGrath, Jaime Harrison, Mark Kelly, Mitch McConnell, and Lindsay Graham all spent record amounts on Facebook and Google Ads.⁶¹

53. *Id.*

54. Honest Ads Act, S. 1356, 116th Cong. §3(4) (2019).

55. *See id.* §3(8).

56. *Id.*

57. Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/> [<https://perma.cc/X74S-JC57>].

58. *Presidential General Election Ad Spending Tops \$1.5 Billion*, *supra* note 51.

59. Howard Homonoff, *2020 Political Ad Spending Exploded: Did it Work?*, FORBES (Dec. 8, 2020, 9:28 AM), <https://www.forbes.com/sites/howardhomonoff/2020/12/08/2020-political-ad-spending-exploded-did-it-work/?sh=7a6e9b053ce0> [<https://perma.cc/N9N5-VUCX>].

60. Simon Dumenco & Kevin Brown, *Here's What Trump and Biden Have Spent on Facebook and Google Ads*, AD AGE (Oct. 30, 2020), <https://adage.com/article/campaign-trail/heres-what-trump-and-biden-have-spent-facebook-and-google-ads/2291531> [<https://perma.cc/KP9F-8MV5?type=image>].

61. Ollie Gratzinger, *Senate Candidates Spend Record Sums on Online Ads*, OPENSECRETS (Sept. 16, 2020, 4:35 PM), <https://www.opensecrets.org/news/2020/09/senate-candidates-920-online-ads/> [<https://perma.cc/532Q-SNHT>].

C. *The Shift to Digital Advertising and Advent of Microtargeting*

As campaigns turned their digital media efforts to political advertising on platforms such as Google and Facebook, candidates gained the ability to use those platforms' user data to target specific groups of voters.⁶² The increase in political advertising on these social media platforms gave way to candidates and advertisers implementing a strategy referred to as microtargeting, where "a political advertiser can craft a specific ad to a much narrower intended audience and only that specific audience."⁶³ Social media platforms have a host of user data at their disposal, allowing online advertisers to target their message to audiences based on user characteristics ranging from age and gender to more specific data points such as an individual's home ownership status or shopping habits.⁶⁴ In contrast, broadcasters rely on more basic demographics like the station, show, time of day, and the designated market area to target their political advertisements: even though they can extrapolate demographic data like age and ethnicity.⁶⁵ This section will briefly outline microtargeting before addressing both criticisms and benefits of political advertisers' ability to serve specific messages to a carefully tailored audience.

When placing a particular advertisement with an online platform like Facebook or Google, advertisers have the ability to select the audience to which that advertisement will be served based on data offered by the platform.⁶⁶ Companies, brands, and businesses may use these features to target an audience most likely to be interested in their products—and to save money by advertising directly to a smaller group of interested users—but these tools are put to a much different use in the political context.⁶⁷ Candidates for political office, political organizations, and incumbent politicians use microtargeting for purposes like voter registration,⁶⁸ issue mobilization, and voter persuasion.⁶⁹ For example, microtargeting can help political advertisers

62. Christopher Mims, *Who Has More of Your Personal Data Than Facebook? Try Google*, WALL ST. J. (Apr. 22, 2018, 8:00 AM), <https://www.wsj.com/articles/who-has-more-of-your-personal-data-than-facebook-try-google-1524398401>.

63. Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation* 29-31 (Geo. Wash. Univ. L. Sch. Pub. L. & Legal Theory Paper No. 2020-48, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672257.

64. Caitlin Dewey, *98 Personal Data Points that Facebook Uses to Target Ads to You*, WASH. POST (Aug. 19, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/> [<https://perma.cc/MM7V-THWG>].

65. Daniel Kreiss & Bridget Barrett, *Democratic Tradeoffs: Platforms and Political Advertising*, 16 OHIO STATE TECHNOLOGY L. J., 493, 507 (2020).

66. *Micro-Targeting: The Good, the Bad and the Unethical*, CAMBRIDGE WIRELESS (Aug. 16, 2018), <https://www.cambridgewireless.co.uk/news/2018/aug/16/micro-targeting-the-good-the-bad-and-the-unethical/> [<https://perma.cc/AM3C-WMPC>].

67. *Id.*

68. Kyle Endres & Kristin J. Kelly, *Does Microtargeting Matter? Campaign Contact Strategies and Young Voters*, J. ELECTIONS, PUB. OP. & PARTIES, Sept. 25, 2017, at 1, 3.

69. Tanzina Vega, *Online Data Helping Campaigns Customize Ads*, N.Y. TIMES (Feb. 20, 2012), <https://www.nytimes.com/2012/02/21/us/politics/campaigns-use-microtargeting-to-attract-supporters.html> [<https://perma.cc/LC72-M8N2>].

“reach niche audiences, such as swing state voters concerned about climate change”⁷⁰ However, the same data can be put to more sinister uses. In the 2016 election, Cambridge Analytica used Facebook’s data to target Black voters in battleground states with “deterrence” advertisements encouraging them not to vote; Black turnout fell over 12 points in those states.⁷¹ As of the 2020 election, the Republican National Committee boasted that it “has more than 3,000 data points on every voter” – a number of which are provided by Facebook—to use in its creation of targeted online advertisements.⁷²

Critics of microtargeting include former FEC Commissioner Ellen Weintraub. In a *Washington Post* op-ed, she called microtargeting “a potent weapon for spreading disinformation and sowing discord.”⁷³ She explained that “the microtargeting of political ads may be undermining the united character of our United States,” since restricting the audience to which the advertisement is served also restricts the opportunity for counterspeech—a First Amendment hallmark encouraging the sharing of conflicting opinions.⁷⁴ Weintraub argued that the solution should be to eliminate microtargeting completely to “[e]nhance transparency and accountability . . . deter and flush out disinformation . . . [and] unite us.”⁷⁵

Some scholars also suggest that microtargeting “facilitates hidden, narrow, and potentially manipulative appeals and therefore incentivizes the most extremist content.”⁷⁶ They point to the Russian-operated Internet Research Agency’s use of microtargeting as a divisive tool in the 2016 election, when the group targeted users who had already visited webpages on controversial topics with advertisements that “seemed to fan division on

70. Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00 PM), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> [<https://perma.cc/K5DP-5T4H>].

71. Craig Timberg & Isaac Stanley-Becker, *Cambridge Analytica Database Identified Black Voters as Ripe for ‘Deterrence,’ British Broadcaster Says*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/technology/2020/09/28/trump-2016-cambridge-analytica-suppression/> [<https://perma.cc/RF75-EVHV>]. Facebook has since limited advertisers’ targeting abilities based on “potentially sensitive personal attributes,” including race. See *Simplifying Targeting Categories*, FACEBOOK (Aug. 11, 2021), <https://www.facebook.com/business/news/update-to-facebook-ads-targeting-categories> [<https://perma.cc/4GEF-Y3UY>].

72. Geoffrey A. Fowler, *How Politicians Target You: 3,000 Data Points on Every Voter, Including Your Phone Number*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/political-campaign-data-targeting/> [<https://perma.cc/8WEW-WT9D>].

73. Ellen L. Weintraub, *Opinion, Don’t Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/> [<https://perma.cc/R962-5YJ9>].

74. *Id.*

75. *Id.*

76. Kreiss & Barrett, *supra* note 65, at 513.

polarizing issues such as gun control and race relations.”⁷⁷ These scholars suggest that limiting advertisers’ targeting tools would force “campaigns to appeal to a broader, more inclusive, form of civil social solidarity.”⁷⁸ Other scholars echo former Commissioner Weintraub’s misinformation concerns, arguing that microtargeting is “essentially preventing others from accessing and scrutinizing the content of the ad” letting “a campaign . . . make different – and even contradictory – appeals to voters” which “increases the possibility that a politician might lie with impunity.”⁷⁹

Others point to the fact that this method may not be all bad, since when employed by political advertisers to mobilize voters it has proven “effective at raising voter turnout, especially for historically marginalized and disenfranchised voters.”⁸⁰ Additionally, because online advertising is so affordable compared to traditional mailers and pamphlets,⁸¹ microtargeting helps smaller entities like “NGOs, non-profits, and political challengers reach their audiences in a cost-effective way.”⁸²

D. Courts Support Disclosure Requirements for Political Advertising

In the FCC’s April 2020 Order on Reconsideration, FCC Commissioner Michael O’Rielly wrote a separate statement warning that “government regulators must tread very lightly when it comes to compelling or restraining the speech of private entities, especially when it comes to the transmission of political speech to the American people via broadcast or other telecommunications services”⁸³ because of the First Amendment implications. However, the courts have repeatedly upheld disclosure requirements in political advertising over the course of nearly 50 years. This section will first discuss the treatment of disclosure requirements in landmark campaign finance case *Buckley v. Valeo*. It will then discuss twenty-first century cases that have since upheld the *Buckley* precedent, providing a strong legal foundation for requiring disclosure requirements in the context of political advertising.

77. Barbara Ortutay & Amanda Seitz, *Online Political Ads: Cheap, Efficient and Ripe for Misuse*, ASSOCIATED PRESS (Jan. 31, 2020), <https://apnews.com/article/eef44be313efdefa959ec7d7200474cc>; see also Craig Timberg, *Critics Say Facebook’s Powerful Ad Tools May Imperil Democracy. But Politicians Love Them.*, WASH. POST (Dec. 9, 2019), <https://www.washingtonpost.com/technology/2019/12/09/critics-say-facebooks-powerful-ad-tools-may-imperil-democracy-politicians-love-them/> [<https://perma.cc/YGE4-HPPV>].

78. Kreiss & Barrett, *supra* note 65.

79. Nunziato, *supra* note 63, at 30.

80. Kreiss & Barrett, *supra* note 65, at 514.

81. Ciara Torres-Spelliscy, Opinion, *A Lie Just for You in 2020*, BRENNAN CTR. FOR JUST. (Sept. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/lie-just-you-2020> [<https://perma.cc/9LPN-Y5SK>].

82. Viviana Padelli, *Facebook’s Political Ads Ban Misses the Mark*, MAPLIGHT NEWS ARCHIVE (Sept. 10, 2020), <https://maplightarchive.org/story/facebooks-political-ads-ban-misses-the-mark/> [<https://perma.cc/CT6S-A4RJ>].

83. *WCNC-TV Order*.

In 1976, the Supreme Court issued its landmark ruling in *Buckley v. Valeo*, which involved a challenge to the Federal Election Campaign Act of 1971 (FECA).⁸⁴ In response to the Watergate scandal, FECA had placed limits on how much candidates could spend, how much donors could contribute to campaigns, and imposed reporting requirements, requiring that campaigns disclose their donors.⁸⁵ Here, the Supreme Court addressed the permissibility of such requirements under the First Amendment.⁸⁶ While striking down spending limits, the Supreme Court upheld both contribution limits and disclosure requirements for advertisements that expressly advocated for or against a candidate.⁸⁷ In its opinion, the Court identified three government interests that it found substantial enough to justify the burden of disclosure on free speech: namely, preventing corruption; providing helpful information to voters; and aiding in the enforcement of other campaign finance laws.⁸⁸

The Supreme Court revisited the issue in *McConnell v. FEC* in 2003, which addressed a challenge to BCRA.⁸⁹ Among other things, this act expanded FECA's disclosure requirements to cover electioneering communications⁹⁰ in an attempt to close a loophole in disclosure requirements for issue advocacy.⁹¹ The *McConnell* court upheld disclosure requirements once more, explaining that FECA's "disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking . . . Moreover, the required disclosures 'would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters before election day.'"⁹² Thus, the *McConnell* court supported BCRA's disclosure requirements based on the justification set forth in *Buckley*—specifically, because of the role disclosure plays in providing helpful information to voters.

The Supreme Court took up the issue once more in 2010, in *Citizens United v. FEC*.⁹³ Here, *Citizens United* challenged BCRA's disclosure requirements as applied to the on-demand Hillary Clinton film at issue.⁹⁴ The Supreme Court again upheld BCRA's disclosure requirements as Constitutional, looking at the *Buckley* rationale of creating an informed

84. See *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

85. Mark Stencel, *The Reforms*, WASH. POST (June 13, 1997), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm> [<https://perma.cc/MAF2-V8VE>].

86. See *Buckley*, 424 U.S. at 14.

87. See *id.* at 35, 45, 84.

88. See *id.* at 64-85.

89. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 114 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

90. *Making Electioneering Communications*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/> [<https://perma.cc/V6DJ-KE9X>] (last visited Apr. 4, 2021). BCRA requires disclosures for "any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of a general election and is targeted to the relevant electorate." *Id.*

91. See *McConnell*, 540 U.S. at 129.

92. See *id.* at 201.

93. See *Citizens United*, 558 U.S. at 318.

94. See *id.* at 321.

electorate as it explained, “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁹⁵ The Court also nodded to *Buckley*’s anti-corruption rationale, saying that BCRA’s disclosure requirements help “citizens . . . see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”⁹⁶

Just four months after *Citizens United*, the Court decided *SpeechNow.org v. FEC*.⁹⁷ The *SpeechNow.org* court upheld BCRA’s disclosure requirements as applied to the 527 organization⁹⁸ saying that the “public has an interest in knowing who is speaking about a candidate and who is funding that speech . . . Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”⁹⁹ Identifying the same public information and anti-corruption interests as *Buckley*, the *SpeechNow.org* court held that “these are sufficiently important governmental interests to justify requiring SpeechNow” to disclose its donors to the FEC.

Overwhelmingly, the case history here demonstrates a strong precedent for upholding disclosure requirements in the context of political advertising, as long as the state can demonstrate that its interests in doing so are aligned with the *Buckley* rationales. This suggests that legislation to accomplish the goals of reducing corruption, providing information to the public, or aiding the enforcement of campaign finance laws would be upheld if it were ever challenged in court.

E. Reporting Requirements are Essential to an Informed Electorate

According to the *Buckley* court and its progeny, disclosure and reporting requirements serve important state interests—namely, preventing corruption, providing helpful information to voters, and aiding enforcement of other campaign finance laws. This section will address the most common justification for disclosure requirements seen post-*Buckley* cases—that reporting helps create an informed electorate—and how disclosure requirements work to achieve that state interest.

Political advertising is a campaign strategy used by candidates, political organizations, and third parties to persuade the public to vote for a candidate or policy. Voters rely on information from advertisements to form their opinions—in fact, multiple studies have found that voters take note of the

95. *See id.* at 370-71.

96. *See id.* at 370.

97. *See SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010).

98. A 527 organization refers to the IRS classification for political groups. *Types of Advocacy Groups*, OPENSECRETS, <https://www.opensecrets.org/527s/types.php> [https://perma.cc/XMX8-AEJU] (last visited Sept. 31, 2020).

99. *SpeechNow.org*, 599 F.3d at 698.

information disclosed to them in an advertisement, including the entity sponsoring that advertisement.¹⁰⁰ When interpreting advertisements, voters consider factors like the advertising intent, the tactics and appeals used, and the advertisement's bias.¹⁰¹ Thus, information about the source of the advertisement, like what BCRA requires for broadcasters, helps "viewers recognize the type of bias inherent in the advertisement."¹⁰² Without comparable disclosure requirements for online platforms, there is a risk that audiences may be "overly receptive to [the advertisement's] content."¹⁰³

The public's dedication to getting this information—and its actual consumption of this information—can be seen in both government and non-government organizations' efforts to provide disclosure reports to the public. At the government level, both the FCC and the FEC impose disclosure requirements on groups that engage in political advertising.¹⁰⁴ As discussed earlier, the FCC requires broadcasters to make detailed reports on every political advertisement distributed on their networks, which must be made available to the public via online political files.¹⁰⁵ The FEC comparably has an entire database dedicated to cataloging organizations' filings, expenditures, contributions, and donor lists, which are all available for public access.¹⁰⁶

Outside the government, a number of watchdog groups have organized to monitor and publish the information reported by the FCC and FEC.¹⁰⁷ For example, the Center for Responsive Politics hosts the website OpenSecrets, whose goal is to "to track the flow of money in American politics and provide the data and analysis to strengthen democracy. . . for Americans . . . to create a more vibrant, representative and accountable democracy."¹⁰⁸ On this site, the public can find extensive data on campaigns' fundraising efforts, donors, and spending for political candidates and officials at both the state and local level. Campaign Legal Center, a Washington D.C.-based group that filed the FCC complaint discussed in the Political File Order, monitors these disclosures and is dedicated to taking action to create a "transparent,

100. See Rachel E. Moran, *Who's Behind that Political Ad? The FCC's Online Political Files and Failures in Sponsorship Identification Regulation*, 11 INT'L J. COMM'N 4702, 4703 (2017) (finding that sponsorship identification can "alter how the message is perceived by the viewer"); see also Conor M. Dowling & Amber Wichowsky, *Attacks Without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising*, AM. J. POL. SCI., Sept. 2015, at 19, 33 (finding voter backlash against candidate when the candidate was the sponsor of the attack advertisement).

101. Moran, *supra* note 100, at 4703.

102. *Id.*

103. *Id.*

104. See *Public Inspection Files*, *supra* note 30; see also *Campaign Finance Data*, FED. ELECTION COMM'N, <https://www.fec.gov/data/> [<https://perma.cc/9AY7-FD36>] (last visited Apr. 2, 2021).

105. *Public Inspection Files*, *supra* note 30.

106. *Campaign Finance Data*, *supra* note 104.

107. *About Our Data*, FOLLOWTHEMONEY.ORG, <https://www.followthemoney.org/our-data/about-our-data> [<https://perma.cc/6PBL-T8XB>] (last visited Apr. 2, 2021).

108. *Our Vision and Mission: Inform, Empower & Advocate*, OPENSECRETS, <https://www.opensecrets.org/about/> [<https://perma.cc/63R8-4MNA>] (last visited Sept. 26, 2021).

accountable” democracy.¹⁰⁹ The National Institute on Money in Politics hosts the website “FollowTheMoney.org” which collects reports from government agencies and aggregates the data into a user-friendly display to literally “follow the money” in the American political system.¹¹⁰ The list goes on, demonstrating support—and public demand—for the information contained in disclosure reporting.

F. No Uniform Approach to Political Advertising Across Online Platforms

Online platforms have taken a variety of approaches on how to regulate and disclose political advertising on their websites. Each social media platform that permits political advertising has come up with some method of self-regulation, but the approaches vastly differ. This section will give an overview of the main policies social media platforms use to govern political advertising. It will also detail how these sites have attempted to self-regulate and provide their own disclosures to users.

Facebook, which received \$264 million from political advertisers in 2020’s third quarter,¹¹¹ subjects all political advertising to its own internal review process.¹¹² Political advertisements are generally permitted, so long as they do not contain any of Facebook’s prohibited content, such as “[a]ds with premature claims of election victory” or “[a]ds that are inconsistent with health authorities on voting safely.”¹¹³ On January 6th, 2021, Facebook further prohibited all advertising related to the Georgia runoff elections.¹¹⁴

Instagram, owned by Facebook,¹¹⁵ also permits political advertising on its platform with similar limitations. The platform requires “increased authenticity and transparency” for social issue advertisements according to the same standards as Facebook.¹¹⁶ It also stopped all “social issue, electoral, and political ads” after polls closed on November 3rd, 2021 to prevent voter

109. *About CLC*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/about> [<https://perma.cc/J88F-7X74>] (last visited Apr. 4, 2021).

110. FOLLOWTHEMONEY.ORG, *supra* note 107.

111. Ari Levy et al., *Why Political Campaigns Are Flooding Facebook with Ad Dollars*, CNBC (Oct. 9, 2021, 12:32 PM), <https://www.cnbc.com/2020/10/08/trump-biden-pacs-spend-big-on-facebook-as-election-nears.html> [<https://perma.cc/3LA4-SX2N>].

112. *Ads About Social Issues, Elections or Politics*, FACEBOOK: BUS. HELP CTR., <https://www.facebook.com/business/help/1838453822893854> (last visited Apr. 4, 2021).

113. *Information on Prohibited Ads Related to Voting and Ads About Social Issues, Elections or Politics in the United States During 2020 Election*, FACEBOOK: BUS. HELP CTR., <https://www.facebook.com/business/help/253606115684173> (last visited Apr. 4, 2021).

114. *An Update on the Georgia Runoff Elections for Advertisers*, FACEBOOK: FOR GOV’T, POL. & ADVOC. (Jan. 5, 2021, 1:30 PM), <https://www.facebook.com/gpa/blog/resuming-ads-in-georgia>.

115. Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES (Apr. 9, 2012, 1:15 PM), <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/> [<https://perma.cc/5ZLQ-NLMP>].

116. Instagram Business Team, *More Information on Social Issue Ads on Instagram*, INSTAGRAM (Oct. 26, 2020), <https://business.instagram.com/blog/more-information-on-social-issue-ads-on-instagram> [<https://perma.cc/5HBG-WQVN>].

confusion.¹¹⁷ Both Facebook and Instagram’s platforms were heavily used by contenders in the 2020 Presidential election, with the Biden campaign spending \$14 million on Facebook and Instagram advertisements and the Trump campaign spending \$6 million between the two platforms.¹¹⁸

Facebook has fleshed out its political advertising policies since it first debuted the policies in 2018.¹¹⁹ Today, Facebook and Instagram both require that the political advertiser be authorized by the platform before running social issue, electoral, or political advertisements.¹²⁰ The advertisements then go through Facebook’s internal review process and, if approved, are run with a disclaimer and sponsor identification.¹²¹ The advertisement is then catalogued in Facebook’s Ad Library, where it is saved for seven years.¹²² While the public can download and search the Ad Library to find the amount spent on the advertisement, how it performed, and whether the advertisement is still active, users cannot see the precise targeting the advertiser used—Facebook only displays the age, gender, and location in which the ad was run, despite providing myriads of other targeting demographics for political advertisers to utilize to reach their desired audience.¹²³ As of February 2021, university-affiliated researchers are now able to request “Ad Targeting” datasets containing targeting information on 1.65 million advertisements from August 3 to November 3, 2020.¹²⁴ However, this information is still not widely available to the public.¹²⁵

Google also allows for political advertising, though unlike Facebook,¹²⁶ it restricts the targeting options available to political advertisers to age, gender, zip code, and some targeting options using keywords and within apps.¹²⁷ Google also saw plenty of advertising in the 2020 Presidential

117. *Id.*

118. *Highlights and Analysis from Election Day 2020*, NBC NEWS, (Jan. 6, 2021), <https://www.nbcnews.com/politics/2020-election/live-blog/election-day-2020-live-updates-n1245892/ncrd1246074#blogHeader> [<https://perma.cc/R8CL-DD8K>].

119. Rob Leathern, *Shining a Light on Ads with Political Content*, FACEBOOK: NEWSROOM (May 24, 2018), <https://about.fb.com/news/2018/05/ads-with-political-content/> [<https://perma.cc/5L9A-EGV8>].

120. *Get Authorized to Run Ads About Social Issues, Elections or Politics*, FACEBOOK, <https://www.facebook.com/business/help/208949576550051?id=288762101909005> (last visited Apr. 4, 2021).

121. *Id.*

122. *About the Ad Library*, FACEBOOK, https://www.facebook.com/business/help/2405092116183307?id=288762101909005&helpref=faq_content (last visited Apr. 4, 2021).

123. *Id.*

124. Kiran Jagadeesh, Rishi Rajee, Isabella Leone, Andrew Gruen & Bennett Hillenbrand, *Introducing New Election-Related Ad Data Sets for Researchers*, FACEBOOK (Feb. 20, 2021), <https://research.fb.com/blog/2021/02/introducing-new-election-related-ad-data-sets-for-researchers/> [<https://perma.cc/BD3S-NTL7>].

125. *Id.*

126. Emily Glazer, *Facebook to Keep Targeted Political Ads but Give Users More Control*, WALL ST. J. (Jan. 9, 2020), <https://www.wsj.com/articles/facebook-to-keep-targeted-political-ads-but-will-give-users-more-control-11578567603> [<https://perma.cc/AS66-7LZK>].

127. *Political Content*, GOOGLE, <https://support.google.com/adspolicy/answer/6014595?hl=en> (last visited Apr. 4, 2021) [<https://perma.cc/AH2R-ZQ95>].

election—in fact, just two weeks before the election, YouTube (also owned by Google¹²⁸) reported that it was so overrun with political advertisements that it could not place them all.¹²⁹ During this election, President Biden spent \$9.7 million on Google Ads and former President Trump spent \$7.9 million.¹³⁰

Google initially launched transparency efforts in 2018, and has since developed its own approach to regulating political advertising on its platform.¹³¹ Google has adopted self-imposed restrictions on microtargeting, such as only allowing political advertisers to use geographic location, age, gender, and contextual targeting options like keywords, apps, pages, and videos.¹³² Google also requires that its political advertisements include a “paid for” disclosure whenever the advertisement is displayed to its selected audience.¹³³ Similar to Facebook, Google has created the Google Transparency Report, wherein users can see a geographic breakdown of where political advertising has occurred, search advertisers, and see recent political advertisements.¹³⁴ The Google Transparency Report also links directly to the FEC’s Campaign Finance Data Search Page.¹³⁵

Snapchat also permits election, advocacy, and issue advertisements, and rolled out its approach to self-regulation in 2019.¹³⁶ Snapchat places some restrictions on political advertisers, stating that it encourages “political advertisers to be positive” rather than running “attack ads,” and prohibits “political ads with attacks relating to a candidate’s personal life.”¹³⁷ Snapchat also has created a downloadable Snap Political Ads Library, which includes the name and address of the advertiser, the creative image, broad demographics targeted (e.g. “blue collar”), and geographic targeting

128. Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, N.Y. TIMES (Oct. 9, 2006), <https://www.nytimes.com/2006/10/09/business/09cnd-deal.html> [<https://perma.cc/3DVP-46TA>].

129. Mark Bergen, *YouTube Can't Place All the Political Ads It Gets*, BLOOMBERG (Oct. 22, 2020), <https://www.bloomberg.com/news/articles/2020-10-22/youtube-is-so-flooded-with-political-ads-it-can-t-place-them-all> [<https://perma.cc/YCT7-L9Q7>].

130. NBC NEWS, *supra* note 118.

131. Michee Smith, *Introducing a New Transparency Report for Political Ads*, GOOGLE: THE KEYWORD (Aug. 15, 2018), <https://blog.google/technology/ads/introducing-new-transparency-report-political-ads/> [<https://perma.cc/HA4P-7D74>].

132. Sorkin & Peters, *supra* note 128.

133. Smith, *supra* note 131.

134. *Id.*

135. *Id.*

136. *Snap Political & Advocacy Advertising Policies*, SNAP, INC., <https://www.snap.com/en-US/ad-policies/political> (last visited Apr. 4, 2021) [<https://perma.cc/Z468-DNMF>].

137. *Id.*

information.¹³⁸ Notably, Twitter¹³⁹ and Tik Tok prohibit all political advertising on their platforms.¹⁴⁰

III. ANALYSIS

A. *The Loophole in Disclosure Requirements for Political Advertising on Social Media*

While broadcast platforms, candidates, political parties, registered political organizations, or any group that makes independent expenditures are all required to participate in some sort of disclosure, social media platforms are noticeably exempt from any of these requirements.¹⁴¹ This is entirely because of Congress's inaction, which has left a hole in disclosure requirements through which billions of advertisements are either inconsistently reported or not reported at all.¹⁴² This section will first address the relevant legislation and its failure to encompass social media platforms. This section will then address the FCC and FEC's respective regulatory powers and their failure to reach social media platforms.

BCRA was passed in 2002 as an update to its predecessor, FECA.¹⁴³ FECA was passed in 1974 in response to the Watergate scandal.¹⁴⁴ It created the FEC, which was tasked with aggregating the newly required disclosure reporting.¹⁴⁵ However, FECA, as interpreted in *Buckley*, left a loophole that allowed donors to circumvent those disclosure requirements as long as the advertisement did not contain any "express advocacy" for or against a candidate for office.¹⁴⁶ *Buckley* defined "express advocacy" as the use of any one of eight specific phrases identified in the Court's opinion, such as "support" and "vote for."¹⁴⁷ If an advertiser simply avoided this list of phrases, the advertisement would be considered an issue advertisement rather than

138. *Snap Political Ads Library*, SNAP, INC., <https://www.snap.com/en-US/political-ads> (last visited Apr. 4, 2021) [<https://perma.cc/4F6J-NQE8>].

139. *Political Content*, TWITTER, <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html> (last visited Apr. 4, 2021) [<https://perma.cc/R7X8-D3N9>].

140. *TikTok Advertising Policies – Industry Entry*, TIKTOK, <https://ads.tiktok.com/help/article?aid=6685586866860720134> (last visited Apr. 4, 2021, 4:00 PM).

141. *See What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> (last accessed Apr. 4, 2021) [<https://perma.cc/V4JX-U68T>]; *see also Campaign Finance Data*, FED. ELECTION COMM'N, <https://www.fec.gov/data/> (last visited Apr. 2, 2021) [<https://perma.cc/VM6F-9BYZ>].

142. *See supra* Section 6.

143. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at various parts of the United States Code).

144. Stencil, *supra* note 85.

145. Federal Election Campaign Act, tit. 2, sec. 310(a)(1), § 437(c), 88 Stat. 1280 (1974) (current version at 52 U.S.C.A. § 30106).

146. *Buckley v. Valeo Summary*, FED. ELECTION COMM'N, <https://www.fec.gov/legal-resources/court-cases/buckley-v-valeo/> (last visited Apr. 4, 2021) [<https://perma.cc/2NRC-TEQM>].

147. *See Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

express advocacy, and would not be subject to FECA's disclosure requirements.¹⁴⁸ This loophole led to an increase in spending on non-disclosed "issue advocacy," which was dubbed "soft money."¹⁴⁹

BCRA was passed largely to address this "soft money" problem and bring transparency to the influx of issue advertising.¹⁵⁰ To do so it created a class of political advertising referred to as electioneering communications, which captured issue advertisements run within 30 days of a primary or 60 days of a general election.¹⁵¹ Advertisements that would normally be considered issue advertisements, and thus not subject to disclosure requirements, would be considered electioneering communications if distributed within the stated time period and therefore subject to the FEC's relevant disclosure requirements.¹⁵²

BCRA also updated § 315 of the Communications Act, adding the requirement that broadcasters disclose any political matter of national importance, any discussion of any candidate for office, any discussion of any election for a federal office, and any national legislative issue of public importance.¹⁵³ These were the updates clarified in the FCC's 2019 Political File Order and its 2020 Order on Reconsideration.¹⁵⁴ However, BCRA still failed to implement any regulations for social media platforms since it was passed in 2002, when social media was only just on the rise.¹⁵⁵

Because BCRA did not incorporate any social media regulations in its update to the Federal Communications Act, the FCC also does not regulate any social media or online platforms.¹⁵⁶ The Federal Communications Act describes the FCC's scope as reaching "commerce in communication by wire and radio,"¹⁵⁷ which has generally been read to preclude jurisdiction over "edge services" or online platforms.¹⁵⁸

Recent events under the Trump administration suggest that the FCC could extend its purview to regulate technology and internet companies. On

148. *See id.*

149. *See* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 142 (2003), *overruled on other grounds by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

150. *McConnell v. FEC Summary*, FED. ELECTION COMM'N, <https://www.fec.gov/legal-resources/court-cases/mcconnell-v-fec/> (last visited Apr. 4, 2021) [<https://perma.cc/W2GH-P7QY>].

151. Fed. Election Comm'n, *supra* note 90.

152. *Id.*

153. Bipartisan Campaign Reform Act of 2002, tit. 5, sec. 504, § 315, 116 Stat. 81 (current version at 47 U.S.C.A. § 315(e)(1)(b)).

154. *See WCNC-TV Order*, *supra* note 33, at para. 2.

155. PEW RSCH. CTR., *supra* note 1.

156. *Statutes and Rules on Candidate Appearances & Advertising*, FCC, <https://www.fcc.gov/media/policy/statutes-and-rules-candidate-appearances-advertising> (last visited Apr. 4, 2021) [<https://perma.cc/XC9H-27V9>].

157. *The Public and Broadcasting*, FCC, <https://www.fcc.gov/media/radio/public-and-broadcasting#ACT> (last visited Apr. 4, 2021) (scroll to "The FCC and Its Regulatory Authority") [<https://perma.cc/7MFW-9SML>].

158. The question of whether the FCC can regulate the internet and its platforms is still a very live debate and is unsettled as of the publication of this note. *See generally* Thomas M. Johnson Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act*, FCC, (Oct. 21, 2020, 10:30 AM), <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act> [<https://perma.cc/U87G-EQPY>].

July 29, 2020 former President Trump suggested that the FCC may have authority over online platforms when he issued an executive order instructing the FCC to interpret the scope of Communications Decency Act, which governs online platforms.¹⁵⁹ On October 15th, FCC Commissioner Ajit Pai said that the agency would move forward to clarify § 230 of the Communications Decency Act as it applied to social media companies.¹⁶⁰ However, Pai has backtracked since the Biden administration has taken over, indicating that there would not be enough time for the FCC to evaluate the Communications Decency Act before the administration transitioned.¹⁶¹ These efforts were dropped in January 20, 2021 at the beginning of the Biden Administration, as the new administration did not support this action.¹⁶²

The FEC also fails to regulate online platforms' political advertising, though it does regulate the groups that distribute advertisements on those platforms.¹⁶³ Specifically, the FEC requires that any group making "independent expenditures"—a term of art that refers to any advertisement "that expressly advocates the election or defeat of a clearly identified candidate"—must make disclosures to the FEC.¹⁶⁴ The FEC also generally requires that any public communication, which includes any "communications placed for a fee on another person's or entity's website" contain a disclaimer identifying who paid for the advertisement and who approved the message.¹⁶⁵ While these regulations do capture some political advertising that occurs on social media platforms, none of them govern the tech companies themselves. Rather, the FEC's requirements are limited to regulating the advertising entity as opposed to the actual platform.

159. Press Release, The White House, Statement from the Press Secretary Regarding the Implementation of President Trump's Executive Order on Preventing Online Censorship (July 29, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-implementation-president-trumps-executive-order-preventing-online-censorship/> [<https://perma.cc/GPN6-43NB>].

160. David Shepardson, *FCC Will Move to Clarify Key Social Media Legal Protections: Chair*, REUTERS (Oct. 15, 2020, 2:53 PM), <https://www.reuters.com/article/us-usa-social-media-trump/fcc-will-move-to-clarify-key-social-media-legal-protections-chair-idUSKBN2702RO> [<https://perma.cc/CRU7-5HQW>].

161. David Shepardson, *Trump's FCC Chairman Does Not Object to Facebook, Twitter Blocking President*, REUTERS (Jan. 7, 2021, 6:40 PM), <https://www.reuters.com/article/usa-trump-social-media/fcc-chairman-will-not-move-to-set-new-u-s-social-media-rules-sought-by-trump-idUSL1N2JI3DD>.

162. Todd Shields & Ben Brody, *FCC Chair Punts Social Media Regulation Trump Sought to Congress*, BLOOMBERG (Jan. 7, 2021, 7:25 PM),

<https://www.bloomberg.com/news/articles/2021-01-08/fcc-chair-says-he-s-dropping-social-media-order-trump-demanded> [<https://perma.cc/X5GU-GJDJ>].

163. *Internet Communications and Activity*, FED. ELECTION COMM'N, <https://www.fec.gov/updates/internet-communications-and-activity/> (last visited Apr. 4, 2021) [<https://perma.cc/KH5N-HM84>].

164. *Making Independent Expenditures*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/> (last visited Sept. 2, 2021) [<https://perma.cc/KGZ8-4HEW>].

165. *Public Communications*, FED. ELECTION COMM'N, <https://www.fec.gov/press/resources-journalists/public-communications/> (last visited Apr. 4, 2021) [<https://perma.cc/ETF9-WP67>].

The FEC also requires regular disclosure reports from the candidate, the campaign, the national political parties, any 527 political organization, and any “individuals and organizations required to file with the FEC that receive contributions or make expenditures, including independent expenditures, aggregating in excess of \$50,000 in a calendar year.”¹⁶⁶ While nearly every actor in the political advertising space is subject to *some* type of disclosure, social media platforms continue to exist without any comparable regulation for the public’s informational purposes.

B. Online Platforms Should Be Required to Disclose Political Advertising

While no agency or law currently governs social media platforms’ political advertising schemes, recent cases and legislative history provide support for Congressional action to close the existing loophole. This section will first examine the case and legislative history suggesting that BCRA should be read broadly to encompass social media regulation. Then this section will discuss the shortcomings of the patchwork regulation emerging at the state and industry level.

In September 2004, the U.S. District Court for the District of Columbia suggested that BCRA should be read broadly to include social media regulation in *Shays v. FEC*.¹⁶⁷ In this case, the District Court struck down an FEC interpretation of BCRA that excluded the Internet in its definition of public communications, which would be subject to disclosure requirements.¹⁶⁸ The court explained that the FEC’s “exclusion of Internet communications . . . severely undermine[d] FECA’s purposes. . . [t]o permit an entire class of political communications to be completely unregulated . . . would permit an evasion of campaign finance laws, thus ‘unduly compromis[ing] the Act[.]’”¹⁶⁹ While this case decided whether the advertisers using social media platforms would have to file disclosures to the FEC, the court looked to the legislative intent behind BCRA to prevent the “circumvention of the campaign finance laws” in its decision.¹⁷⁰ The fact that BCRA was ultimately read to include advertising that takes place on online platforms, in the same way BCRA regulates advertising that takes place on broadcast mediums, suggests that online platforms should have a corresponding disclosure scheme just like broadcasters do.

The legislative history surrounding BCRA also suggests that part of its intended effect was to address the very issues seen in political advertising on social media. For example, when BCRA was brought to the House floor,

166. *Reports Due in 2020: Filing Electronically*, FED. ELECTION COMM’N, (Jan. 2, 2020), <https://www.fec.gov/updates/reports-due-2020/#:~:text=Under%20the%20Commission's%20mandatory%20electronic,must%20file%20all%20reports%20and> [https://perma.cc/B9Y4-XKSF].

167. *See 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).

168. *Id.* at 66.

169. *Id.* at 70.

170. *Id.*

Congressman Todd Tiahrt (R-KS) advocated for “full and complete reporting disclosure. There is no reason why it could not be on the Internet; whenever dollars are contributed within 24 hours, it would be reported.”¹⁷¹ Here, Congressman Tiahrt envisioned integrating reporting and the Internet when it came to disclosure requirements. Congresswoman Lynn Nancy Rivers (D-MI) directly acknowledged Congress’s power to “require disclosure of the source and size of certain kinds of spending and most contributions . . . [to] thwart attempts to circumvent existing election law,” which suggests that Congress was aware of its broad powers in this arena.¹⁷² Additionally, Congressman Thomas Dale DeLay (R-TX), who advocated against BCRA, still thought that Congress “ought to let the voters decide through instant disclosure to be able to tell and see while people are collecting their money and spending it to decide. [Congress] should be empowering voters, not government bureaucrats.”¹⁷³

Additionally, the lack of a national standard has already led to a patchwork of state regulations that have had ramifications for voters. States such as California, Maryland, New Jersey, New York, Washington, Wyoming, and Vermont have all implemented legislation governing social media disclosures, while California, Maryland, New Jersey, Nevada, and Washington have specifically mandated that social media platforms maintain records of political ads distributed in their borders.¹⁷⁴ These record requirements have allegedly caused Facebook and Instagram to suspend state and local election and ballot measure advertisements in Washington, while Google has done the same in Washington, Maryland, Nevada, and New Jersey.¹⁷⁵ Rather than produce a more informed electorate, the patchwork and state-level disclosure requirements actually have the opposite effect, as they result in platforms eliminating entire channels of communication for campaigns to reach and educate voters.¹⁷⁶ This runs contrary to the public information rationale for disclosure in *Buckley*—were Congress to regulate social media platforms on a national level, these social media platforms would be forced to implement standardized disclosure procedures rather than picking and choosing which states they want to serve.

The Fourth Circuit is one of the few courts that has addressed the constitutionality of these state-level campaign finance laws. In *Washington Post v. McManus*, various news outlets challenged a Maryland campaign finance law requiring the news outlets to maintain and electronically publish a file of the political ads hosted on their platforms.¹⁷⁷ The law, the Online Electioneering Transparency and Accountability Act, was passed after the 2016 election to “better protect against foreign meddling” and applied to online platforms that (1) garnered over 100,000 monthly visitors and (2)

171. 148 CONG. REC. H339-02, 344 (daily ed. Feb. 13, 2002) (statement of Rep. Todd Tiahrt).

172. *Id.* at 342 (statement of Rep. Lynn Nancy Rivers).

173. *Id.* (statement of Rep. Thomas Dale DeLay).

174. Kreiss & Barrett, *supra* note 65, at 514-15.

175. *Id.*

176. *Id.*

177. *See* *Washington Post v. McManus*, 944 F.3d 506, 510 (4th Cir. 2019).

received money for political ads.¹⁷⁸ The Fourth Circuit ultimately said that as applied to *The Washington Post* and its co-plaintiffs including *The Baltimore Sun*, this requirement constituted compelled speech in violation of the First Amendment.¹⁷⁹ It denied that there was a compelling state interest in maintaining this law because there was no evidence of foreign interference in elections on these online news platforms.¹⁸⁰ However, the court acknowledged that the “bulk of foreign meddling took place on websites like Facebook, Instagram, or other social media platforms that each garner millions of visitors per month,”¹⁸¹ which may suggest that states’ disclosure requirements for those companies would have a compelling interest.

The effect of this patchwork of regulations and social media’s subsequent retreat from political advertising in those states has also chilled speech, as one candidate for Maryland’s House of Delegates lamented.¹⁸² That candidate explained that “his campaign was hindered by Google’s policy of not accepting political advertising for Maryland candidates and ballot measures.”¹⁸³ As the cheaper price tag on digital advertising on platforms like Google and Facebook means that “lesser-known candidates or smaller local and statewide campaigns . . . can now spend as little as \$250 to reach hundreds or thousands of voters online,”¹⁸⁴ these same candidates would be hard-pressed to get the same reach on more expensive broadcast networks.

The lack of uniformity across platforms’ internal approaches to political advertising could also provide yet another loophole to circumvent disclosure requirements. Platforms that have not taken steps towards disclosure could see an influx in advertisers, similar to the influx of soft money spending on issue advertising in the wake of FECA and *Buckley*.¹⁸⁵ Whereas Congress had to step in to address this issue with BCRA, it should look for a way to anticipate circumvention attempts such as this one.

Finally, although platforms have begun compiling their own data, each platform is in control of what information they choose to share. For example, Facebook’s Ad Library only discloses targeting information the advertiser used, such as location, age, and gender, despite allowing the advertiser to develop audiences using much more detailed demographics.¹⁸⁶ Though it recently offered more detailed data to researchers, Facebook suggested that it may be unwilling to share this information with the public when it was sued by Washington state in April 2020 for repeatedly failing to comply with the

178. *Id.* at 510-11.

179. *Id.* at 521.

180. *Id.* at 521.

181. *See id.* at 522.

182. Victoria Smith Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. LEGIS. 74, 91-92 (2021).

183. *Id.*

184. Ortutay & Seitz, *supra* note 77.

185. *See supra* section 1.

186. Glazer, *supra* note 126.

state's campaign finance laws.¹⁸⁷ Facebook was previously sued by Washington in 2018, leading the platform to announce that it would no longer sell political ads in the state.¹⁸⁸ However, the tech giant violated its own policy and continued to sell at least \$25,000 worth of political ads about Washington state and local elections.¹⁸⁹ Deception such as this calls into question the authenticity of social media platforms' calls for transparency in political advertising, and illustrates the dangers of allowing these platforms to regulate themselves.

Moreover, allowing platforms to pick and choose the data they share with the public does not give voters the same standardized quality of information from platform to platform. The lack of uniformity could also cause unscrupulous advertisers to flock to a platform with fewer disclosure requirements to continue keeping the public in the dark about its funding sources and other agendas.

C. The Honest Ads Act Address Many of the Issues Presented by Political Advertising on Social Media Platforms

The Honest Ads Act, which has received bipartisan support, proposes to update and amend the FECA to address the campaign finance loopholes for social media platforms.¹⁹⁰ However, neither the Honest Ads Act, nor the For The People Act of 2021 that encompasses it, contain any limitations on social media platforms' ability to microtarget voters.¹⁹¹ Thus, the legislation is an incomplete solution to the problem. This section will first discuss the Honest Ads Act's proposed amendments. This section will next address the reasons the Honest Ads Act should be expanded to include restrictions on political advertisers' ability to microtarget specific audiences.

The Honest Ads Act proposes amendments to FECA that would allow the FEC to regulate and enforce disclosure requirements for online platforms.¹⁹² The act was first introduced in 2017 and co-sponsored by Senator Amy Klobuchar (D-MN) and the late Senator John McCain (R-AZ),¹⁹³ and was recently reintroduced in May 2019 by Sen. Klobuchar and

187. Press Release, Washington State Off. of the Att'y Gen., AG Ferguson Sues Facebook for Repeatedly Violating Washington Campaign Finance Law (Apr. 14, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-sues-facebook-repeatedly-violating-washington-campaign-finance-law#:~:text=OLYMPIA%20%E2%80%94%20Attorney%20General%20Bob%20Ferguson,Washington%20state%20campaign%20finance%20law> [https://perma.cc/NU56-RQWY].

188. *Id.*

189. David Gutman, *Facebook and Google Agreed to Stop Selling Political Ads in Washington State, but They Are Still Doing It*, SEATTLE TIMES (Oct. 28, 2019, 8:40 AM), <https://www.seattletimes.com/seattle-news/politics/despite-promising-to-stop-facebook-and-google-are-still-selling-political-ads-in-washington-state/> [https://perma.cc/9F42-HB6R].

190. Honest Ads Act, S. 1356, 116th Cong. (2019).

191. *Id.*; see also For the People Act, H.R. 1, 117th Congress (2021).

192. *Id.*

193. Andrew Blake, *Honest Ads Act, Anti-Election Meddling Bill, Reintroduced with Bipartisan Support*, WASH. TIMES (May 8, 2019), <https://www.washingtontimes.com/news/2019/may/8/honest-ads-act-anti-election-meddling-bill-reintro/> [https://perma.cc/2M3E-8JZM].

co-sponsored by Senator Lindsay Graham (R-SC) and Senator Mark Warner (D-VA).¹⁹⁴ Though it has not been introduced as a standalone bill in the 117th Congress,¹⁹⁵ its text has been introduced in full as “Subtitle C” of Democrats’ comprehensive For The People Act of 2021.¹⁹⁶ The Honest Ads Act’s main proposals include expanding the FEC’s definition of public communications and electioneering communications and adding political records requirements for online platforms.¹⁹⁷

The FEC currently defines a “public communication” as “any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising”¹⁹⁸ or any “communication[] placed for a fee on another person’s or entity’s website.”¹⁹⁹ The Honest Ads Act would replace this language with “any public communication,” allowing the FEC to extend its regulatory oversight to online and digital advertising.²⁰⁰ “any public communication,” allowing the FEC to extend its regulatory oversight to online and digital advertising.²⁰¹

The FEC’s current definition of “electioneering communication” is limited to “broadcast, cable, or satellite” communications.²⁰² As this notably excludes communications on online platforms, the Honest Ads Act would amend the definition to include any “qualified internet or digital communication.”²⁰³ This update would allow the FEC to impose disclosure requirements on electioneering communications that take place on online platforms.

The Honest Ads Act also proposes that a section be added to include a political records requirement for online platforms.²⁰⁴ That requirement provides that online platforms “maintain, and make available for online public inspection in machine readable format, a complete record of any request to purchase on such online platform a qualified political advertisement which is made by a person whose aggregate requests to purchase qualified political advertisements on such online platform during the calendar year exceeds \$500.”²⁰⁵ Advertisers using these online platforms would be required to provide the platform with the information required for its political records.²⁰⁶

194. S. 1356.

195. *Tentative 2021 Legislative Schedule*, U.S. SENATE, https://www.senate.gov/legislative/2021_schedule.htm (last visited July 30, 2021) [<https://perma.cc/UUV9-VPTQ>].

196. H.R. 1, §§ 4201-11.

197. S. 1356, §§ 5-6, 8.

198. 52 U.S.C.A. § 30101(22).

199. FED. ELECTION COMM’N, *supra* note 165.

200. S. 1356, § 5(b)(1)(A).

201. *Id.*

202. *Id.* § 5(b)(1).

203. *Id.* § 6(a).

204. *Id.* § 8(a).

205. *Id.*

206. *Id.*

D. To Provide Comprehensive Reform, the Honest Ads Act Needs a Provision Addressing Microtargeting

While a step in the right direction, the Honest Ads Act does not do enough to curb advertisers' use of microtargeting. As currently written, the Honest Ads Act's only attempt to address microtargeting is its requirement that online platforms disclose "a description of the audience targeted by the advertisement."²⁰⁷ This section will discuss the dangers of this vague requirement and the need to more stringently limit advertisers' targeting tools. This section will also discuss existing support for a limiting microtargeting options for political advertising.

First, the quoted language above is insufficient because it leaves vague what a "description of the audience targeted" means. Facebook's Ad Library currently gives a topical breakdown of the audience who has seen the advertisement,²⁰⁸ Because of the vagueness of this language, it is likely that the public would be left with the same incongruities in audience reporting it sees now with no regulations. Contrastingly, Snapchat's provision of a detailed spreadsheet with audience details like "blue collar"²⁰⁹ provide a more holistic "description of the audience targeted."

Second, the Honest Ads Act's requirement that platforms provide "a description of the audience targeted by the advertisement" is insufficient because it does not actually prevent microtargeting's harmful effects, which include spreading disinformation and carving up the electorate.²¹⁰ The public has seen the harms of microtargeting play out on a national level—in the 2016 Russian election interference—even though these tactics are "routine" in all political online advertising.²¹¹ In the 2016 U.S. elections, Russian agents "deploy[ed] powerful microtargeted political ads on social media. With its use of microtargeted political ads, the Agency was able to powerfully leverage its influence to interfere with U.S. elections."²¹² Despite the abuse of Facebook's microtargeting features, Facebook continues to supply these tools to political advertisers.

A handful of Congressional representatives have proposed legislation that would curb the use of microtargeting in political advertising though none of which was incorporated into the Honest Ads Act or the recent For the People Act of 2021. Congresswoman Anna Eshoo (D-CA) introduced the Banning Microtargeted Political Ads Act in 2020, on the same day that Congressman David Cicilline (D-RI) introduced the Protecting Democracy

207. *Id.*

208. *Facebook Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&q=donald%20trump (click "See Summary Details") (last visited Apr. 4, 2021).

209. *Snap Political Ads Library*, *supra* note 138 (follow links under "Archives" subsection; select 2021 database; download and view "Advanced Demographics" column entries).

210. S. 1356 § 8(a).

211. Timberg, *supra* note 77.

212. *Id.*

from Disinformation Act.²¹³ The former would amend FECA to prohibit “the dissemination of a political advertisement . . . on any basis” except to target individuals within a recognized location or to those who had expressly consented to receive that advertisement.²¹⁴ The latter would amend FECA to, among other things, restrict microtargeting for online advertisers to age, gender, and location.²¹⁵ It would still permit targeting on a “contextual basis,” meaning an advertiser could serve advertisements to voters while they browse Fox News or CNN online, but could not use the fact that the voter browsed those websites as a basis for targeting that voter on any other platform.²¹⁶ While neither of these proposals is as comprehensive as the Honest Ads Act, their introduction suggests a need for legislation addressing microtargeting’s specific harms.

Facebook employees and global non-profit Mozilla also joined in the call for limiting microtargeting for political advertising. Facebook employees pointed to how microtargeting “allows politicians to weaponize [the] platform by targeting people who believe that content posted by political figures is trustworthy” and suggested “restricting some of the options for targeting users with those ads.”²¹⁷ Mozilla also recommended that “Google and Facebook should explore, in addition to limits on racial and demographic targeting, limits on interest and behavior microtargeting . . . that can similarly be used to carve up and manipulate the electorate.”²¹⁸ Still others suggest that Facebook “ban ‘Custom Audiences’ and ‘Lookalike Audiences’ for political ads” as the solution to this fix.²¹⁹

E. The Honest Ads Act, As Incorporated by the For The People Act of 2021, Should Be Amended To Restrict The Targeting Options Available To Political Advertisers

The Honest Ads Act should limit microtargeting options available to political advertisers to gender, geography, and age. These categories would be appropriate because they mirror the demographics identified by the online platforms themselves in their internal regulatory schemes and by legislators’ previous proposals. Furthermore, they would allow for targeting comparable to what is used by broadcasters without being overly invasive of users’ private data.

Both Facebook and Google have shown reliance on gender, geography, and age in their approaches to self-regulating political advertising on their

213. See Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020); see also Protecting Democracy from Disinformation Act, H.R. 7012, 116th Cong. (2020).

214. H.R. 7014 § 325(a)-(b).

215. H.R. 7012 § 325(a)(2)(B)(i)-(iii).

216. *Id.* § 325(a)(3)(B).

217. Mike Isaac, *Dissent Erupts at Facebook Over Hands-Off Stance on Political Ads*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-political-ads.html> [<https://perma.cc/AS9T-LMY4>].

218. Ashley Boyd, *Statement on Disallowing Microtargeting of Political Ads*, MOZILLA (Nov. 8, 2019), <https://foundation.mozilla.org/en/blog/statement-disallowing-microtargeting-political-ads/> [<https://perma.cc/2XHH-CVQM>].

219. Timberg, *supra* note 77.

platforms. Google, even with its limiting targeting options, still raked in over \$83 million in political advertising dollars from both the Biden campaign²²⁰ and the Trump campaign²²¹ and over \$746 million since May 2018.²²² Facebook’s use of these demographic features in its Ad Library also provides support for this solution—since those are the only demographics Facebook chooses to share with the public, those should be the only demographics Facebook uses in its political advertising targeting.

Furthermore, these categories already have a basis for legislative support. When Rep. Cicilline introduced the Protecting Democracy From Disinformation Act, the proposition received eight cosponsors.²²³ Rep. Eshoo’s Banning Microtargeted Political Ads Act, comparably, received zero.²²⁴ While neither act had support from Republican legislators, combining the more successful Protecting Democracy From Disinformation Act with the Honest Ads Act’s bipartisan support, could ultimately lend itself to a greater likelihood of legislative success. The proposal to permit online political advertisers to target voters by age, gender, and location is also more likely to receive support from the online platforms themselves because of Google’s precedent of restricting political advertisers to these demographics in the 2020 election. While there may be public support for a complete ban on microtargeting in political advertising, as proposed by Rep. Eshoo, there is no legislative or industry support for such a drastic proposal at this time.²²⁵

Additionally, these select demographics also still allow for creative targeting by campaigns. As “suburban white women” were an important voting coalition for the 2020 Presidential candidates, these tools would still allow for campaigns to target (1) women (2) of voting age in (3) the suburbs by using zip code geotargeting. Between these three demographics tools, campaigns would still be extremely capable of executing their digital media strategies without jeopardizing public access to information or risking the spread of misinformation.

Finally, these demographics are logical to target because age, location, and gender are information commonly requested by online platforms and are

220. *Advertiser: Biden for President*, GOOGLE, <https://transparencyreport.google.com/political-ads/advertiser/AR108481940364984320> (last visited Apr. 4, 2021).

221. *Advertiser: Donald J. Trump for President, Inc.*, GOOGLE, <https://transparencyreport.google.com/political-ads/advertiser/AR105500339708362752> (last visited Apr. 4, 2021).

222. GOOGLE: TRANSPARENCY REP., *supra* note 131.

223. Protecting Democracy from Disinformation Act, H.R. 7012, 116th Cong. (2020).

224. Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020).

225. Justin McCarthy, *In U.S., Most Oppose Micro-Targeting in Online Political Ads*, GALLUP (Mar. 2, 2020), <https://news.gallup.com/opinion/gallup/286490/oppose-micro-targeting-online-political-ads.aspx> [<https://perma.cc/BUT9-BBBE>]. In a March 2020 Gallup poll, 72% of U.S. respondents indicated that online platforms should withhold all user information from online political advertisers and 20% of respondents supported the use of limited information such as age, gender, and zipcode being provided for political advertisers’ targeting. *Id.*

“readily volunteered”²²⁶ by users. Much of the other information platforms learn about its users—like gambling habits, personal hardships, and medical histories²²⁷—is gathered from users without “explicit ‘opt-in’ consent.”²²⁸ Because of the unique user information harvested by each platform, the most logical demographics to use are ones that are accessible to political advertisers across platforms. Furthermore, this reflects the public’s stance; Pew Research Center found in a 2020 study that 77% of US adults do not think it is acceptable for “companies to use data about their users’ online activities to show them ads from political campaigns.”²²⁹ While keeping the ability to target relevant ads based on readily volunteered information, the proposed microtargeting restrictions would exclude users’ online activities from political advertisers’ targeting options.

IV. CONCLUSION

For the above reasons, online platforms hosting digital political advertising must be regulated at a federal level. While the Honest Ads Act, as incorporated in the For the People Act of 2021, addresses significant concerns with the loophole allowing online platforms to avoid disclosure requirements for political advertising, it alone is not sufficient to address all the problems caused by a lack of regulation in this industry. The Honest Ads Act, therefore, should be amended to include a provision that requires online platforms to limit microtargeting options available to political advertisers to age, gender, and location.

226. Natasha Singer, *What You Don’t Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html> [<https://perma.cc/8AU6-N2XJ>].

227. *Personalized Advertising*, GOOGLE, <https://support.google.com/adspolicy/answer/143465?hl=en> (last visited Apr. 4, 2021) [<https://perma.cc/SBX5-KUP5>].

228. Singer, *supra* note 226.

229. Brooke Auxier, *54% of Americans Say Social Media Companies Shouldn’t Allow Any Political Ads*, PEW RSCH. CTR. (Sept. 24, 2021), <https://www.pewresearch.org/fact-tank/2020/09/24/54-of-americans-say-social-media-companies-shouldnt-allow-any-political-ads/> [<https://perma.cc/N8GU-4YQ7>].