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Thank you for the opportunity to provide written testimony, on behalf of the Center for Competitive Politics ("CCP" or "Center"), to the Subcommittee on Information Technology of the Committee on Oversight and Government Reform.

This subcommittee's consideration of online political advertisements is timely and important. Americans are increasingly turning to the Internet, rather than curated media such as newspapers, periodicals, and cable television, to receive information. As the Pew Research Center observed last month, "43% of Americans report often getting news online, just 7 percentage points lower than the 50% who often get news on television. This gap between the two news platforms was 19 points in early 2016, more than twice as large."[1]

And access to the Internet is becoming increasingly convenient. Twenty years ago, smartphones and handheld tablet computers were the stuff of science fiction. According to data cited by Chief Justice John Roberts in *Riley v. California*, today "it is the person who is not carrying a cell phone, with all that it contains, who is the exception…with 12% [of such users] admitting that they even use their phones in the shower."[2] As cell phones transition to smart phones, it is unsurprising that "two-thirds…of Americans report that they get at least some of their news on social media," including Facebook and Twitter, "with two-in-ten doing so often."[3]

This new medium has served as a democratizing force, allowing Americans to instantly connect with one another at all hours and from virtually anywhere. The Internet has also drastically reduced the cost of

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[1] Jeffrey Gottfried and Elisa Shearer, "Americans' online news use is closing in on TV news use," FacTank, Pew Research Center, Sept. 7, 2017; *available at*: http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/
[2] 134 S. Ct. 2473, 2490 (2014).
[3] Elisa Shearer and Jeffrey Gottfried, "News Use Across Social Media Platforms 2017," Pew Research Center, Sept. 7, 2017; *available at*: http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/

bringing together like-minded people with common goals and interests. The rapid growth of the Internet for grassroots communications is, in that sense, merely a logical extension of the development of desktop publishing in the 1980's, which empowered individuals and groups to self-publish political material without turning to expensive and capital-intensive professional shops.

Political activity has not been immune from these forces. The Internet has allowed an explosion of political participation by ordinary Americans and the grassroots efforts they support. But that has been possible because a light regulatory touch and low overhead have made Internet communications vastly more affordable than traditional media. As the Federal Election Commission noted when it promulgated current regulations regarding online communications, the Internet is "a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."[4] As a federal judge recently put it: "the [I]nternet is the new soapbox; it is the new town square."[5]

Nevertheless, because the Internet's rise to ubiquity has felt so sudden and dramatic, some have characterized online political advertising as a lawless "wild west," with an alleged lack of transparency singled out as a particular issue for Congress's attention.[6]

The view that the Internet is a lawless arena, however, is mistaken. Federal law already regulates "communications placed for a fee on another person's Web site."[7] Any communication that expressly advocates the election or defeat of a federal candidate[8] must "in a clear and conspicuous manner"[9] state who paid for the ad. A "disclaimer is not [considered] clear and

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[4] 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006); *also* Advisory Opinion 2017-05 (Great America PAC) at 6 (citing same).

[5] *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014); *aff'd sub nom. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016); *cert. denied sub nom. Williams v. Coal. for Secular Gov't*, 137 S. Ct. 173 (2016).

[6] Bill Allison, Daniel Flatley and Todd Shields, "Russian Ads on Facebook End the Web's 'Wild West,'" Bloomberg, Sept. 21, 2017; *available at*: https://www.bloomberg.com/news/articles/2017-09-21/russian-ad-buys-on-facebook-prompt-calls-to-end-wild-west-on-web; Hamza Shaban and Karoun Demirjian, "Facebook and Google may be one step closer to new regulations on ad transparency," The Washington Post, Oct. 19, 2017 ("'Social media advertising had to be regulated, it's the wild wild west,' said Sen. Lindsey O. Graham (R-S.C.)"); *available at*: https://www.washingtonpost.com/news/the-switch/wp/2017/10/19/facebook-and-google-might-be-one-step-closer-to-new-regulations-on-ad-transparency/?utm_term=.ee81c3479a36.

[7] 11 C.F.R. § 100.26.

[8] If placed for a fee. 11 C.F.R. § 110.11(a)(1-3).

[9] 11 C.F.R. § 110.11(c)(1).

conspicuous if it is difficult to read or hear, or if the placement is easily overlooked."[10]

Additionally, for Internet communications "not authorized by a candidate…the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee."[11]

Furthermore, all political committees—candidate committees, traditional PACs, and so-called Super PACs—must also place disclaimers on "all Internet websites" they maintain.[12] And significant email communications sent by such groups must also list the paid-for-by information.[13] The only exceptions have been for "small items" or situation where it is "impractical" to apply these disclaimers to relatively minute advertisements,[14] measured either in terms of the number of characters[15] or number of pixels.[16]

It should be noted that the "small items" and "impracticality" exceptions, the subject of a current FEC Advanced Notice of Proposed Rulemaking, are not unique to the Internet—both exceptions have existed since the Federal Election Campaign Act first began requiring advertising disclaimers, and they have been consistently applied to things such as bumper stickers, buttons, and pens. While such items may seem quaint today, they were a significant target of campaign spending when the exemptions were created.

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[10] 11 C.F.R. § 110.11(c)(1).
[11] 11 C.F.R. § 110.11(b)(3).
[12] 11 C.F.R. § 110.11(a)(1).
[13] *Id*. ("…electronic mail of more than 500 substantially similar communications when sent by a political committee").
[14] The Commission has struggled to apply those regulations on a case by case basis, and has instead reopened public comments to consider a general approach that would allow political speakers to accurately predict what speech does or does not qualify. Previously, the Center encouraged the FEC to pursue this course and to adopt a rule stating that online advertisements are excused from "disclaimers in any Internet advertising product where the number of characters needed for a disclaimer would exceed 4% of the characters available in the advertised product, exclusive of those reserved in the ad's title." Comments of the Center for Competitive Politics on Notice 2011-14 at 5, *available at*: http://sers.fec.gov/fosers/showpdf.htm?docid=98752 Such a rule provides an explicit standard. It also accords with a recent federal appellate ruling that invalidated *commercial* disclaimers occupying 20% of targeted advertisements. *Am. Beverage Ass'n v. City and Cnty. of San Francisco*, Case No. 16-16072, 2017 U.S. App. LEXIS 18150, 2017 WL 4126944 (9th Cir. Sept. 19, 2017)
[15] *See* Advisory Opinion 2010-19 (Google).
[16] *See* Advisory Opinion 2013-18 (Revolution Messaging).

In short, subject to a common-sense exception where disclaimers are simply not practical, the FEC already regulates the core of online electoral speech: express advocacy and communications by candidates, parties, and PACs.[17] Going further would, by definition, regulate speech that is further afield. It would necessarily be directed at a subset of political speech, which may or may not be partisan, and would disproportionately target speech by "groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance."[18]

Such an expansion has been urged in the name of purging foreign meddling in our elections. In particular, revelations of relatively modest Internet ad buys from Russian sources over the course of 2015-16 have led to calls for regulation. This is an understandable impulse: Americans, like people across the globe, bristle at foreign intervention in our elections.

Yet perspective is necessary. There is little evidence that these purchases affected the election, and none at all that Russian efforts affected vote tallies. Indeed, former Clinton strategist Mark Penn earlier this month calculated Russian Internet ad buys at a mere $6500 in actual electioneering ads.[19] In a world where the Russian state operates RT, a cable network, foreign citizens who are U.S. permanent residents may contribute directly to candidates, and information may be posted to the Internet for free, it is not clear that small-dollar ad buys constitute a substantial route for nefarious foreign influence?

We are still learning the full scope of Russian attempts to influence the 2016 election. Nevertheless, regardless of the problem's scope, the deterrence of foreign powers is a mission for which campaign finance law and the FEC are poorly suited. Counterintelligence and diplomatic efforts, and the criminal authority of the Department of Justice ("DOJ"), are a better fit. This is especially so as nearly any efforts by foreign governments would already be regulated under the Foreign Agent Registration Act ("FARA"), which requires ongoing periodic registration, disclaimers, and copies of advertising to be filed with DOJ. Campaign finance efforts are at best duplicative and at worst counterproductive. The Congress's attention would be better directed to FARA, rather than the Federal Election Campaign Act ("FECA").

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[17] *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (*per curiam*).
[18] *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears") (internal quotation marks and citation omitted).
[19] Mark Penn, *You Can't Buy the Presidency for $!00,000*, Wall Street Journal, Oct. 15, 2017 (https://www.wsj.com/articles/you-cant-buy-the-presidency-for-100-000-1508104629).

Any expansion of the campaign finance laws, whether intended to regulate foreign nationals or not, will mostly impact American citizens and American companies. For that reason, expanding the "electioneering communications" regulatory regime enacted in the Bipartisan Campaign Reform Act of 2002, and rushing to place new regulatory burdens on small political ad buyers, would be a mistake.

It would be a mistake precisely because it would infringe upon the core activities—political speech and association—protected by the First Amendment. Given the relatively small amounts of money known to have been spent by foreign interests, any "effective" regulation would necessarily target small purchases—that is, precisely the small, grassroots activity most sensitive to, and most likely to be chilled by, heavy-handed governmental intervention. And because the majority of spending appears to have been spent on general discussions of political issues, it will be all too tempting to reach beyond advocacy for or against candidates and to instead impose restrictions on vague and subjective categories of speech "about politics."[20]

These difficulties would be exacerbated if, as has been suggested, the government chooses to shift the burden of enforcement onto social media companies. This approach would be problematic in two ways. First, these corporations would be required to determine which ads fell within and without the relevant statutory definitions. This is a difficult task even for elementary concepts like "express advocacy" that lie at the core of existing campaign finance law. If federal courts and the FEC's commissioners disagree, often and in good faith, on whether a particular communication "expressly advocates," what hope does a private actor have? The predictable result will be a risk-averse approach, vetted by competent but cautious counsel, that will sweep a large proportion of genuine issue speech into the regulated bucket.

Similarly, if Congress determines that small-dollar advertisements must be regulated, and that those ads must, in practice, be vetted by social media corporations or other significant Internet players, there is likely to be a price point at which the ads are not worth the bother. This would be especially true if liability of any kind is imposed for mistakes, but it would be true as a simple matter of costly overhead in any event. The result would be the exclusion of precisely that speech that is most central to First Amendment concerns.

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[20] Congress has made this mistake before, and the Supreme Court was forced to correct its error. *Buckley v. Valeo*, 424 U.S. at 77 ("'Contributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable assets 'for the purpose of… influencing' the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems").

It is not obvious that anything will be gained in exchange for these burdens on fundamental liberties. Whatever modest advances may be made in preventing foreign influence will be on the backs of regulated Americans, who will bear the overwhelming burden under any proposed campaign finance regulation.

Nor is it obvious that existing concepts, such as the federal electioneering communications regime, can be seamlessly extended online. In fact, there are reasons to think that such efforts would raise serious constitutional issues given the unique nature of online communications.

Currently, federal law defines an "electioneering communication" as any "broadcast, cable, or satellite" ad which "refers to a clearly identified candidate for Federal office" made "60 days before a general, special, or runoff election for the office sought by the candidate" or "30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate."[21] Such a communication must be "targeted to the relevant electorate," which means that the "communication can be received by 50,000 persons" in the district or state in which a candidate is running.[22]

All electioneering communications must include a statement that "[XYZ] is responsible for the content of this advertising."[23] In addition, the disclaimer, whether by text or audio (by audio, if the ad is a radio ad), must provide the sponsor's street address, telephone number, or website URL and state that the ad is not authorized by any candidate or candidate's committee.[24] Additionally, upon making "electioneering communications in an aggregate amount in excess of $10,000 during any calendar year,"[25] the speaker must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period "for the purpose of furthering electioneering communications."[26]

The exceptions to the electioneering communications regime are few, but include an exemption for the institutional media[27] and candidate debates or fora.[28] In addition, the Federal Election Commission sought to exempt

[21] 52 U.S.C. § 30104(f)(3)(A)(i).
[22] 52 U.S.C. § 30104(f)(3)(C).
[23] 52 U.S.C. § 30120(d).
[24] 11 C.F.R. § 110.11(a)(4), (b)(3), (c)(4).
[25] 52 U.S.C. § 30104(f)(1)
[26] 11 C.F.R. 104.20(c)(9).
[27] 52 U.S.C. § 30104(f)(3)(B)(i).
[28] 52 U.S.C. § 30104(f)(3)(B)(iii).

communications made by § 501(c)(3) nonprofits,[29] which by definition cannot "electioneer."[30] However, this attempt to carve-out civil society speech was successfully challenged on administrative law grounds.[31]

The Supreme Court has upheld the current federal electioneering communication regime, both facially[32] and as-applied to "pejorative" ads about then-Senator Hillary Clinton's 2008 bid for the Democratic presidential nomination.[33] But it did so because "the vast majority of [electioneering communication] ads clearly" sought to elect candidates or defeat candidates.[34] The government supplied evidence, through a record the *Citizens United* Court recounted as being "over 100,000 pages long,"[35] that Congress had precisely targeted the type of communication and forms of media required to regulate "candidate advertisements masquerading as issue ads."[36] Indeed, the *McConnell* Court itself noted that it "assume[d] that the interest that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."[37]

But there is reason to doubt that "almost all" Internet ads that would be swept up in an expanded electioneering communication definition would also be "specifically intended to affect election results."[38]

The purchasing of broadcast advertisements is a cumbersome process. Typically, one cannot simply produce and buy a broadcast, cable, or television advertisement in a matter of hours—or even minutes—as one can when

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[29] 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (finding concerns "compelling" that failing to provide a bright-light exemption for § 501(c)(3) charities would "discourage[e]…highly desirable and beneficial activity").

[30] 26 U.S.C. § 501(c)(3) ("…which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

[31] *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, 127 (D.D.C. 2004). There is nothing preventing Congress from enacting a similar exemption.

[32] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003).

[33] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-367 (2010); *also Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *cert.*) ("And finally in *Citizens United v. Federal Election Comm'n*, the Court concluded that federally required disclosure 'avoid[ed] confusion by making clear' to voters that advertisements naming then-Senator Hillary Clinton and 'contain[ing] pejorative references to her candidacy' were 'not funded by a candidate or political party") (quoting *Citizens United*, 558 U.S. at 368.

[34] *McConnell*, 540 U.S. at 206; *id.* at 193 ("And although the resulting advertisements do not urge the viewer to vote for or against a candidate *in so many words*, they are no less *clearly intended* to influence the election") (emphasis supplied).

[35] *Citizens United*, 558 U.S. at 332 (citation and quotation marks omitted).

[36] *McConnell*, 540 U.S. at 132 (quotation marks omitted); *id.* at 127-128 (noting that "so-called issue ads" which "eschewed the use of magic words" were "almost all aired in the 60 days immediately preceding a federal election").

[37] *McConnell*, 540 U.S. at 206 n.88.

[38] *McConnell*, 540 U.S. at 127.

purchasing online advertising. Merely producing an advertisement, let alone vetting it and securing airtime, is a significant undertaking—one that most groups would only undertake with the assistance of counsel and advertising professionals.

As a result, broadcast mass advertising is not a game for small grassroots speakers. It may often the case that people planning, producing, and scheduling a broadcast media purchase capable of reaching 50,000 people in a Congressional district a month before an election are seeking to affect the outcome of the vote. This is in part because spectrum and cable are finite media—one buys a broadcast ad to run on a given station at a given time.

By contrast, Facebook or Google AdWords advertisements calling for named members of Congress to, say, repeal the Jones Act in the immediate aftermath of a devastating late September hurricane, are more likely to be engaging in those "issue discussions unwedded to the cause of a particular candidate" that are "vital and indispensable to a free society."[39] The Supreme Court is less likely to bless the regulation of that speech.[40]

Additionally, spending $10,000, in aggregate, on broadcast television ads is likely to involve the distribution of a handful of messages. But spending $10,000 in the aggregate on small online ads such as Facebook or Google AdWords could involve many small transactions purchased by groups with a diverse set of legitimate legislative interests.

This matters. Groups that can afford counsel to help with the production of a broadcast ad are more likely to understand the disclaimer requirements and to know how to preserve documentation and comply with disclosure rules. And to the extent that Congress is tempted to provide a lower monetary trigger, it would simply compound these problems. Indeed, it has been publicly reported that legislation will soon be introduced imposing these requirements at a threshold of just $500.[41] Worse, such a low trigger might even lead Internet companies to decline to permit small-dollar grassroots advertising, rather than risk their own liability over relatively minor revenue streams.

Unless Congress can assure itself that it is regulating electioneering, and not mere political discussion about issues of public interest, it ought to act with care. After all, as the Supreme Court noted in the landmark case of *Mills v. Alabama*, "[w]hatever differences may exist about the interpretations

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[39] *Buckley*, 519 F.2d at 873.
[40] *E.g. Talley v. Calif.*, 362 U.S. 60 (1960).
[41] *See* Elizabeth Strassner, *Warner, Kobluchar, McCain propose Honest Ads Act*, U.S. News, Oct. 19, 2017 (https://www.usnews.com/news/politics/articles/2017-10-19/warner-klobuchar-mccain-propose-honest-ads-act).

of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes"[42]

In addition, there are practical concerns with merely cloning the electioneering communication standard applied to broadcast ads. What constitutes a communication reachable by 50,000 persons in the "relevant electorate?" Do the technical means exist to determine that answer without imposing insurmountable compliance costs? After all, basic economics dictates that such costs will be passed on to the consumer. And increasing compliance costs will crowd out precisely the small, grassroots speakers that are most vulnerable and rely most upon the Internet to disseminate their message. Conversely, removing the targeting requirement entirely will simply expand the scope of regulated communications, sweeping in discussions of key legislators, such as committee chairs, even where those conversations are not directed at constituents and are almost certainly not intended to affect electoral results.

These concerns suggest caution. The Internet's role as a conduit for grassroots speech and association is delicate, and too-easily crushed by overzealous or ill-considered restrictions. In particular, Congress should be wary of burdening an enormous swath of Americans' grassroots political advocacy in the name of preventing, or attempting to prevent, relatively small foreign purchases. That concern is especially acute where such foreign meddling is already regulated under an unrelated statutory regime that does not burden Americans' First Amendment liberties.

Thank you again for the opportunity to provide testimony on this important question.

[42] 384 U.S. 214, 218-219 (1966).