

**Comment of Ian Vandewalker
to the California Fair Political Practices Commission
Digital Transparency Task Force¹
May 29, 2020**

On behalf of the Brennan Center for Justice, I thank the Task Force for the opportunity to comment on the issue of transparency for online political ads in California. The Brennan Center is a nonpartisan think tank and advocacy organization that focuses on democracy and justice. We work to ensure that our elections are conducted in a way that allows all Americans to participate in a self-governing democracy. The Brennan Center has studied campaign finance issues for 20 years, working to develop effective and constitutionally sound policies and advocating for them in the courts, legislatures, and administrative bodies across the nation.

Transparency about online political advertising is crucial for California elections for two main reasons: the increasing importance of highly targeted ads online, and California's history of being targeted by spending originating with unknown sources or foreign sources.

I. Political Advertising Online

Political advertising over the Internet has grown exponentially in recent years, yet campaign finance rules have not kept up. Although California has been a leader in campaign finance transparency, the state's democracy would benefit from greater transparency about online ads.

The internet has rapidly become a key focus of political advertising in American elections. One industry estimate predicts that political ad spending online in 2020 will hit \$1.34 billion, three times higher than the 2016 cycle.² That spending growth almost certainly understates the importance of the Internet in political campaigns, given how cheap Internet advertising is relative to other types of media.³ This is especially true in

¹ Mr. Vandewalker serves as Senior Counsel in the Democracy Program at the Brennan Center for Justice at New York University School of Law. This testimony does not reflect the views, if any, of New York University School of Law.

² Kate Gibson, "Spending on U.S. digital political ads to top \$1 billion for first time," *CBS News*, February 12, 2020, <https://www.cbsnews.com/news/spending-on-us-digital-political-ads-to-cross-1-billion-for-first-time/>.

³ "Traditional Media vs. Social Media Advertising," *Lyfe Marketing*, accessed February 15, 2018, <https://www.lyfemarketing.com/traditional-media-versus-social-media/>

light of sophisticated ad targeting tools that make it easier for political operatives across the spectrum to direct divisive messages to susceptible audiences.⁴

Indeed, the targeting capabilities of online advertising are particularly dangerous in political contexts. Traditional print or broadcast advertising is available to almost anyone and can be widely seen, so that the public—as well as fact checkers and political opposition researchers—know which candidates and operatives are pushing which messages. But online advertising allows ads to be targeted to small demographic slices. This obstructs fact checking and political accountability. It allows politicians to say one thing to one audience and the opposite to another. And it creates the potential for individuals to be targeted for certain messages without knowing why.

The Internet Research Agency (IRA), a Russian company with ties to President Vladimir Putin, has been trying to influence American politics with deceptive online ads and organic posts for years.⁵ Operatives with fake social media accounts disguising them as Americans attacked presidential candidates in the 2016 and 2020 elections, in addition to pushing divisive messages on many controversial issues from both left and right viewpoints. The group targeted African Americans with voter suppression and calls to boycott the election.⁶ In 2017, its operatives helped the California secessionist hashtag #Calexit reach Twitter's top trends.⁷ Similar tactics are also used by other countries, such as Iran and China.⁸

The ad archive voluntarily maintained by Facebook reveals tens of thousands of ads concerning politics or social issues that target California. Some are listed as paid for by groups that do not show up in FPPC campaign finance data and whose donors are not obvious. One page, Legit Politic, buys ads criticizing Democratic Party politicians in the

⁴ Harry Davis and Danny Yadron, "How Facebook tracks and profits from voters in a \$10bn US election," *The Guardian*, January 28, 2016, <https://www.theguardian.com/us-news/2016/jan/28/facebook-voters-us-election-ted-cruz-targeted-ads-trump>; Issie Lapowsky, "The Real Trouble with Trump's 'Dark Post' Facebook Ads," *Wired*, September 20, 2017, <https://www.wired.com/story/trump-dark-post-facebook-ads/>; "Connect with constituents and voters on Facebook," *Facebook*, politics.fb.com, accessed February 16, 2018.

⁵ See U.S. Department of Justice, Office of Special Counsel Robert S. Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. I, 14-36 (2019); U.S. Senate Select Comm. on Intelligence, *Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, Vol 2; *Russia's Use of Social Media*, S. Rep. 116-XX (2019); *Assessing Russian Activities and Intentions in Recent U.S. Elections*, ICA 2017-01D, Office of the Director of National Intelligence, 2017.

⁶ Jon Swaine, "Russian propagandists targeted African Americans to influence 2016 US election," *Guardian*, December 17, 2018, <https://www.theguardian.com/us-news/2018/dec/17/russian-propagandists-targeted-african-americans-2016-election>.

⁷ "Russian trolls' promoted California independence," *BBC*, November 4, 2017, <https://www.bbc.com/news/blogs-trending-41853131>.

⁸ "Facebook dismantles disinformation network tied to Iranian media," *Al Jazeera*, May 5, 2020, <https://www.aljazeera.com/news/2020/05/facebook-dismantles-disinformation-network-tied-iranian-media-200505182330583.html>.

state. Another, BRITE CA, bought an ad in 2018 that reached more than one million people and described its “effort to support Governor Jerry Brown” in the reform of environmental legislation.⁹

II. Spending from Secret and Foreign Sources in California

California elections have been targeted by spending from secret sources, or “dark money,” as well as foreign sources.

In 2013, the FPPC levied a record \$1 million fine against a two out-of-state dark money groups for violating disclosure rules as they spent \$15 million to influence ballot measure elections in California.¹⁰ The Texas oil company Phillips 66 was caught sending mailers to oppose a local ballot measure under the name of the shell group Californians for Good Schools and Good Jobs in 2012.¹¹ California has strengthened disclosure rules since these incidents. Nevertheless, “gray money”—when one political committee receives donations from another political committee, making the original source more difficult to find—remains an issue. Gray money has been significant in California elections, with well over \$40 million in each of the 2010 and 2014 cycles.¹²

Some political spenders in the state have been unmasked as foreign nationals. In 2012, for example, a Mexican property developer managed to funnel more than \$600,000 into San Diego’s mayoral race in an effort, as described by prosecutors, to “buy a mayor.”¹³ In another example, a committee opposing a 2012 Los Angeles ballot measure regulating the adult film industry was revealed to have been partially funded by foreign nationals affiliated with a Luxembourg-based company that runs pornographic websites.¹⁴ The funds included contributions from a corporation based in Cyprus and corporate donations directed by a German citizen.¹⁵ A group trying to get California to secede from the U.S.

⁹ BRITE was reportedly financed by utility companies trying to change the state’s wildfire liability rules after massive fires were blamed on utility equipment. Emily Turner, “Wildfire Victims Rally For Utility Company Liability In Large Fires,” KPIX5, August 8, 2018, <https://sanfrancisco.cbslocal.com/2018/08/08/wildfire-victims-rally-for-utility-company-liability-in-large-fires/>.

¹⁰ Kim Barker, “Dark Money Groups Pay \$1 Million in Fines in California Case,” *ProPublica*, October 24, 2013, <https://www.propublica.org/article/dark-money-groups-pay-1-million-dollars-in-fines-in-california-case>.

¹¹ Chisun Lee *et al.*, *Secret Spending in the States*, Brennan Center for Justice, 2016, 17, https://www.brennancenter.org/sites/default/files/2019-08/Report_Secret_Spending_in_the_States.pdf.

¹² Chisun Lee *et al.*, *Secret Spending in the States*, Brennan Center for Justice, 2016, 8, https://www.brennancenter.org/sites/default/files/2019-08/Report_Secret_Spending_in_the_States.pdf.

¹³ Greg Moran, “Feds say Azano wanted to ‘buy a mayor,’” *The San Diego Union-Tribune*, July 27, 2016, <http://www.sandiegouniontribune.com/sdut-feds-say-azano-wanted-to-buy-a-mayor-2016jul27-story.html>.

¹⁴ Ciara Torres-Spelliscy, “Dark Money as a Political Sovereignty Problem,” *Kings Law Journal* 28 (2017).

¹⁵ Federal Election Commission, First General Counsel’s Report, MUR 6678 (MindGeek USA, Inc., *et al.*), Aug. 15, 2014, 9-10 <http://eqs.fec.gov/eqsdocsMUR/15044372921.pdf>

called Yes California has been suspected of financial ties to the Russian government, although group leaders deny it.¹⁶

III. Transparency for Online Political Ads in California

The Brennan Center strongly supports the Task Force’s mission statement that: “Paid political ads should be archived in a publicly accessible database.”¹⁷ An ad archive will directly address the issues noted above. Even ads that target small audiences will still be visible to the public and subject to political accountability. And an ad archive will make it harder for dark money and covert foreign operatives to hide their identities.

Although some large platforms have created their own ad archives, voluntary efforts are not enough. Company policies can be insufficient, varied, or applied inconsistently across users. They can also be abandoned once a scandal blows over. State action is indispensable.

Below, we comment on issues raised in the Task Force’s agenda for its meeting on May 29, 2020.¹⁸

A. The state should consider creating a public database of online political ads.

Where feasible, a single state database will make the ad data most useful to the public, journalists, researchers, and law enforcement, because it will collect the information in a single place and in a standard format. Proposals to have each platform publish their own database run into issues with different data formats, different levels of completeness, and other complications.

B. The archive should include, at a minimum, all campaign ads, independent expenditures, and issue advocacy.

Transparency for political ads is clearly needed for all ads from candidates, political committees, and party committees. In addition, anything that meets the definition of “independent expenditure” or what is often called “issue advocacy”—communications

¹⁶ John Sepulvado, “From His Home in Russia, #Calexit Leader Plots California Secession,” *KQED*, December 13, 2016, <https://www.kqed.org/news/11217187/from-his-home-in-russia-calexit-leader-plots-california-secession>.

¹⁷ California Fair Political Practices Commission Digital Transparency Task Force Mission Statement, <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/DTTF/Task%20Force%20Goals%20Outline.pdf>.

¹⁸ California Fair Political Practices Commission Digital Transparency Task Force May 2020 Agenda, <http://www.fppc.ca.gov/about-fppc/hearings-meetings-workshops/digital-transparency-task-force/may-2020-agenda.html>.

that identify a candidate without express advocacy—should be included.¹⁹ These are all, by definition, communications that influence elections.

In addition, ads concerning legislative issues of importance to the state should be included. Broadcasters have been complying with a version of this requirement for years. The Federal Communications Commission requires television and radio broadcasters to maintain a file of political ads that discuss “national legislative issues of public importance.”²⁰ This category should include ads that pertain to pending or recently passed legislation or that are intended to encourage future legislative action.²¹

C. The archive should include information about the ad, its financing, as well as its targeting and audience.

To keep voters informed about who is trying to influence California politics and how, it is important that the archive include key pieces of information. It should include a copy of the ad, so that messages are available to everyone, not only those who are targeted. Since some ads are purely images, the names of candidates, ballot measures, or legislative issues discussed should be reported explicitly. The archive should include information about who paid for the ad and how much it cost, as well as which platform it ran on and the dates it was active.

Information about who the advertiser sought to target, the number of impressions (how many users were served the ad), and demographic information about the audience reached should all be included as well. Targeting, especially, is crucial because the meaning of an ad can change depending on who is targeted. For example, the message, “boycott the election because there is no difference between the candidates,” takes on a different significance if we learn that the advertiser targeted African Americans for “boycott” messages and targeted other Americans with messages in favor of one of the candidates, as the Kremlin’s operatives at the IRA did in 2016.

D. Reporting requirements should reflect who has the information.

Much of the information needed for an ad archive can be most easily provided by the ad buyer. But there are compelling reasons to require platforms and ad vendors to report as well, even if the archive is maintained by the state rather than the platforms. Ad sellers

¹⁹ Cal. Gov’t Code § 82031 (defining independent expenditure); § 85310 (requiring reporting for communications that clearly identify a candidate within 45 days of an election).

²⁰ 47 U.S.C. § 315(E)(1)(B)(iii).

²¹ Cf. Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, et al., Memorandum Opinion and Order, DA 17-14, para. 34-35 (MB rel. Jan. 6, 2017) (clarifying the scope of “national legislative issues of public importance”), *rescinded by* Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, et al., Memorandum Opinion and Order, DA 17-126.

like platforms and third-party vendors are likely in possession of information that ad buyers don't have, like how many impressions the ad achieved and the demographics of the audience reached. Collecting data from platforms is also important as a check on the accuracy of the data, since some ad buyers may not report accurately.

E. The archive should be fully searchable.

The public should be able to search the archive by any of the types of information stored in it, including the text of the ad, as discussed above. The public should be able to download data into spreadsheets for analysis. Some ad copies will not be amenable to search and download because of images, but the data should include an identifier that will allow members of the public who search other information about an ad, like the candidate depicted, to find the images.

F. The archive should be structured with awareness of constitutional concerns.

In *Post v. McManus*, the federal Fourth Circuit Court of Appeals blocked the state of Maryland from enforcing portions of its political ad transparency law against a group of newspapers and press organizations. Although the Brennan Center disagrees with the decision, it illuminates certain constitutional concerns that may be raised.²²

The *McManus* court reasoned that certain aspects of the Maryland law were not sufficiently tailored to the legislature's stated purpose of blocking foreign interference in its elections.²³ This was, in part, because the legislative history indicated that the primary purpose of the bill was blocking interference like Russia's use of deceptive online activity in 2016. Since most of Russia's interference involved unpaid ads and messages that did not expressly advocate about the election, the court found that Maryland's regulation of paid, express-advocacy ads was underinclusive.²⁴ Increased transparency requirements for paid political ads online should therefore be expressly justified by the ample compelling reasons for regulation, such as informing voters and combating corruption, in addition to concerns about foreign interference.²⁵

Also, disclosure requirements on platforms and ad vendors—as opposed to ad buyers—should be targeted to the platforms and vendors that pose the greatest risk for spreading

²² 944 F.3d 506 (4th Cir. 2019).

²³ *Id.* at 513-23.

²⁴ *Id.* at 521.

²⁵ *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (disclosure “enables the electorate to make informed decisions and give proper weight to different speakers and messages”); *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (reasoning that disclosure “expos[es] large contributions and expenditures to the light of publicity [which] may discourage those who would use money for improper purposes either before or after the election.”).

non-transparent political ads. *Post v. McManus* expressed concern that the Maryland law was overbroad in its application to platforms with small audiences.²⁶ Therefore, regulation of platforms and ad vendors—whether requiring them to host their own ad archives or requiring them to report to a state database—should be imposed on those with large audience shares. One example of this approach is the Honest Ads Act contained in omnibus legislation that passed the U.S. House last year, which imposes certain disclosure obligations only on platforms that have 50 million or more monthly users.²⁷

Finally, *Post v. McManus* expressed special concern with the imposition of any kind of publication requirement on the press.²⁸ For this reason, the FPPC should consider exempting bona fide press outlets from regulations that would require platforms to publish anything.

²⁶ 944 F.3d at 521.

²⁷ For the People Act, H.R. 1, 116th Cong., § 4208(a).

²⁸ 944 F.3d at 521.