

**Joint Testimony of Daniel I. Weiner and Ian Vandewalker  
to the Maryland House of Delegates, Ways and Means Committee<sup>1</sup>**

**February 20, 2018**

On behalf of the Brennan Center for Justice, we thank the Committee for the opportunity to testify in support of HB 981, the Online Electioneering Transparency and Accountability Act. 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.

Political advertising over the Internet has grown exponentially in recent years, yet campaign finance rules have largely failed to keep pace. That failure created an opening for Russian operatives to secretly inject propaganda and divisive messages into the 2016 campaign—including messages targeting Maryland voters. HB 981 would help fortify Maryland elections against such threats and improve their overall transparency. It would do so employing reasonable and constitutionally sound means. We do recommend certain modifications to the proposed legislation to enhance its effectiveness and administrability. With these changes, we urge the House of Delegates to immediately take up and pass HB 981.

**I. The Rise of Internet Advertising**

The Internet has rapidly become a key focus of political advertising in American elections. In 2017, ad buys for digital platforms outstripped those for traditional broadcast ads for the first—but certainly not the last—time.<sup>2</sup> The \$1.4 billion spent online in the 2016 election was almost eight times higher than the amount spent in 2012.<sup>3</sup> And that spending growth almost certainly understates the importance of the Internet in political campaigns, given how cheap internet

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<sup>1</sup> Mr. Weiner and Mr. Vandewalker both serve as Senior Counsel in the Brennan Center’s Democracy Program. This testimony does not reflect the views, if any, of the NYU School of Law.

<sup>2</sup> George Slefo, “Desktop and Mobile Ad Revenue Surpasses TV for the First Time,” *AdAge*, April 26, 2017, <http://adage.com/article/digital/digital-ad-revenue-surpasses-tv-desktop-iab/308808/>.

<sup>3</sup> Sean J. Miller, “Digital Ad Spending Tops Estimates,” *Campaigns & Elections*, January 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

advertising is relative to other types of media.<sup>4</sup> This is especially true in light of sophisticated ad targeting tools that make it easier for political operatives across the spectrum to direct tailored messages to select, highly-susceptible audiences at relatively little cost.<sup>5</sup>

## II. Russia's Use of Internet Ads in the 2016 Election

Russia attempted to influence the 2016 election by having “trolls” buy online ads and promote content through fake accounts pretending to be Americans. They crafted different messages for different audiences and used leading online platforms’ sophisticated audience targeting tools to increase the chances that propoganda would reach the most receptive audiences.<sup>6</sup>

The Kremlin’s messages were mostly designed to “amplify[] divisive social and political messages across the ideological spectrum.”<sup>7</sup> Some also included attacks on or praise for specific presidential candidates.<sup>8</sup> Maryland was among the states targeted. For instance, Russian operatives targeted socially polarizing Facebook ads to the Baltimore area, which was experiencing mass protest movements and high tensions during the 2016 election period.<sup>9</sup> In total, there is evidence of at least 261 different ads having been targeted towards Maryland residents.<sup>10</sup>

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<sup>4</sup> “Traditional Media vs. Social Media Advertising,” Lyfe Marketing, accessed February 15, 2018, <https://www.lyfemarketing.com/traditional-media-versus-social-media/>.

<sup>5</sup> 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*, Sept 20, 2017, <https://www.wired.com/story/trump-dark-post-facebook-ads/>; “Connect with constituents and voters on Facebook,” <https://politics.fb.com/>, accessed February 16, 2018.

<sup>6</sup> See Massimo Calabresi, “Inside Russia’s Social Media War on America,” *Time*, May 18, 2017, <http://time.com/4783932/inside-russia-social-media-war-america/>.

<sup>7</sup> Alex Stamos, Chief Security Officer, Facebook, “An Update On Information Operations On Facebook,” September 6, 2017, <https://newsroom.fb.com/news/2017/09/information-operations-update/> [“Stamos Update”]. See also Josh Dawsey, “Russian-funded Facebook ads Backed Stein, Sanders and Trump,” *Politico*, September 26, 2017, <http://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>; Adam Entous, Craig Timberg and Elizabeth Dwoskin, “Russian Operatives Used Facebook ads to Exploit America’s Racial and Religious Divisions,” *Washington Post*, September 25, 2017, [https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa\\_story.html](https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html).

<sup>8</sup> See Stamos Update; Scott Shane, “These Are the Ads Russia Bought on Facebook in 2016,” *New York Times*, November 1, 2017, <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>; Ben Popken, “Twitter deleted 200,000 Russian troll tweets. Read them here.” *NBC News*, February 14, 2018, <https://www.nbcnews.com/tech/social-media/now-available-more-200-000-deleted-russian-troll-tweets-n844731>. Some of these ad buys were likely illegal, since they recommended voting for presidential candidates, and foreign nationals are banned from engaging in “express advocacy” that tells the public how to vote. See 52 U.S.C. § 30121 (banning foreign nationals from election spending); 11 C.F.R. § 100.22 (defining express advocacy). But, based on what Facebook has reported, many of the ads stopped short of express advocacy and so may not have run afoul of current federal law.

<sup>9</sup> Dylan Byers, “Exclusive: Russian-bought Black Lives Matter ad on Facebook targeted Baltimore and Ferguson,” *CNN*, September 28, 2017, <http://money.cnn.com/2017/09/27/media/facebook-black-lives-matter-targeting/index.html>.

<sup>10</sup> Changez Ali and J.F. Meils, “GOP Senator: Maryland One of Three States Most Targeted by Russian Ads in 2016,” *Delmarva Now*, November 2, 2017, <http://www.delmarvanow.com/story/news/local/maryland/2017/11/02/maryland-russian-facebook-ads-campaign/826688001/>.

So far, internal investigations by Facebook, Twitter, and Google have found Russian activity on each of these popular platforms.<sup>11</sup> Total expenditures were in the hundreds of thousands of dollars.<sup>12</sup> Although this may seem like a comparatively small amount of money, powerful modern ad targeting tools and the possibility for messages to be shared organically by users can vastly expand even a modest ad buy's reach.<sup>13</sup>

Russia's purchases of political ads in 2016 called particular attention to the problem of "dark posts"—narrowly targeted online ads that the general public does not know about. Dark posts allow political operatives to take different positions with different audiences and use inflammatory or blatantly false rhetoric.<sup>14</sup> And they can drive audiences to unpaid content posted by the same fake accounts.<sup>15</sup>

In total, Facebook has estimated that 11.4 million people saw its Russia-linked ads; related content that users could organically share reached 126 million Facebook users.<sup>16</sup>

Last Friday, a grand jury empaneled by Special Counsel Robert Mueller handed up its first indictments of Russian nationals (thirteen individuals and three business entities with ties to the Russian government) for their use of social media platforms to influence the 2016 election in violation of U.S. law.<sup>17</sup> However, it is important to emphasize that even with these indictments,

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<sup>11</sup> Elizabeth Dwoskin, Adam Entous, and Craig Timberg, "Google Uncovers Russian-bought Ads on YouTube, Gmail and other platforms," *Washington Post*, October 9, 2017, <https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/>; Carol D. Leonnig, Tom Hamburger, and Rosalind S. Helderman, "Russian Firm Tied to Pro-Kremlin Propaganda Advertised on Facebook During Election," *Washington Post*, September 6, 2017, [https://www.washingtonpost.com/politics/facebook-says-it-sold-political-ads-to-russian-company-during-2016-election/2017/09/06/32f01fd2-931e-11e7-89fa-bb822a46da5b\\_story.html](https://www.washingtonpost.com/politics/facebook-says-it-sold-political-ads-to-russian-company-during-2016-election/2017/09/06/32f01fd2-931e-11e7-89fa-bb822a46da5b_story.html).

<sup>12</sup> See Stamos Update; Twitter Public Policy, "Update: Russian Interference in 2016 US Election, Bots, & Misinformation," *Twitter Blog*, Sept 28, 2017, [https://blog.twitter.com/official/en\\_us/topics/company/2017/Update-Russian-Interference-in-2016--Election-Bots-and-Misinformation.html](https://blog.twitter.com/official/en_us/topics/company/2017/Update-Russian-Interference-in-2016--Election-Bots-and-Misinformation.html).

<sup>13</sup> Ben Collins, Kevin Poulsen, and Spencer Ackerman, "Russia's Facebook Fake News Could Have Reached 70 Million Americans," *The Daily Beast*, September 8, 2017, <http://www.thedailybeast.com/russias-facebook-fake-news-could-have-reached-70-million-americans>; Kevin Bingle, "I Ran Digital For A 2016 Presidential Campaign. Here's What Russia Might Have Got For \$100,000," *BuzzFeed*, September 8, 2017, <https://www.buzzfeed.com/kevinbingle/how-far-did-russias-100000-go>.

<sup>14</sup> See Christopher S. Elmendorf, Ann Ravel and Abby Wood, "Open Up the Black Box of Political Advertising," *San Francisco Chronicle*, September 22, 2017, <http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php>; Siva Vaidhyanathan, "Facebook Wins, Democracy Loses," *New York Times*, September 8, 2017, <https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html>.

<sup>15</sup> On Facebook, users who click "like" or "share" on one of an account's promoted posts are automatically, and possibly unknowingly, subscribed to follow that advertiser's account. Mike Isaac, "At Facebook, Hand-Wringing Over a Fix for Fake Content," *New York Times*, October 27, 2017, <https://www.nytimes.com/2017/10/27/technology/facebook-fake-content-employees.html>.

<sup>16</sup> Craig Timberg, "Russian propaganda may have been shared hundreds of millions of times, new research says," *Washington Post*, October 5, 2017, <https://www.washingtonpost.com/amphtml/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/>.

<sup>17</sup> Indictment, February 16, 2016, available at <https://www.justice.gov/file/1035477/download> ["Feb. 16 Indictment"].

we still do not know the full extent of Russia's efforts to influence the American electorate using online platforms.

What we do know is that what happened in 2016 is likely to recur. In fact, the country's top intelligence officials warned Congress this month that the Russian government sees the upcoming midterm elections as an opportunity to sow fresh discord in American politics.<sup>18</sup>

In response to the Russian interference scandal, social media platforms like Facebook and Twitter have promised changes to blunt the ability of foreign powers to fund online political ads in American elections.<sup>19</sup> However, voluntary efforts are not enough. Policies can be insufficient, varied, or applied differently across users. They can also be abandoned once a scandal blows over. In short, while internet companies are valuable partners in the effort to prevent foreign meddling in U.S. elections, government—at both the state and federal levels—also has an indispensable role to play

### III. Other Examples of Foreign Spending in U.S. Elections

Russia's use of internet ads is not the only example of foreign governments and nationals seeking to influence the 2016 campaign through election spending. The FBI is also reportedly investigating whether a Russian oligarch with close ties to President Vladimir Putin funneled money to the National Rifle Association to spend on elections.<sup>20</sup>

Moreover, Russian nationals are hardly alone in seeking to influence U.S. campaigns. For instance, a wealthy Chinese couple who have long sought to cultivate ties to American politicians reportedly used a U.S. company to give \$1.2 million to a super PAC backing Jeb Bush's presidential campaign.<sup>21</sup> Chinese nationals seeking EB-5 visas for foreign investors also have been accused of using a limited liability company to funnel money to a super PAC backing Representative Patrick Murphy, the Democratic U.S. Senate nominee in Florida; the Federal Election Commission (FEC) declined to investigate, over the strenuous objections of two

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<sup>18</sup> Matthew Rosenberg, Charlie Savage and Michael Wines, "Russia Sees Midterm Elections as Chance to Sow Fresh Discord, Intelligence Chiefs Warn," *New York Times*, February 13, 2018, <https://www.nytimes.com/2018/02/13/us/politics/russia-sees-midterm-elections-as-chance-to-sow-fresh-discord-intelligence-chiefs-warn.html>.

<sup>19</sup> For instance, Facebook is building an "ad transparency" tool that will require additional human review and approval of ads that are targeted with reference to "politics, religion, ethnicity or social issues." Sara Fisher and David McCabe, "Facebook tells advertisers more scrutiny is coming," *Axios*, October 7, 2017, <https://www.axios.com/scoop-facebook-tells-advertisers-more-scrutiny-is-coming-2493827891.html>. Twitter has likewise promised to strengthen its site against "bots and networks of manipulation." Twitter PublicPolicy, "Update: Russian Interference in 2016 US Election, Bots, & Misinformation," *Twitter*, September 28, 2017, [https://blog.twitter.com/official/en\\_us/topics/company/2017/Update-Russian-Interference-in-2016--Election-Bots-and-Misinformation.html](https://blog.twitter.com/official/en_us/topics/company/2017/Update-Russian-Interference-in-2016--Election-Bots-and-Misinformation.html). In this effort, the company has identified and suspended accounts identified as spam accounts; tracked spending by known foreign entities targeting U.S. audiences; and removed tweets which suppressed the vote. *Id.*

<sup>20</sup> Peter Stone and Greg Gordon, "FBI Investigating whether Russian Money went to NRA to help Trump," *McClatchy*, January 18, 2018, <http://www.mcclatchydc.com/news/nation-world/national/article195231139.html>

<sup>21</sup> Lee Fang, Jon Schwarz and Elaine Yu, "Power Couple: Meet the Chinese Husband-and-Wife Team Whose Company Spent \$1.3 Million Trying to Make Jeb Bush President," *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/chinese-couple-million-dollar-donation-jeb-bush-super-pac/>.

commissioners from Murphy's own party.<sup>22</sup> And the American Chemistry Council, a major spender in federal elections, announced this month that a state-owned Chinese firm, Wanhua Chemical, will become a dues-paying member.<sup>23</sup>

Nor are such activities limited to federal elections. 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."<sup>24</sup> In another example, a committee opposed to 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 online pornography company.<sup>25</sup> The funds included contributions from a corporation based in Cyprus and corporate donations directed by a German citizen.<sup>26</sup> The episode generated a complaint to the FEC, but the Commission deadlocked, with half the commissioners blocking enforcement based on their conclusion that the federal prohibition on foreign national campaign spending does not apply to state ballot measures.<sup>27</sup>

Several of these examples highlight another critical issue: the ability of foreign nationals to funnel campaign contributions through domestic corporations.

The Supreme Court's *Citizens United* decision and its progeny freed corporations to spend money on elections by, for example, giving to super PACs.<sup>28</sup> The Court's subsequent ruling in *Bluman v. Federal Election Commission* reaffirmed, however, that foreign nationals may still be prohibited from spending on campaigns.<sup>29</sup> As a result, although corporations organized abroad are still banned from giving money, the same restrictions have not generally been applied to domestic corporations with significant foreign ownership.<sup>30</sup> Such entities are prohibited from acting as "conduits" for illegal donations (as in several of the examples above), but conduit schemes tend to be very difficult to prove and rarely prosecuted.

Moreover, too often current law does not prevent many other foreign-influenced corporations—including firms with ties to foreign governments—from spending legally in U.S. elections. Russia, for example, often operates through proxies, like its Internet Research Agency, which is

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<sup>22</sup> Kenneth P. Doyle, "FEC Drops Foreign Money Case Involving Super PAC Contributions," *Bloomberg BNA*, October 25, 2017, <https://www.bna.com/fec-drops-foreign-n73014471336/>.

<sup>23</sup> Lee Fang, "Chinese State-Owned Chemical Firm Joins Dark Money Group Pouring Cash into U.S. Elections," *The Intercept*, February 15, 2018, <https://theintercept.com/2018/02/15/chinese-state-owned-chemical-firm-joins-dark-money-group-pouring-cash-into-u-s-elections/>.

<sup>24</sup> 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>.

<sup>25</sup> Ciara Torres-Spelliscy, "Dark Money as a Political Sovereignty Problem," *Kings Law Journal* 28 (2017).

<sup>26</sup> FEC, First General Counsel's Report, Matter Under Review (MUR) 6678 (MindGeek USA, Inc., et al.), August 15, 2014, 9-10, available at <http://eqs.fec.gov/eqsdocsMUR/15044372921.pdf>.

<sup>27</sup> *Id.* at 15 – 20; Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman in MUR 6678 (MindGeek USA, Inc., et al.), April 30, 2015, available at <http://eqs.fec.gov/eqsdocsMUR/15044372963.pdf>.

<sup>28</sup> See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); Jon Schwarz and Lee Fang, "Cracks in the Dam: Three Paths Citizens United Created for Foreign Money to Pour into U.S. Elections," *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/citizens-united-foreign-money-us-elections/>.

<sup>29</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (three judge court), *summarily aff'd.*, 565 U.S. 1104 (2012).

<sup>30</sup> "Foreign Nationals," *FEC Record*, June 23, 2017, <https://www.fec.gov/updates/foreign-nationals/>; FEC Advisory Op. 2006-15, available at <http://saos.fec.gov/aodocs/2006-15.pdf>.

organized as a business corporation (and was one of the three entities indicted last Friday for election interference).<sup>31</sup> In theory, there is nothing to stop such an entity from forming an American subsidiary with the ability to spend money on U.S. campaigns. Even if that subsidiary was independently managed, those running it on behalf of the parent would have a fiduciary responsibility to pursue the parent corporation's best interests, including through the entity's political spending.<sup>32</sup>

As explained below, we do not believe that such a result is compelled by the Supreme Court's jurisprudence. As with foreign campaign spending over the Internet, government can and must act to address this problem.

#### IV. Analysis of HB 981

HB 981 takes meaningful steps to address both the central role the Internet now plays in political advertising—including the use of internet advertising by foreign governments or their proxies to interfere with our elections—and the problem of foreign campaign spending funneled through U.S. corporations. It does so by, among other things: 1) including online political advertisements in the definition of “electioneering communications” subject to certain disclosure and disclaimer rules; 2) requiring internet platforms to maintain a “public file” documenting the political ads they have sold in the previous year; and 3) expanding prohibitions on campaign spending by foreign nationals to include foreign-influenced corporations.

We strongly support these changes, which are consistent with the Supreme Court's jurisprudence. The only campaign spending the bill prohibits is that of entities owned or controlled in significant part by foreign nationals. Court have long recognized that government has a “compelling interest for purposes of the First Amendment in limiting the participation of foreign citizens in activities of American self-government, and in thereby preventing foreign influence over the U.S. political process.”<sup>33</sup> Thus, “government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.”<sup>34</sup> U.S. shareholders and other citizens and permanent residents affiliated with foreign-influenced corporations remain free to spend money on Maryland elections; HB 981 simply prohibits them from doing so in conjunction with foreign nationals who are ineligible to do so.

HB 981's remaining provisions do not prohibit any campaign spending at all, but simply ensure that it will be transparent. The Supreme Court—from *Buckley v. Valeo*<sup>35</sup> to *Citizens United*<sup>36</sup> and

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<sup>31</sup> Ivan Nechepurenko and Michael Schwartz, “The Troll Farm: What We Know About 13 Russians Indicted by the U.S.,” *New York Times*, February 17, 2018, <https://www.nytimes.com/2018/02/17/world/europe/russians-indicted-mueller.html>; Feb. 16 Indictment, ¶ 25. Russia has a widely recognized practice of employing proxy entities in other countries. *See, e.g.*, Orysia Lutsevych, “Agents of the Russian World: Proxy Groups in the Contested Neighbourhood,” *Chatham House, The Royal Institute of International Affairs*, 2016, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf>.

<sup>32</sup> Memorandum from Ellen L. Weintraub, Commissioner, Federal Election Commission, September 28, 2016, [https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign\\_National\\_2\\_Memo\\_28\\_Sept\\_2016.pdf](https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf).

<sup>33</sup> *Bluman*, 800 F. Supp.2d at 288.

<sup>34</sup> *Id.*

<sup>35</sup> 424 U.S. 1, 62-64, 84 (1976).

beyond—has consistently and repeatedly held that transparency requirements are constitutional. Even when dismantling other regulations, the Court has reaffirmed that disclosure rules are justified to “help citizens make informed choices in the political marketplace,”<sup>37</sup> and prevent “abuse of the campaign finance system.”<sup>38</sup> The common-sense requirements that HB 981 establishes for paid internet communications, which are in line with rules for other types of political spending, further these goals, and are likely to be upheld if challenged.

While we strongly support passage of HB 981, based on our review of the legislation’s current text, we do recommend the following amendments to enhance its effectiveness.

1. Proposed Section 1-101(dd-2)

As noted, we strongly support HB 981’s core goal of extending common-sense campaign finance rules to online political ads. To further strengthen the provisions working towards this objective, we recommend three key changes to the definition of “Online Political Advertisement” in proposed section 1-101(dd-2):

First, **reduce the distribution threshold in proposed section 1-101(dd-2)(1)(II) from 5000 to 500**. As noted above, Russian efforts to interfere in the 2016 election exploited sophisticated targeting tools to direct tailored ads to small groups of people. It is likely that other actors will take advantage of similar techniques. In the very least, platforms should be required to keep records of these ad purchases in their public files, which will allow journalists to fact-check claims and give the wider public the power to hold speakers accountable for inflammatory or false rhetoric.<sup>39</sup> The 500-recipient threshold is already used elsewhere in the Election Law,<sup>40</sup> and we believe it makes sense here.

Second, **include generic references to political parties and issues of public importance in proposed section 1-101(dd-2)(1)(III)**. Many of the ads deployed by Russian operatives in 2016, including some of those deployed in Maryland, did not make specific reference to any candidate or ballot question, but instead discussed issues of public importance. Such ads, like ads targeted to relatively small numbers of people, should at least be included in the public files maintained by platforms. Under federal law, the public “political file” requirements that television and radio broadcasters must follow include all political ads and ads concerning issues of public importance.<sup>41</sup> A similar requirement is in the federal Honest Ads Act.<sup>42</sup> We believe a parallel requirement makes sense here.

Third, **include online ads with production costs of at least \$5000 in proposed section 1-101(dd-2)(1)(I)**. Social media websites like Facebook and YouTube allow content to be shared

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<sup>36</sup> 558 U.S. at 371.

<sup>37</sup> *Id.* at 367, 369.

<sup>38</sup> *McCutcheon v. FEC*, 134 S.Ct. 1434, 1459 (2014) (plurality opinion).

<sup>39</sup> See Elmendorf, Ravel and Wood, “Open up the Black Box of Political Advertising”; Siva Vaidhyanathan, “Facebook Wins, Democracy Loses,” *New York Times*, September 8, 2017, <https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html>.

<sup>40</sup> See Md. Election Law § 13-306(a)(4) (mass mailings).

<sup>41</sup> The file includes information about the content of the ad, when and where it was aired, the cost, and the buyer’s identity. 47 C.F.R. § 73.1943. The files are available online at <https://publicfiles.fcc.gov/>.

<sup>42</sup> Honest Ads Act of 2017, S.1989, 115th Cong. (2017), sec. 8, available at <https://www.congress.gov/bill/115th-congress/senate-bill/1989/text> [“Honest Ads Act”].

widely for free. Political operatives can spend significant amounts to produce a slick video, then share it without paying the platform anything. To capture this spending, ads that cost \$5000 or more to produce (the minimum reporting threshold for electioneering communications<sup>43</sup>) should qualify as Online Political Advertisements even if posted for free. Section 13-307 governing electioneering communications should also be amended to make clear that “disbursements” counting towards the reporting thresholds include money spent on ad production as well as ad placement.

We also urge you to consider adding use of a candidate’s voice in the definition of “clearly-identified” in proposed section 1-101(dd-2)(2), with a conforming amendment to the definition of “electioneering communication” in section 13-307(a)(3)(iii). Federal law is silent with respect to this issue, on which the Federal Election Commission (FEC) has deadlocked.<sup>44</sup> In our view, use of a candidate’s voice in an ad does “clearly identify” a candidate, and should be expressly covered.

## 2. Section 13-236.1

We also strongly support HB-981’s extension of prohibitions on campaign spending by foreign nationals to foreign-influenced corporations. We do, however, recommend three key changes to these provisions.

First, **change the definition of “foreign-influenced corporation” in proposed section 13-236.1(a)(2)**. The current definition covers any “corporation at least 5% of which is owned by foreign nationals.” This formulation would create compliance challenges for publicly-traded corporations that cannot easily determine how many of their direct and indirect shareholders at a given time are not U.S. citizens or permanent residents.

We recommend replacing this language with definitional language from federal legislation introduced by Congressman Jamie Raskin.<sup>45</sup> Congressman Raskin’s bill defines a “foreign-influenced corporation” to include, among other categories, corporations at least five percent of whose voting shares are owned or controlled by a foreign government or entity or individual connected to it; at least twenty percent of whose voting shares are owned by any other foreign national; or whose decision-making processes (overall or with respect to election-related activities) with respect to the United States<sup>46</sup> are controlled at least in part by one or more foreign nationals. By limiting the triggering percentage to cases in which a single entity owns, in the very least, five percent or more, the bill minimizes the compliance burden; publicly-traded corporations are already required to report purchases of five percent or more, along with the buyer’s citizenship, to the Securities and Exchange Commission within 10 days of the

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<sup>43</sup> Md. Election Law § 13-307(b).

<sup>44</sup> FEC Advisory Op. 2012-19 (American Future Fund), available at <http://saos.fec.gov/aodocs/AO%202012-19.pdf>; Concurring Statement of Vice Chair Ellen L. Weintraub and Commissioner Cynthia L. Bauerly on Advisory Opinion Request 2012-19 (American Future Fund), June 13, 2012, available at <https://www.fec.gov/resources/about-fec/commissioners/weintraub/aos/sorao2012-19.pdf>.

<sup>45</sup> Get Foreign Money Out of U.S. Elections Act, H.R. 1615, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/1615/text>.

<sup>46</sup> It may be appropriate to add “or the State of Maryland or any subdivision of it” to the phrase “with respect to the United States” in subsection 2(a)(3) of Congressman Raskin’s bill.



purchase.<sup>47</sup> This definition is more precise and, in our view, adequate to accomplish HB-981's goal of preventing foreign interference in Maryland elections.

Second, **make sure LLCs are included.** We urge inclusion of express language that limited liability companies (LLCs), which are hybrid entities typically set up to obtain certain tax benefits while retaining the benefit of the corporate form, count as corporations for purposes of this provision. There is evidence that LLCs are increasingly being used in political spending.<sup>48</sup> LLCs can generally be organized with little more than an anonymous name like "ABC LLC," a post office box, and a bank account, effectively masking the origin of any funds.<sup>49</sup> LLC spending in federal elections increased by almost fifty percent in 2016 relative to 2012.<sup>50</sup> Investigations outside the electoral context have also documented the use of LLCs to obscure foreign ownership of U.S. assets.<sup>51</sup>

Third, **add a "reasonable efforts" requirement for those who sell political ads.** The federal Honest Ads Act would require broadcasters, cable and satellite providers, and online platforms to "make reasonable efforts to ensure that [independent expenditures and electioneering communications] made available by such station, provider or platform are not purchases by a foreign national, directly or indirectly."<sup>52</sup> We recommend adding a similar requirement to HB 981. This would require providers to, for example, give extra scrutiny to purchases by credit card where there is a foreign billing address.<sup>53</sup> Online platforms like Google could also screen ads purchased from foreign IP addresses. Such techniques would not prevent all prohibited ad purchases by foreign nationals, but they would at least screen out the most obvious violations.

### 3. Section 13-307(a)(3)

Two additional conforming changes should be made to the definition of "electioneering communication" in section 13-307(a)(3)(i).

First, the provision as currently drafted does not specify how many people an online political advertisement needs to reach to qualify as an electioneering communication. We recommend adding online political advertisements to the list of communications in subsection 3(B) that must reach at least 5000 people to qualify, since they are more analogous to the other forms of

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<sup>47</sup> 17 C.F.R. § 240.13d-101.

<sup>48</sup> The FEC has received complaints of donations coming from LLCs apparently created to hide donors' identities. Office of Commissioner Ann M. Ravel, Federal Election Commission, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, February 2017, [http://www.fec.gov/members/ravel/ravelreport\\_feb2017.pdf](http://www.fec.gov/members/ravel/ravelreport_feb2017.pdf).

<sup>49</sup> Michael Beckel, "Rapper-backed Group Illustrates Blind Spot in Political Transparency," *Center for Public Integrity*, March 31, 2015, <https://www.publicintegrity.org/2015/03/31/16944/rapper-backed-group-illustrates-blind-spot-political-transparency> (discussing anonymity of LLCs).

<sup>50</sup> Ashely Balcerzak, "Surge in LLC Contributions Brings More Mystery about True Donors," *OpenSecrets*, April 27, 2017, <https://www.opensecrets.org/news/2017/04/surge-in-llc-contributions-more-mystery/>.

<sup>51</sup> Louise Story and Stephanie Saul, "Stream of Foreign Wealth Flows to Elite New York Real Estate," *New York Times*, February 8, 2015, <https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html>.

<sup>52</sup> Honest Ads Act, sec. 9.

<sup>53</sup> A similar requirement for federal campaign contributions has been proposed with bipartisan support. See Stop Foreign Donations Affecting Our Elections Act, S.1660, 115th Cong. (2017), sec. 2, available at <https://www.congress.gov/bill/115th-congress/senate-bill/1660/text>.

communication listed in that subsection (such as e-mail and text blasts and mass mailings) than they are to the television and radio communications covered by subsection 3(A).

Second, for avoidance of any doubt, we recommend clarifying that the media exception in section 13-307(a)(3)(ii)(2) applies to news stories disseminated over the web or in print. This could be accomplished by conforming the language of this subsection to that in section 13-306(a)(6)(ii)(1) dealing with “public communications.”

#### 4. Proposed Section 13-403.1

Finally, we strongly support the policy of requiring businesses that sell online ads to make information about political ads available in a public file, as HB 981 does. We recommend strengthening the bill’s relevant provisions as follows:

First, **require public files to be online.** Platforms may not have offices in Maryland, making physical inspection infeasible. And internet companies should have the expertise to build easy-to-access online databases. The database should be machine readable so that members of the public can easily download the data for analysis. The law should also make clear how frequently platforms are required to update the database (at least quarterly).

Second, **require public files to contain more information.** In addition to the information currently required (the advertiser’s name and the cost), there should also be public access to the name of the candidate and office sought, ballot issue, or party or issue referenced; how the ad’s audience was targeted; and what dates the ad ran.

Third, **expand the 48-hour reporting requirement.** The 48-hour report that would be required by proposed Section 13.403.1(B) should be strengthened to include all the information required for the public file, not just the ad and the cost. Including information about the spender, election, and targeting will make the reports most useful to law enforcement investigations of potential violations of the ban on election spending by foreign nationals.

Fourth, **consider adding a safe harbor.** We recommend consideration of a safe harbor provision that would allow platforms to keep some identifying information out of the public file in cases where an ad buyer presents credible evidence (subject to review by the Board of Elections) that disclosure will likely subject them to “threats, harassment, or reprisals.”<sup>54</sup>

Legislative language embodying most of these recommendations can be found in the federal Honest Ads Act and a bill proposed by New York Gov. Andrew Cuomo.<sup>55</sup>

#### 5. Authority Line Provisions

In addition to the above-referenced changes to the public file requirement, we further recommend requiring platforms that allow online political advertisements to be republished by other users (e.g., “sharing” on Facebook and “retweeting” on Twitter) ensure that the “authority line” disclaimer required under section 13-401 remain visible when the ad is republished by users. This is needed to ensure that audiences that only see the republished version will still be

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<sup>54</sup> *Buckley*, 424 U.S. at 74.

<sup>55</sup> Honest Ads Act, sec. 8; New York State Executive Budget FY 2019, Good Government and Ethics Reform Article VII Legislation, 7-8, <https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19artVII/GGERArticleVII.pdf>.

informed as to who is responsible for the ad. For example, Facebook should be required to ensure that “paid for by” disclaimers appear on political ads no matter who they are shared by, or how many times.

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With these amendments, HB 981 will be an important step in closing loopholes that have undermined campaign transparency in Maryland and left state elections vulnerable to foreign interference. With Election Day little more than eight months away, and the near certainty that foreign powers will continue to look for ways to interfere with campaigns in Maryland and across the nation, the time to act is now. We commend the Committee for taking up this important matter and urge HB 981’s prompt passage by the full House of Delegates.