
PERSUASIVE OR DECEPTIVE? NATIVE ADVERTISING IN POLITICAL CAMPAIGNS

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TABLE OF CONTENTS

INTRODUCTION	340
I. CAMPAIGN FINANCE DISCLOSURE	342
A. <i>BUCKLEY V. VALEO</i> AND THE SUPREME COURT'S DISCLOSURE FRAMEWORK	342
B. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 AND DISCLOSURE POST- <i>BUCKLEY</i>	346
C. <i>CITIZENS UNITED V. FEC</i>	347
II. EMPIRICAL STUDIES MEASURE THE BENEFITS OF DISCLOSURE	350
A. THE EFFECTIVENESS OF DISCLAIMERS	350
B. VOTERS VALUE TRANSPARENCY	353
III. DISCLOSURE ONLINE	354
A. FREE COMMUNICATION	354
B. THE SMALL-ITEMS AND IMPRACTICABLE EXCEPTIONS	355
C. STATES GRAPPLE WITH LOOPHOLES	359
IV. NATIVE ADVERTISING	361
A. GROWTH OF DIGITAL COMMUNICATION	361
B. POLITICIANS GO NATIVE	362
C. POTENTIAL FOR SELF-REGULATION BY ONLINE PLATFORMS	366
D. A PROPOSAL FOR CLOSING THE LOOPHOLES	369

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CONCLUSION.....	373
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INTRODUCTION

Political advertising is undergoing what some experts have coined a “revolution,” as digital advertising catches up with—and looks poised to overtake—television advertising as the most effective way of reaching voters during a political campaign.¹ An increasingly popular method of communicating with voters online is through native advertisements—ads that match the editorial content of media or technology platforms, making them less intrusive but also more difficult to identify as advertising. Native ads can be used to match a broad range of environments and now can be found in online newspapers, social media platforms like Facebook, and even mobile and video games. New native advertising techniques have become so sophisticated that, according to studies, many consumers cannot distinguish a native ad from editorial content.² Politicians have identified the potential appeal of native ads, particularly as a tool for engaging younger voters through popular mediums such as social media and games. But in the political sphere, due to several outdated loopholes in current federal election law, native ads may be exempt from having to include typically mandatory disclaimers, making them particularly difficult to identify as advertisements.³ This Note argues that native ads create disclosure issues when they are used in settings such as mobile games, where users may have no expectation of seeing political advertisements, if the platforms are exempt from disclaimer requirements due to alleged practical limitations.

Part I of this Note provides a brief overview of the Supreme Court’s campaign finance jurisprudence since the seminal case, *Buckley v. Valeo*.⁴ In *Buckley*, the Supreme Court identified three governmental interests that support upholding campaign finance disclosure: providing voters with information, deterring corruption, and enforcing campaign finance laws.⁵

1. Nathaniel Persily, *The Coming Revolution in Campaign Communication*, SACRAMENTO BEE (May 30, 2015, 5:00 PM), <http://www.sacbee.com/opinion/california-forum/article22581321.html>.

2. Joe Lazauskas, *Article or Ad? When It Comes to Native Advertising, No One Knows*, CONTENTLY (Sept. 8, 2015), <https://contently.com/strategist/2015/09/08/article-or-ad-when-it-comes-to-native-no-one-knows>; Erik Sass, *Consumers Can’t Tell Native Ads from Editorial Content*, MEDIAPOST (Dec. 31, 2015), <http://www.mediapost.com/publications/article/265789/consumers-consumers-cant-tell-native-ads-from-editorial-con.html> (discussing findings by Grady College showing that fewer than 8% of participants identified native advertisements as promotions).

3. See *infra* Part III.B.

4. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976) (per curiam).

5. *Id.* at 66–68.

The cases discussed in Part I demonstrate that while the Supreme Court has gradually deregulated campaign finance laws in its jurisprudence since *Buckley*, it has continued to uphold disclosure as a “less restrictive alternative to more comprehensive regulations of speech.”⁶

Part II examines several empirical studies to show that disclosure can in fact promote the informational interest laid out by the Court and that voters care about being informed. With this background in place, Part III turns to Internet-specific advertising and points out that disclosure regulation is significantly less robust for online advertising than for other forms of political communication. In particular, the Federal Election Commission (“FEC”)’s small-items and impracticable exceptions—which allow certain items to forego disclaimers due to size limitations or in the interest of convenience—have created loopholes that digital advertisers have sought to take advantage of to circumvent traditional disclaimer requirements. Pointing to these exceptions, major Internet companies including Google and Facebook have argued that their ads should not be obligated to have disclaimers because of their small size. Part IV focuses on the rise of native advertising—specifically in unconventional contexts such as mobile games—arguing that the changing landscape of political advertising and the growing influence of potentially deceptive native ads have reinvigorated the need for the FEC to close outdated loopholes that may mislead and deceive voters. As made evident by the 2016 presidential campaign, false and misleading information can proliferate online. With everyone from politicians to the news media to social media websites acknowledging the problem of “fake news,” now is a particularly salient time for the FEC to do its part to promote truthfulness and transparency online.⁷ Lastly, Part IV proposes a solution for closing the loopholes for paid Internet ads, tracking the regulatory language adopted by several states as a guidepost. Using Snapchat as a model of how such a regulatory

6. *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). *See also* Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1445 (2014); Abby K. Wood, *Show Me the Money: “Dark Money” and the Informational Benefit of Campaign Finance Disclosure* 4–7, 13 (Ctr. for Law & Social Sci. Research Papers Series No. CLASS17-24, Legal Studies Research Papers Series No. 17-23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029095 [hereinafter *Show Me The Money*].

7. *See* Katie Rogers & Jonah Engel Bromwich, *The Hoaxes, Fake News and Misinformation We Saw on Election Day*, N.Y. TIMES (Nov. 8, 2016), <https://nyti.ms/2nyMJ4r>; Sam Schechner, *Facebook and Google Step Up Efforts to Combat Fake News*, WALL ST. J. (Feb. 6, 2017, 3:24 PM), <https://www.wsj.com/articles/facebook-and-google-step-up-efforts-to-combat-fake-news-1486396476>; Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 2:15 PM), <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

solution may be implemented, this Note argues that it is possible to craft regulatory language that will protect voters without stifling innovation or technological advances.

I. CAMPAIGN FINANCE DISCLOSURE

The following discussion traces some of the Supreme Court's most significant rulings in the realm of campaign finance from the past several decades, demonstrating that while the Court has gradually chipped away at campaign finance regulation—including striking down limits on campaign contributions and expenditures—it has continued to uphold disclosure as a less restrictive means of promoting important governmental interests. Today, disclosure laws seem to be the last remaining avenue for regulating campaign finance.⁸

A. *BUCKLEY V. VALEO* AND THE SUPREME COURT'S DISCLOSURE FRAMEWORK

In 1971, Congress passed the Federal Election Campaign Act (“FECA”),⁹ intending to reform campaign finance, including spending and fundraising.¹⁰ Congress passed even more aggressive amendments to FECA just a few years later in 1974.¹¹ Together, the 1971 and 1974 FECA regulations created limits on both contributions and independent expenditures. Contributions are “anything of value” made directly to candidates for political office or to the political committees that support them¹² while independent expenditures are “expenditure[s] by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.”¹³ In other words, independent expenditures are not coordinated with a candidate or a political party. FECA prohibited individuals from

8. See generally Heerwig & Shaw, *supra* note 6; *Show Me the Money*, *supra* note 6; Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV. INTER ALIA (Apr. 3, 2016), https://ylpr.yale.edu/inter_alia/taking-disclosure-seriously.

9. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

10. ERIKA FRANKLIN FOWLER ET AL., POLITICAL ADVERTISING IN THE UNITED STATES 14 (2016).

11. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; FOWLER ET AL., *supra* note 10, at 14.

12. 11 C.F.R. § 100.52(a) (2017); *Contribution Limits*, FED. ELECTION COMMISSION https://transition.fec.gov/pages/brochures/contrib.shtml#Contribution_Limits (last visited Jan. 12, 2018).

13. 11 C.F.R. § 100.16(a).

contributing more than \$25,000 in a single year or more than \$1,000 to any one candidate in an election campaign.¹⁴ FECA also prohibited expenditures in excess of \$1,000 per year spent “relative to a clearly identified candidate.”¹⁵

In 1976, FECA was challenged before the Supreme Court in *Buckley v. Valeo*.¹⁶ In *Buckley*, the Court upheld FECA’s contribution limits to quell the potential of “quid pro quo” corruption as well as the appearance of corruption.¹⁷ The Court asserted that limits on contributions created only “marginal restriction[s] upon the contributor’s ability to engage in free communication”¹⁸ because, more than anything else, contributions are “symbolic” showings of support for the candidate.¹⁹ Limits on contributions would affect the size of an individual’s showing of support, but would not altogether prevent an individual from expressing his or her support for a political candidate.²⁰ At the same time, large political contributions might lead to an exchange of favors in return for political contributions, which could undermine the “integrity of our system of representative democracy.”²¹ Even if contributions do not lead to actual corruption, the public might perceive corruption in a system where large individual contributions to political candidates are permitted, which would be nearly as dangerous to the integrity of our representative democracy as actual corruption.²² Based upon these grounds, the Court deemed that a limited restriction on First Amendment rights was justified.²³

Limits on individual and interest-group expenditures, on the other hand, were struck down.²⁴ First, the Court held that the statutory language limiting expenditures “relative to a clearly identified candidate” was too vague and must be more narrowly construed, to apply only to spending on “communications that in express terms advocate the election or defeat of a

14. *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (per curiam) (citing 18 U.S.C. § 608(b)(1), (3) (Supp. IV 1970) (repealed 1976)).

15. *Id.* (citing 18 U.S.C. § 608(e) (repealed 1976)).

16. *Id.* at 6; FOWLER ET AL., *supra* note 10, at 16.

17. *Buckley*, 424 U.S. at 26–29.

18. *Id.* at 20–21.

19. *Id.* at 21.

20. *Id.* at 20–21.

21. *Id.* at 26–27.

22. *Id.* at 27.

23. *Id.*

24. *Id.* at 50–51. *See also* FOWLER ET AL., *supra* note 10, at 18. While limits on independent expenditures by political parties made on behalf of candidates survived *Buckley*, these limits were also later struck down. *See Colo. Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996).

clearly identified candidate.”²⁵ But even on such narrower grounds, the Court found that the limitation on expenditures could not be justified by the governmental interest of preventing actual corruption or the appearance of corruption. Because expenditures cannot be made in coordination with a candidate or campaign—if they were, they would be treated as contributions—they do not pose a risk of quid pro quo relationships.²⁶ Moreover, the Court argued that spending was equivalent to speech, and thus restricting the ability to spend on an election was the same as cutting off one’s ability to speak, which would impermissibly violate the First Amendment while failing to promote any legitimate government interest.²⁷

Despite striking down some of FECA’s spending limitations, the court fully upheld FECA’s reporting and disclosure requirements.²⁸ Under FECA, political committees had to register with the FEC and keep records of expenditures and contributions, including the names and addresses of anyone who had contributed more than \$10 and the occupation and principal place of business of anyone who had contributed more than \$100.²⁹ Candidates and political committees were also required to submit quarterly contribution and expenditure reports,³⁰ which would be available “for public inspection and copying.”³¹ Additionally, any individual or group that made a contribution or expenditure of more than \$100 in one year—excluding contributions to candidates or political committees—was required to file a statement with the FEC.³²

The Court recognized that although mandatory disclosure has the potential to substantially encroach on First Amendment rights, it may be justified by a compelling government interest.³³ However, any such justification for compelled disclosure must survive “exacting scrutiny.”³⁴ The government interest must also have a “substantial relation” to the information that is to be disclosed.³⁵ The Court identified three governmental interests that are “sufficiently important to outweigh the

25. *Buckley*, 424 U.S. at 43–44.

26. *Id.* at 44–49.

27. *Id.*

28. Heerwig & Shaw, *supra* note 6, at 1450–52 (citing *Buckley*, 424 U.S. at 83–84).

29. *Buckley*, 424 U.S. at 63 (citing 2 U.S.C. §§ 432(c)–(d), 433 (Supp. IV 1970)).

30. *Id.* (citing 2 U.S.C. § 434(a)).

31. *Id.* (quoting 2 U.S.C. § 438(a)(4)).

32. *Id.* at 63–64 (citing 2 U.S.C. § 434(e)).

33. *See id.* at 64–66.

34. *Id.* at 64.

35. *Id.*

possibility of infringement.”³⁶ The first interest is the information that disclosure provides to voters.³⁷ The Court stated that the source of campaign money and how candidates spend it allows voters to “place each candidate in the political spectrum” more accurately than using only party labels or speeches.³⁸ Disclosure may also help voters identify any potential interests the candidate might hold.³⁹ Second, by exposing a candidate’s source of money, disclosure helps deter corruption and the “appearance of corruption.”⁴⁰ Candidates might be less inclined to grant special favors to their major donors if voters have access to donor information and may spot a quid pro quo relationship.⁴¹ Third, disclosure helps with enforcement of campaign finance laws by exposing any potential violations of contribution limits, since contributions can be tracked and monitored through reported documents.⁴²

Although it upheld compelled disclosure requirements, the Court acknowledged that disclosure can pose some threats.⁴³ In particular, disclosure may have a chilling effect on some people who would have contributed money absent the requirements.⁴⁴ Disclosure may also pose risks of harassment and retaliation against contributors.⁴⁵ On the basis of these concerns, some parties may be eligible for an exception from disclosure requirements if they can show a “reasonable probability” of “threats, harassment, or reprisals.”⁴⁶ But despite these potential chilling effects, the Court, nevertheless, concluded that disclosure requirements “appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”⁴⁷

36. *Id.* at 66.

37. *Id.*

38. *Id.* at 66–67.

39. *Id.* at 67.

40. *Id.*

41. *See id.*

42. *Id.* at 67–68.

43. *See id.* at 68.

44. *Id.*

45. *Id.*

46. *Id.* at 74. *See also* Doe v. Reed, 561 U.S. 186, 199–201 (2010) (quoting *Buckley*, 424 U.S. at 74) (holding that the State of Washington did not violate the First Amendment by making public the identities of signers of an anti-gay marriage petition because the state had a sufficiently important interest in maintaining the “integrity of the electoral process,” but also noting that disclosure requirements may be struck down if a plaintiff shows a reasonable probability that the “compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties”); Heerwig & Shaw, *supra* note 6, at 1452; *Show Me the Money*, *supra* note 6, at 5.

47. *Buckley*, 424 U.S. at 68. *See also* Heerwig & Shaw, *supra* note 6, at 1453.

B. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 AND DISCLOSURE
POST-*BUCKLEY*

Congress made another attempt to reform campaign finance laws in 2002 with the Bipartisan Campaign Reform Act (“BCRA”) (also known as the McCain-Feingold Act), which prohibited political parties from using funds raised outside of the limits of campaign finance laws, otherwise known as “soft money.”⁴⁸ BCRA also attempted to regulate “sham issue ads.”⁴⁹ An ad paid for by a party or an interest group that advocated for the election of a particular candidate by including “magic words” such as “vote for,” “elect,” “support,” and similar expressions was considered express advocacy and had to comply with strict regulation requirements.⁵⁰ Ads that did not contain these magic words were called issue ads and could be paid for with soft money.⁵¹ This loophole led to the rise of sham issue ads, which presumed to promote broad party values and did not have to disclose their source of funding, even if they featured a candidate, as long as the magic words were not used.⁵²

BCRA tackled the issue of sham issue ads by establishing regulations for “electioneering communications.”⁵³ An electioneering communication is “any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election.⁵⁴ Unless the communication refers to a presidential or vice presidential candidate, it must also be “targeted to the relevant electorate,” meaning that the communication can reach fifty thousand or more people.⁵⁵ Under BCRA, electioneering communications had to disclose their donors, include a disclaimer identifying who supported the ad, and could not be paid for with

48. ANTHONY CORRADO ET AL., *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 30–43 (2005); *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMMISSION, https://transition.fec.gov/pages/brochures/fecfecsa.shtml#Historical_Background (last updated Feb. 2, 2018).

49. Douglas M. Spencer & Abby K. Wood, Citizens United, *States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 319 (2014). See also FOWLER ET AL., *supra* note 10, at 19.

50. FOWLER ET AL., *supra* note 10, at 19 (citing *Buckley*, 424 U.S. at 44 n.52).

51. *Id.* at 19.

52. See Spencer & Wood *supra* note 49, at 319. See also FOWLER ET AL., *supra* note 10, at 19–20 (explaining political parties’ general strategy shift following BCRA).

53. Spencer & Wood, *supra* note 49, at 319–20.

54. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 201(a), § 304(f)(3), 116 Stat. 81, 89 (codified as amended at 52 U.S.C. § 30104(f)(3) (2015)).

55. *Id.*

funds from the general treasury of corporations or unions.⁵⁶

BCRA was immediately controversial and was quickly challenged, eventually ending up in the Supreme Court in *McConnell v. FEC*.⁵⁷ In *McConnell*, the Court narrowly upheld BCRA's prohibition against corporate funding of electioneering communications.⁵⁸ However, the Court left open the possibility that the ban on corporate spending could be subject to as-applied challenges.⁵⁹ The Court was more enthusiastic about BCRA's disclosure requirements, upholding its provision that individuals or entities spending more than \$10,000 on electioneering communications be disclosed to the FEC, identifying the names and addresses of anyone who contributed more than \$1,000 to the communication.⁶⁰ The Court reaffirmed its reasoning from *Buckley* that disclosure supported important government interests.⁶¹ The court held that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA."⁶² In 2007, however, the Court narrowed BCRA's reach in *FEC v. Wisconsin Right to Life, Inc.*, by holding that BCRA's ban on corporate or union spending on electioneering communications was constitutional only if the communication in question could be "susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate."⁶³

C. *CITIZENS UNITED V. FEC*

BCRA came under fire again in the now-infamous *Citizens United v. FEC*.⁶⁴ In *Citizens United*, the Supreme Court reviewed whether Section

56. Spencer & Wood, *supra* note 49, at 320.

57. See *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010). See also William M. Welch & Jim Drinkard, *Passage Ends Long Struggle for McCain, Feingold*, USA TODAY (Mar. 20, 2002, 10:24 PM), <http://usatoday30.usatoday.com/news/washdc/2002/03/21/usat-mccain.htm> (reporting that Republican Senator Mitch McConnell vowed to challenge BCRA in court even before President Bush signed the bill into law).

58. *McConnell*, 540 U.S. at 201–02. See also Spencer & Wood, *supra* note 49, at 321.

59. *McConnell*, 540 U.S. at 201–02. See also Spencer & Wood, *supra* note 49, at 321.

60. Bipartisan Campaign Reform Act § 201; *McConnell*, 540 U.S. at 194–202. See also Heerwig & Shaw, *supra* note 6, at 1453–54.

61. *McConnell*, 540 U.S. at 196–202. See also Heerwig & Shaw, *supra* note 6, at 1454.

62. *McConnell*, 540 U.S. at 196. See also Heerwig & Shaw, *supra* note 6, at 1454.

63. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007) (per curiam) (emphasis added). See also Spencer & Wood, *supra* note 49, at 321–22.

64. *Citizens United v. FEC*, 558 U.S. 310, 318 (2010).

203 of BCRA, banning corporate use of general treasury funds for electioneering communications, was constitutional on its face and as applied to the documentary film *Hillary: The Movie*, which criticized presidential candidate Hillary Clinton.⁶⁵ Additionally, the Court was evaluating whether BCRA's disclosure and disclaimer requirements were unconstitutional as applied to the film and to the short advertisements used to promote it.⁶⁶ Specifically, the non-profit organization Citizens United objected to Sections 201 and 311 of BCRA.⁶⁷ Section 201 required corporations that spent more than \$10,000 on electioneering communications to send a report to the FEC.⁶⁸ Section 311 required all electioneering communications not funded by a candidate to include a verbal disclaimer identifying who supported the ad as well as a written disclaimer, shown for four seconds, revealing the name and contact information of the sponsoring organization and stating that the communication was not authorized by any candidate or committee.⁶⁹ Citizens United argued that these requirements would subject their donors to harassment and distract viewers from their message.⁷⁰

This time, the Supreme Court struck down BCRA's ban on corporate electioneering and independent expenditures.⁷¹ The Supreme Court held that banning corporations from using their general treasury funds on express advocacy impermissibly infringes on the First Amendment right to speech.⁷² Writing on behalf of the Court, Justice Kennedy stated, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."⁷³ In reference to electioneering communications, he wrote, "it seems stranger than fiction for our Government to make this political speech [preceding an election] a

65. *Id.* at 318–22. *See also* 2 U.S.C. § 441(b) (2006). For additional background on how the case that became *Citizens United* changed as it moved through the federal court system on its way to the Supreme Court, *see* Heerwig & Shaw, *supra* note 6, at 1455–59; Spencer & Wood, *supra* note 49, at 319–29.

66. *Citizens United*, 558 U.S. at 318–22. *See also* 52 U.S.C. §§ 30104(f), 30120(d) (2015).

67. *Citizens United*, 558 U.S. at 366–69.

68. *Id.* at 366.

69. *Id.*

70. Spencer & Wood, *supra* note 49, at 322 (citing Memorandum in Support of Preliminary Injunction Motion at 8, *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2007) (No. 07-2240)).

71. *Citizens United*, 558 U.S. at 362–66.

72. *Id.* at 371–72. *See also* Spencer & Wood, *supra* note 49, at 328. In striking down Section 203 (and 2 U.S.C. § 441(b), which it had amended), *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld the prohibition of independent expenditures by corporations and unions expressly advocating the election or defeat of a candidate, as well as the portions of *McConnell* that had upheld Section 203. *Citizens United*, 558 U.S. at 324–41.

73. *Citizens United*, 558 U.S. at 357.

crime.”⁷⁴

Nevertheless, the Court remained firm on its support of disclosure, with all of the justices except Justice Thomas upholding BCRA’s disclosure and disclaimer requirements in Sections 201 and 311. Quoting itself from *McConnell*, the Court stated that while disclosure and disclaimer requirements “may burden the ability to speak,” they do not “prevent anyone from speaking.”⁷⁵ Moreover, reiterating its analysis from *Buckley*, the Court explained that disclosure and disclaimer requirements justify the encroachment on speech because they are sufficiently related to the important governmental interest of providing voters with information about the source of money in politics prior to an election.⁷⁶ Disclosure permits citizens and corporate shareholders to “make informed decisions and give proper weight to different speakers and messages.”⁷⁷ Therefore, even though disclaimer and disclosure requirements may infringe on the First Amendment, the information that they provide to the electorate justifies the cost.⁷⁸ As it had said in *Buckley*,⁷⁹ the Court repeated in *Citizens United* that disclosure requirements are a “less restrictive alternative to more comprehensive regulations of speech.”⁸⁰ Because of the weight of the informational interest, the Court did not even address the other governmental interests.⁸¹

Although the Court has by and large tended to uphold disclosure laws over the past several decades, it has not done so uniformly,⁸² and there is no guarantee that it will continue to take a positive stance on disclosure in the future.⁸³ Katherine Shaw points out that the Court has always

74. *Id.* at 372.

75. *Id.* at 366 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)).

76. *Id.* at 366–67.

77. *Id.* at 371.

78. *See id.*

79. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam) (“[W]e note and agree with appellants’ concession that disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”).

80. *Citizens United*, 558 U.S. at 369.

81. *Id.*

82. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347–57 (1995) (striking down an Ohio statute prohibiting the distribution of anonymous campaign literature because it was not narrowly tailored to “serve an overriding state interest” and outlawed a category of speech in violation of the First Amendment); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 88, 101–02 (1982) (striking down an Ohio statute requiring candidates for political office to disclose every contributor and recipient of campaign funds as applied to a minor political party that had been historically subject to harassment).

83. *See Shaw, supra* note 8, at 21–24; *Show Me the Money, supra* note 6, at 7.

interpreted disclosure laws in relation to other regulations, so disclosure may have appeared less restrictive by comparison.⁸⁴ If, on the other hand, disclosure were to be the only issue in question, the Court might take a different stance.⁸⁵ Furthermore, changes in the composition of the Court will have an immense impact on how disclosure is perceived in the future.⁸⁶

II. EMPIRICAL STUDIES MEASURE THE BENEFITS OF DISCLOSURE

As discussed in Part I, the Supreme Court has articulated three governmental interests that are supported by campaign finance disclosure: information, anti-corruption, and enforcement.⁸⁷ Focusing in particular on the informational benefit as first articulated in *Buckley*, this section outlines several empirical studies that have attempted to measure whether disclosure does in fact support this interest.

A. THE EFFECTIVENESS OF DISCLAIMERS

Campaign finance disclosure may help voters make better decisions by prompting them to formulate mental shortcuts or heuristics that assist them in making voting choices that align with their policy preferences, even if they are fairly uninformed about the issue or candidate.⁸⁸ For example, Arthur Lupia found that voters who knew that the insurance industry supported a complicated insurance reform proposal were more likely to vote in a way that conformed to their policy interests.⁸⁹ Knowledge of the insurance industry's position allowed uninformed voters to form the same inferences about the relationship between the proposition and their preferences as voters with "encyclopedic" knowledge.⁹⁰ These inferences led them to emulate the behavior of more informed voters more closely than uninformed voters who were not aware of the industry's stance.⁹¹ Similarly, in the context of political ads, disclaimers can help voters make judgments about the claims made in an ad if they recognize the

84. Shaw, *supra* note 8, at 22–24.

85. *Id.*

86. *Show Me the Money*, *supra* note 6, at 7.

87. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (per curiam).

88. Abby K. Wood, Campaign Finance Disclosure 4–5 (Nov. 12, 2016) (unpublished manuscript) (on file with author).

89. Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63–64 (1994).

90. *Id.*

91. *Id.* at 71.

political party or group sponsoring the message.⁹²

Other studies have shown that disclaimers can mitigate the effects of attack ads, further demonstrating that disclaimers in political ads can affect voter perception. Conor Dowling and Amber Wichowsky showed study participants a real attack ad from a Senate race funded by a Republican organization called American Crossroads.⁹³ Participants were grouped into one of five disclosure treatment conditions. One group saw a disclaimer listing the top five donors to American Crossroads, the amounts they contributed, and their states of residence presented in table format. Three groups were shown news articles after viewing the ad, with all participants in these groups reading about the high spending in this campaign. One of these groups also received an article about the special interests that contributed to American Crossroads; another group read an article explaining the prevalence of anonymous donors sponsoring political ads, emphasizing in particular that American Crossroads had chosen to keep its donors secret; the third group in this treatment did not get any information about donors to American Crossroads at all. The final treatment group simply saw the ad without receiving any additional information about American Crossroads.⁹⁴

Dowling and Wichowsky found that while the attack ads created a more negative perception of the attacked candidate, participants who received some additional information about the sponsors of the ads were more supportive of the attacked candidate than participants who watched the ads but received no additional information.⁹⁵ News articles stressing the

92. See Wood, *supra* note 88, at 5 (“The most obvious heuristic is a candidate’s party label.”). But it is important to acknowledge that scholars do not universally support the informational benefits of disclosure. David Primo also conducted a survey experiment in the ballot initiative context to measure the informational benefit of disclosure. David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION L.J. 114, 117 (2013). Focusing on a ballot issue about taxes and illegal immigration, Primo presented survey participants with a series of newspaper articles, a voter guide, and two advertisements; participants were told that they could “review as much or as little” of the information as they wanted, with most choosing to look at only a “handful of items.” *Id.* at 118–20. Respondents were then asked to predict the likely position on the issue of several interest groups. The results found that responders who had access to disclosure information were only marginally better at identifying the positions of the interest groups than the control group. *Id.* at 121, 125–27. Abby Wood argues, however, that the “null effect[s]” of disclosure in Primo’s study may have been due to the research design in which “subjects did not access the disclosure information at all.” *Show Me the Money*, *supra* note 6, at 11.

93. Conor M. Dowling & Amber Wichowsky, *Does It Matter Who’s Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RES. 965, 973–74 (2013).

94. *Id.* at 974–76.

95. *Id.* at 982–86.

anonymity of donors had the greatest effect of mitigating the attack ad's persuasiveness.⁹⁶ Dowling and Wichowsky argue that this finding suggests voters might be suspicious of groups who choose not to disclose their donors.⁹⁷ A disclaimer identifying the top five donors of American Crossroads was the second most effective way of mitigating the attack ad's negative effect on a targeted candidate.⁹⁸ Wichowsky and Dowling believe that their findings demonstrate not only that voters tend to find anonymous advertising less persuasive, but that the form of disclosure can also weigh heavily on its effectiveness.⁹⁹ They argue that disclaimers are more effective when they present information in "a more direct and novel fashion" in the form of a table similar to the way that information is presented on nutrition labels.¹⁰⁰

In a separate study, Dowling and Wichowsky found that voters perceive attack ads differently depending on whether they are sponsored by a candidate as opposed to a political party or outside group.¹⁰¹ Participants were again shown an attack ad from a real Senate race, but the ads were altered to include different disclaimers: one disclaimer attributed the ad to an attacking candidate, another to a political party, and a third to American Crossroads.¹⁰² Participants who saw the group and party-sponsored ads were less supportive of the attacked candidate than participants who saw the candidate-sponsored ad.¹⁰³ In other words, an attack ad funded by a party or an outside group was more effective at creating a negative perception of the targeted candidate in the voter than an attack ad funded by a candidate. These findings of backlash were limited to partisans of the attacked candidate; by contrast, subjects who affiliated with the same party as the attacking candidate did not show a backlash regardless of who sponsored the ad.¹⁰⁴ Dowling and Wichowsky suggest that group and party-sponsored ads result in less backlash because, although voters tend to punish candidates for going negative, they cannot always connect the party or group ad back to the candidate.¹⁰⁵

96. *Id.* at 981.

97. *Id.* at 981–83.

98. *Id.*

99. *See id.* at 982–86.

100. *Id.* at 981–82.

101. Conor M. Dowling & Amber Wichowsky, *Attacks Without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising*, 59 AM. J. POL. SCI. 19, 24–35 (2015).

102. *Id.* at 24, 28–31.

103. *Id.* at 32–35.

104. *Id.*

105. *Id.* at 23, 33–35.

B. VOTERS VALUE TRANSPARENCY

Empirical data further shows that voters not only benefit from the information they glean from disclosure, but they also value disclosure and reward more transparent candidates.¹⁰⁶ Abby Wood reviewed survey responses of 2,000 participants who were asked how often they seek out campaign finance information, ranging from “never” to “always.”¹⁰⁷ Around 75% of respondents reported seeking out disclosure information “at least some of the time,” and 66% of respondents reported that the amount of campaign finance information a candidate discloses is “important or very important.”¹⁰⁸

To further test the value of transparency to voters, Wood conducted an experiment in which 1,000 respondents were given a blurb about the policy positions of two hypothetical candidates for state Senate whose ideologies were meant to align with the respondents’ stated political views.¹⁰⁹ Respondents were told that one of the candidates received a high transparency grade because she and the independent groups that supported her disclosed more campaign finance information than required by law. The second candidate, on the other hand, had a low transparency grade because she was supported by independent groups with anonymous donors.¹¹⁰ A control group was presented with policy information about the candidates but was given no information about disclosure.¹¹¹ Compared with the control group, respondents who learned about a candidate’s lack of transparency rated her 9.4 percentage points lower in favorability; conversely, respondents were 3.9 percentage points more likely to vote for the candidate with a high transparency grade than the control group.¹¹² Wood explains that the differences in favorability can be partially explained by trust: respondents find less transparent candidates less trustworthy and therefore less favorable.¹¹³ Wood’s findings suggest that voters not only care about transparency, but are more likely to vote for more transparent politicians.¹¹⁴

The studies discussed in this section suggest that disclosure can affect

106. *Show Me the Money*, *supra* note 6, at 23.

107. *Id.* at 13–14.

108. *Id.* at 14–16 & figs.1–3.

109. *Id.* at 17–18.

110. *Id.* at 19.

111. *Id.* at 19–20.

112. *Id.* at 21, 23.

113. *Id.* at 24–26.

114. *See id.*

the persuasiveness of political ads. As such, disclaimers, particularly when clearly presented, may help further the informational interest identified by the Supreme Court as important by providing voters with information and context through which they can filter messages and potentially make decisions that are more aligned with their preferences. Moreover, voters want more information, and they reward candidates who are willing to be transparent with their constituents.

III. DISCLOSURE ONLINE

A. FREE COMMUNICATION

Although the Supreme Court has consistently upheld disclosure laws, and empirical studies suggest that disclaimers can be an effective way of supporting the informational interest that the Court has articulated as compelling since *Buckley*, the FEC has not treated all ads as equals when it comes to disclosure and disclaimers. The FEC requires that disclaimers appear on all “public communications,” identifying whether the communications were paid for or authorized by a candidate.¹¹⁵ Ads that are neither paid for nor authorized by candidates must also identify the source of their funding.¹¹⁶ Disclaimers must be “presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication.”¹¹⁷ However, the FEC has made a distinction between television and Internet advertising, which has led to several important loopholes for online ads.¹¹⁸

Advertisements on television are required to include a visual disclaimer, as described above. An audio component must also identify whether the advertisement has been approved by a candidate or sponsored by an outside group.¹¹⁹ In addition to using disclaimers, candidates must send itemized reports to the FEC detailing their expenditure.¹²⁰ Furthermore, pursuant to requirements by the Federal Communications Commission (“FCC”), television broadcast and cable stations must make their contracts for political advertising purchases publicly available, which creates a paper trail of sorts for television communications.¹²¹

115. 11 C.F.R. § 110.11(a)(1), (b)(1)–(3) (2017).

116. *Id.* § 110.11(b)(3).

117. *Id.* § 110.11(c)(1).

118. See FOWLER ET AL., *supra* note 10, at 118–19.

119. 11 C.F.R. § 110.11(c)(3)–(4).

120. See FOWLER ET AL., *supra* note 10, at 26–27.

121. *Id.* at 30. See also Libby Watson, *FCC Votes to Expand Transparency for Political Ads*,

Internet advertisements, on the other hand, are only required to have disclaimers when the ads are purchased for a fee.¹²² This distinction developed because, in 2006, the FEC excluded the Internet from its definition of public communication. Such communications include “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.”¹²³ However, the only covered Internet communications are those “placed for a fee on another person’s Web site.”¹²⁴ This definition of public communication leaves items such as social media posts and YouTube or candidate-website videos unregulated. Spending on advertising which is hosted online free-of-charge thus need not be disclosed to the FEC—and even contracts for Internet ad *purchases* are not made publicly available, as they are for television buys.¹²⁵ Lee E. Goodman, former Chairman of the FEC and a proponent of Internet deregulation, argues that the rules have created “a robust national forum for political discussion about public policy, government and elections.”¹²⁶ He contends that regulation of Internet platforms is both unfeasible and damaging to political speech and civic engagement.¹²⁷ Yet, these exceptions can also create less transparency because videos, social media posts, and other forms of free communication can reach millions of voters online with essentially no accountability.

B. THE SMALL-ITEMS AND IMPRACTICABLE EXCEPTIONS

Even paid online ads may be subject to further exceptions. Namely, an advertisement does not need to carry a disclaimer if it cannot be “conveniently printed” due to the ad’s small size.¹²⁸ Historically, this exception has applied to “[b]umper stickers, pins, buttons, pens, and similar small items.”¹²⁹ A disclaimer is also unnecessary if it would be

SUNLIGHT FOUND. (Jan. 28, 2016, 3:45 PM), <https://sunlightfoundation.com/2016/01/28/fcc-votes-to-expand-transparency-for-political-ads> (reporting that while the FCC had previously required stations to keep physical copies of political ad sales, in January 2016, the Commission mandated that the files must be posted online).

122. FOWLER ET AL., *supra* note 10, at 118.

123. 11 C.F.R. § 100.26.

124. *Id.*

125. FOWLER ET AL., *supra* note 10, at 118–19.

126. Lee E. Goodman, Commentary, *Online Political Opinions Don’t Need Regulating*, WALL ST. J. (Jan. 1, 2015, 6:37 PM), <http://www.wsj.com/articles/lee-e-goodman-online-political-opinions-dont-need-regulating-1420155421>.

127. *Id.*

128. 11 C.F.R. § 110.11(f)(i).

129. *Id.*

impracticable to include one.¹³⁰ This exception has applied to formats such as skywriting and water towers, where it would be very difficult to post a disclaimer.¹³¹ In recent years, these exceptions have generated newfound attention because of their potential application to Internet and mobile advertising.¹³²

In 2010, Google, wishing to sell text ads to candidates and political committees, submitted a request for an advisory opinion from the FEC regarding its AdWords program.¹³³ When a search using particular keywords is run, AdWords displays small ads near the search results. These advertisements are limited in size: they can only have two lines of text, with a headline of up to twenty-five characters and a URL of up to seventy characters in length.¹³⁴ Google wanted to know whether these ads were exempt from the FEC's disclaimer requirements under the small-items exception.¹³⁵ If not, the company wanted to know whether including a link to the sponsor's website, which would carry a full disclaimer, could be a satisfactory alternative.¹³⁶ Although the commissioners could not obtain the four votes necessary to definitely state whether the AdWords program was exempt, in a vote joined by Chairman Matthew Peterson and Commissioners Cynthia Bauerly, Steven Walther, and Ellen Weintraub, the FEC ruled that the AdWords program did not violate any applicable statutes or regulations "under the circumstances described."¹³⁷ In a separate concurring opinion, Commissioners Bauerly, Walther, and Weintraub wrote that the link itself provided useful information by including some indication of the sponsoring organization's identity.¹³⁸ The concurrence also noted that, historically, the FEC has allowed alternate forms of disclaimers where a traditional one would be impracticable.¹³⁹

130. *Id.* § 110.11(f)(ii).

131. *Id.*

132. See Cynthia L. Bauerly, *The Revolution Will be Tweeted and Tmbl'd and Txd: New Technology and the Challenge for Campaign-Finance Regulation*, 44 U. TOL. L. REV. 525, 532–34 (2013) (arguing that the FEC should issue a rule to address the small-items and impracticable exceptions).

133. See Letter from Marc E. Elias & Jonathan S. Berkon, Counsel to Google, to Thomasenia Duncan, Gen. Counsel, FEC 1 (Aug. 5, 2010), <http://saos.fec.gov/aodocs/1147698.pdf>.

134. *Id.* at 2.

135. *Id.* at 4–6, 8.

136. *Id.* at 7–9.

137. FEC Advisory Op. 2010-19, at 2 (Oct. 8, 2010), <http://saos.fec.gov/aodocs/AO%202010-19.pdf>.

138. Concurring Statement of Vice Chair Cynthia L. Bauerly, Comm'r Steven T. Walther & Comm'r Ellen L. Weintraub, FEC Advisory Opinion 2010-19, at 3 (Dec. 16, 2010), <http://saos.fec.gov/aodocs/1158390.pdf> [hereinafter Concurring Statement].

139. *Id.* at 2. See also Bauerly, *supra* note 132, at 533–34 (reflecting on her vote in Google's

Because an Advisory Opinion technically only applies to the party requesting it and is confined to the facts of a particular situation, the FEC revisited the issue of the small-items and impracticable exceptions in 2011, when Facebook requested an advisory opinion of its own.¹⁴⁰ Facebook sought an exemption for its standard ads and Sponsored Story ads, which each use under 200 characters of text and include a small image.¹⁴¹ Some of the ads include links to either a Facebook page or an external website, but not all of the linked websites contain a disclaimer.¹⁴² This time, a divided Commission was unable to agree on a response to Facebook's request, so no advisory opinion was issued.¹⁴³

A draft opinion supported by Commissioners Bauerly, Walther, and Weintraub argued that Facebook should not qualify for the small-items exception because nothing about Facebook's platform made it "physically" or "technologically" impossible to include a disclaimer.¹⁴⁴ Facebook has the ability to make its ads bigger or expand the amount of permissible text to include a disclaimer even if it might not be desirable from a business perspective to do so. (Facebook had argued that bigger ads are disruptive to its users.)¹⁴⁵ Using the same line of reasoning, this draft opinion concluded that the impracticable exception should not apply to Facebook either.¹⁴⁶ Although Facebook had not proposed any disclaimer alternatives, this opinion suggested that in the future Facebook might be able to satisfy the disclaimer requirements by including a link to a full disclaimer or by providing necessary disclosure information using rollover technology or other technological means.¹⁴⁷ Taking the opposite position, though,

request for an advisory opinion).

140. See Letter from Marc E. Elias et al., Counsel to Facebook, to Christopher Hughey, Acting Gen. Counsel, FEC 1 (Apr. 26, 2011), <https://www.fec.gov/files/legal/aos/2011-09/1174825.pdf>.

141. *Id.* at 6–7.

142. *See id.*

143. See Letter from Rosemary Smith, Assoc. Gen. Counsel, FEC, to Marc E. Elias et al., Perkins Coie LLP 1 (June 15, 2011), <https://www.fec.gov/files/legal/aos/2011-09/AO-2011-09.pdf>. See also Bauerly, *supra* note 132, at 533.

144. Draft C, Advisory Opinion 2011-09, at 6 (June 15, 2011), <https://www.fec.gov/files/legal/aos/2011-09/1176195.pdf>. For the vote tally, see Certification, *In re* Facebook, FEC AO 2011-09 (June 17, 2011), <https://www.fec.gov/files/legal/aos/2011-09/1176290.pdf>.

145. Letter from Marc E. Elias, *supra* note 140, at 7.

146. Draft C, Advisory Opinion 2011-09, *supra* note 144, at 7–8.

147. *Id.* at 9. It is important to recognize that advisory opinions are incredibly fact specific and therefore not necessarily predictive of future outcomes. For instance, in December 2017, the FEC Commissioners agreed that "under the circumstances described in [its] request" the non-profit Take Back Action Fund must include all of the required disclaimer information on its Facebook video and image ads. But the Commissioners relied on different reasoning to reach this conclusion and the decision did not result in an advisory opinion, leaving the issue unsettled. See Christopher Berg, *AO 2017-12: Nonprofit Must Include Disclaimers on Its Facebook Ads*, FED. ELECTION COMMISSION (Dec.

Commissioners Caroline Hunter, Donald McGahn, and Matthew Peterson supported an alternative draft opinion stating that the impracticable exception should apply to Facebook's ads as they are because the character limitations on the advertisements make disclaimers physically impossible.¹⁴⁸ This opinion pointed out that Facebook's ability to enlarge its ads is irrelevant because the Commission must evaluate the "entity's existing advertising model as it is."¹⁴⁹

The Commission was again unable to reach a decision on an advisory opinion request submitted in 2013 by Revolution Messaging, a digital strategy firm specializing in mobile communications, which sought to know whether the small-items or impracticable exceptions applied to banner ads on mobile phones.¹⁵⁰ Revolution Messaging argued that including too much content in a mobile banner ad is not possible without producing blurry, low-quality ads, given the pixel limitations established by the Interactive Advertising Bureau.¹⁵¹ Although some mobile banners would have links to webpages with disclaimers, others would not.¹⁵² Ads that did not link to a full disclaimer would contain identifying information in the advertisement itself, such as the name or the logo of the sponsoring committee.¹⁵³ As before, half of the Commissioners, including Goodman, Hunter, and Peterson, believed that the banner ads should be exempt from the disclaimer requirement.¹⁵⁴ But others, including Walther, Weintraub, and Ann Ravel, argued that as long as Revolution Messaging was physically and technologically capable of adjusting the size of its ads, no exception should apply.¹⁵⁵ Their draft opinion also added that while the FEC is willing to approve alternate forms of disclaimers, Revolution's proposals to include the name or logo of the sponsor did not provide "adequate notice of the identity of the person or political committee that

18, 2017), <https://www.fec.gov/updates/ao-2017-12-nonprofit-must-include-disclaimers-its-facebook-ads>.

148. Certification, *supra* note 144; Draft B, Advisory Opinion 2011-09, at 5–6 (June 15, 2011), <https://www.fec.gov/files/legal/aos/2011-09/1176020.pdf>.

149. *Id.* at 5.

150. Certification, *In re* Revolution Messaging, LLC, FEC AO 2013-18 (Feb. 27, 2014), <https://www.fec.gov/files/legal/aos/2013-18/1252337.pdf>.

151. Letter from Joseph E. Sandler et al., Counsel to Revolution Messaging, LLC, to Lisa Stevenson, Deputy Gen. Counsel, FEC 2, 4 (Sept. 11, 2013), <http://saos.fec.gov/aodocs/1247145.pdf>.

152. *Id.* at 1.

153. *See generally* Letter from Joseph E. Sandler et al., Counsel to Revolution Messaging, LLC, to Lisa Stevenson, Deputy Gen. Counsel, FEC (Feb. 3, 2014), <http://saos.fec.gov/aodocs/1251248.pdf>.

154. *See* Certification, *supra* note 150; Revised Draft B, Advisory Opinion 2013-18, at 4 (Feb. 26, 2013), https://www.fec.gov/files/legal/aos/2013-18/201318_2.pdf.

155. *See* Certification, *supra* note 150; Revised Draft A, Advisory Opinion 2013-18, at 4, 7–8 (Feb. 21, 2014), https://www.fec.gov/files/legal/aos/2013-18/201318_1.pdf.

paid for and, where required, authorized the communication.”¹⁵⁶

C. STATES GRAPPLE WITH LOOPHOLES

Although the FEC has had trouble identifying the best way to approach the small-items and impracticable exceptions when it comes to Internet advertising, some states, including Texas, Florida, Maryland, and California, have had more success in creating guidelines.

In 2012, the Texas Ethics Commission issued an advisory opinion to a political committee, stating that ads appearing on social networking websites, which limit the amount of text that can be used in the ad, do not have to include a full, embedded disclaimer.¹⁵⁷ Nevertheless, these ads must link to a landing page that contains the entire disclosure statement required by the Texas Election Code.¹⁵⁸ The link itself must contain the words “political advertising,” “pol ad,” or another easily identifiable abbreviation.¹⁵⁹ The Ethics Commission explained that restrictions on the websites make full-size disclaimers impracticable, and it wished to interpret the laws with a focus on “reasonableness and practicality,” given technological advances.¹⁶⁰ Florida takes a similar approach, allowing political ads to forego disclaimers when they would not be “reasonably practical due to the size of the graphic or picture link,” provided that the link directs users to a website that contains a disclaimer identifying who paid for or approved the ad.¹⁶¹ Nevertheless, Florida also seems amenable to excusing disclaimer requirements entirely in certain instances where a political ad is distributed through “any other technology-related item, service, or device for which compliance with [disclaimer requirements] is not reasonably practical.”¹⁶² In Maryland, ads that are too small to carry a

156. *Id.* at 10 (quoting 11 C.F.R. § 110.11(c)(1) (2014)). *See also* Statement for the Record by Vice Chair Ann M. Ravel, Comm’r Steven T. Walther, & Comm’r Ellen L. Weintraub in Advisory Opinion Request 2013-18, at 2 (Feb. 27, 2014), <https://www.fec.gov/files/legal/aos/2013-18/1252267.pdf> (reiterating the Commissioners’ position that disclaimer requirements should not be struck down on the basis of surmountable technological limitations).

157. *See* Tex. Ethics Comm’n Advisory Op. No. 491 (Apr. 21, 2010), <https://www.ethics.state.tx.us/opinions/491.html>. *See also* INTERACTIVE ADVERT. BUREAU, FEDERAL ELECTION COMMISSION (FEC) AND STATE REGULATION OF ONLINE POLITICAL ADVERTISING 3–6 (2012), <https://www.iab.com/wp-content/uploads/2015/07/Memo-FEC-and-Online-Political-Advertising.pdf> (summarizing several state-level approaches to regulating online political advertising).

158. Tex. Ethics Comm’n Advisory Op. No. 491, *supra* note 157. *See* TEX. ELEC. CODE ANN § 255.001 (West 2017).

159. Tex. Ethics Comm’n Advisory Op. No. 491, *supra* note 157.

160. *Id.*

161. FLA. STAT. § 106.143(10)(c) (2017).

162. *Id.* § 106.143(10)(i).

disclaimer must also include a link to another website.¹⁶³ If it is not possible to include a link, the ad and information about who sponsored or approved it must be registered with the State Board.¹⁶⁴ Items that Maryland considers too small to include a disclaimer on include micro bars, button ads, paid text ads with fewer than 200 characters, and small paid graphic or picture links.¹⁶⁵

California has taken a slightly more flexible approach than the states discussed above. The California Fair Political Practices Commission specified in 2011 that Internet ads that are “limited in size” such as “a micro bar, a button ad, a paid text advertisement that is limited to 500 characters or less in length, or a small paid graphic or picture link” must display the disclaimer as a rollover, a link to another website that contains the disclaimer, or “other technological means that provide the user with disclosure information.”¹⁶⁶ Given the broad language of this provision, this solution is detailed enough to give specific guidance yet expansive enough to allow advertisers to take advantage of technological innovations, while still providing voters with relevant disclosures.

Former FEC Chair Cynthia Bauerly suggests that the FEC could look to states like California and Maryland for guidance in crafting not just advisory opinions but rules addressing how disclaimers should be treated in the Internet age.¹⁶⁷ Bauerly believes that a rulemaking would provide broader guidance than advisory opinions, which are confined to the particular facts at issue in a given case.¹⁶⁸ Yet the Commission seems hesitant to respond in a concrete way. In October 2011, the FEC opened comments on whether to move forward with rulemaking to update some of the current disclaimer rules for Internet advertising, including the small-items and impracticable exceptions. Despite this encouraging sign, the Commission took little action until it reopened the comment period on the issue in October 2016 and then again in October 2017.¹⁶⁹ Hopefully, these continued delays are not an indication that the Commission does not plan to address the issue after all.¹⁷⁰

163. MD. CODE REGS. 33.13.07.02(D)(2)(b)(i) (2017).

164. *Id.* 33.13.07.02(D)(2)(b)(ii).

165. *Id.* 33.13.07.02(D)(2)(c)(i)–c(iv).

166. CAL. CODE REGS. tit. 2, § 18450.4(b)(3)(G)(1) (2017).

167. Bauerly, *supra* note 132, at 533–35.

168. *Id.*

169. *See* Internet Communication Disclaimers, 82 Fed. Reg. 46,937 (proposed Oct. 10, 2017) (to be codified at 11 C.F.R. pt. 110).

170. *See* Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, AM. INTEREST (Oct. 10, 2015), <https://www.the-american-interest.com/2015/10/10/the-campaign-revolution-will-not-be->

IV. NATIVE ADVERTISING

A. GROWTH OF DIGITAL COMMUNICATION

The loopholes for Internet advertising are significant now in particular because online advertising is quickly catching up to more traditional forms of political communication, such as television and radio. Borrell Associates, which tracks advertising data, found that in 2016 a record \$1.4 billion was spent on digital advertising across local, state, and national campaigns, which constitutes a 789% increase in digital spending from 2012.¹⁷¹ The dramatic increase seems to correspond with voter preferences. According to the Interactive Advertising Bureau, based on a sample size of 1,513 registered voters, 61% relied on digital media to learn about candidates during the 2016 presidential primaries.¹⁷² This finding is on par with the responders' reliance on television for candidate information, which also polled at 61%.¹⁷³ Additionally, digital advertising offers politicians an opportunity to generate more voter engagement. According to a study conducted by the Rubicon Project, an online advertising firm, and the polling firm Penn Schoen Berland, 64% of those who have seen a political advertisement on their mobile device have clicked on it or have taken some other action in response.¹⁷⁴ Illustrating that television advertising is losing some of its dominance in the advertising arena, two-thirds of participants in the study further reported skipping ads recorded on their television "all or most of the time."¹⁷⁵ The same study also found that gaming is important for political advertising. Half of the likely voters surveyed reported playing games on their mobile devices on a weekly basis, and over one-third of likely Democratic voters and one-quarter of likely independent voters reported playing mobile games *daily*.¹⁷⁶

televised ("[W]hen the current Chair of the FEC merely hinted at updating regulations to account for the transition to online campaigning, her opponents both within and beyond the FEC publicly criticized her.").

171. Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS (Jan. 4, 2017), <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

172. INTERACTIVE ADVERT. BUREAU & VISION CRITICAL, *THE RACE FOR THE WHITE HOUSE 2016: REGISTERED VOTERS AND MEDIA AND INFORMATION DURING THE PRIMARIES 4* (2016), <https://www.iab.com/insights/the-race-for-the-white-house-2016-registered-voters-and-media-and-information-during-the-primaries>.

173. *Id.*

174. RUBICON PROJECT, *2016 VOTER MEDIA CONSUMPTION HABITS 2* (2016), <http://rubiconproject.com/wp-content/uploads/2016/01/Rubicon-Project-Voter-Media-Consumption-Habits.pdf>.

175. *Id.* at 1.

176. *Id.* at 2.

B. POLITICIANS GO NATIVE

Native advertising, also known as sponsored content, has become a popular component of the digital advertising landscape. Native advertising is designed to match the content of a media or technology platform, “bear[ing] a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it.”¹⁷⁷ Native ads are popular with advertisers because they blend in with their surroundings, making consumers less likely to block or skip them.¹⁷⁸ It is projected that spending on sponsored content will grow to \$21 billion in 2018, up from \$7.9 billion in 2015.¹⁷⁹ A study by Facebook and IHS predicts that by 2020, native advertisements will make up over 63% of all mobile display ads.¹⁸⁰

Just like corporate advertisers, politicians have recognized the allure of native ads.¹⁸¹ During the 2016 presidential primaries, Senator Bernie Sanders actively turned to sponsored content to influence voters. In February 2016, Politico partnered with Sanders to run an article criticizing privatized prisons, featured under the label “Sponsored Story.”¹⁸² According to a senior Politico executive, Politico had held discussions with “all the campaigns” about running similar features.¹⁸³ Sanders also ran an ad on BuzzFeed in the form of a list titled “15 Reasons Bernie Sanders is the Candidate We’ve Been Waiting For.”¹⁸⁴ A small logo below the headline identified that the posting was paid for by Bernie 2016, Sanders’s

177. See *Native Advertising: A Guide for Businesses*, FED. TRADE COMMISSION (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> (providing guidance to businesses on using native advertising techniques without deceiving consumers).

178. See *id.*

179. BI Intelligence, *Spending on Native Advertising Is Soaring as Marketers and Digital Media Publishers Realize the Benefits*, BUS. INSIDER (May 20, 2015, 5:04 PM), <http://www.businessinsider.com/spending-on-native-ads-will-soar-as-publishers-and-advertisers-take-notice-2014-11>.

180. ELENI MAROULI & JACK KENT, IHS TECH., *THE FUTURE OF MOBILE ADVERTISING IS NATIVE 8* (2016), <http://mma.nl/wp-content/uploads/2016/05/Future-of-mobile-is-native-1.pdf>.

181. See Libby Watson, *A New Frontier in Opaque Political Ad Spending: GIFs*, SUNLIGHT FOUND. (Mar. 30, 2016, 11:37 AM), <https://sunlightfoundation.com/blog/2016/03/30/a-new-frontier-in-opaque-political-ad-spending-gifs>.

182. Bernie Sanders, *We Must End For-Profit Prisons*, POLITICO (Feb. 26, 2016, 2:14 PM), <http://www.politico.com/sponsor-content/2016/02/we-must-end-for-profit-prisons>.

183. Simon Dumenco, *Bernie Sanders Campaign Buys ‘Sponsored Story’ Ad on Politico*, AD AGE (Feb. 26, 2016), <http://adage.com/article/campaign-trail/bernie-sanders-campaign-buys-sponsored-story-politico-ad/302874>.

184. See *15 Reasons Bernie Sanders Is the Candidate We’ve Been Waiting For*, BUZZFEED (Jan. 8, 2016, 11:45 AM), <https://www.buzzfeed.com/berniesanders/times-bernie-sanders-gave-us-all-hope>.

campaign organization.¹⁸⁵

News sources are not the only platforms where native advertising has been used: games have also become a potential advertising option for politicians and their supporters. In 2008, Barack Obama became the first presidential candidate to campaign using video games.¹⁸⁶ Obama placed ads geared toward a male audience within sports-themed games; virtual pro-Obama billboards or other signs appeared in the background, reminding players to vote.¹⁸⁷ But as native ads become more sophisticated, they no longer have to look only like digital replicas of traditional banners or signs. Instead, they can be designed to blend in with the content of the platform even more seamlessly.

In January 2016, Zynga, the gaming company behind Words With Friends and Farmville, partnered with the Rubicon Project to work with political campaigns to develop native mobile ads for its gaming platforms.¹⁸⁸ The “SponsoredPLAY” ads are “optional mini-games” that appear while users play regular games.¹⁸⁹ According to Zynga’s chief data officer, SponsoredPLAY is “designed with players in mind while also incorporating the goals of political campaign clients.”¹⁹⁰ The games can incorporate campaign goals such as “issue awareness, email collection, fundraising or polling.”¹⁹¹ Zynga can also draw on its player data to use “location-based targeting,” adjusting the games with customized messages for specific states.¹⁹² Zynga is a potentially powerful marketing tool for politicians. The company claims that over one billion people have played its games since its founding in 2007.¹⁹³ Strikingly, about 90 percent of Zynga’s users were registered and planned to vote in 2016, according to a Nielsen study.¹⁹⁴ Combined with the findings that about half of potential voters play mobile games weekly, this statistic makes the value of games for political advertising even more apparent.¹⁹⁵

185. *See id.*

186. *Obama Campaign Buys Ads in 18 Video Games*, FOX NEWS (Oct. 15, 2008), <http://www.foxnews.com/story/2008/10/15/obama-campaign-buys-ads-in-18-video-games.html>.

187. *Id.*

188. Marty Swant, *Zynga Is Now Offering Native Political Gaming Ads for Presidential Campaigns*, ADWEEK (Jan. 7, 2016), <http://www.adweek.com/news/technology/zynga-now-offering-native-political-gaming-ads-presidential-campaigns-168894>.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Let’s Play*, ZYNGA, <https://www.zynga.com/about> (last visited Jan. 26, 2018).

194. Swant, *supra* note 188.

195. RUBICON PROJECT, *supra* note 174, at 2.

Despite its growing popularity, native advertising is not without controversy. The characteristics that make native advertising commercially appealing can also pose ethical issues; studies show that consumers frequently cannot distinguish native ads from editorial content. A study by the International Advertising Bureau found that only 41% of participants were able to identify native ads as promotional materials,¹⁹⁶ and in a study by Contently, a media strategy company, 48% of participants felt deceived upon discovering that what they assumed was editorial content was, instead, an advertisement.¹⁹⁷

The federal government prohibits false and misleading advertising, and the Federal Trade Commission (“FTC”), which is charged with enforcing truth in advertising laws, has recognized the potentially deceptive nature of native ads.¹⁹⁸ The FTC issued an enforcement policy statement in 2015 announcing that an ad will be considered deceptive if it “misleads reasonable consumers as to its nature or source, including that a party other than the sponsoring advertiser is its source.”¹⁹⁹ To determine whether an advertisement is deceptive, the FTC will evaluate where the ads are featured and will consider the “customary expectations based on consumers’ prior experience with the media.”²⁰⁰ The adequacy of disclosure will also be judged by whether “reasonable consumers perceive the ad as advertising.”²⁰¹ The FTC advises businesses to use terms such as “Advertisement” and “Paid Advertisement”²⁰² to make the nature of ads more apparent to consumers. The Better Business Bureau (“BBB”), a non-profit group, has joined the FTC’s efforts, stating that any ad that is “designed to fool consumers is—plain and simple—a bad ad, and violates [the BBB’s] standards.”²⁰³ Like the FTC, the BBB modified its Code of Advertising to require that sponsored content include clear disclaimers such

196. INTERACTIVE ADVERT. BUREAU, GETTING IN-FEED SPONSORED CONTENT RIGHT: THE CONSUMER VIEW 16 (2014), https://www.iab.com/wp-content/uploads/2015/07/IAB_Edelman_Berland_Study.pdf. See also Sass, *supra* note 2.

197. Lazauskas, *supra* note 2.

198. See *Truth in Advertising*, FED. TRADE COMMISSION, <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited Jan. 26, 2018).

199. FTC, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 16 (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

200. *Id.* at 11.

201. *Id.* at 13.

202. *Id.* at 2–3, 13.

203. *Native Advertising Added to BBB Code of Advertising; Deceptive Native Ads Now Violate Code*, BETTER BUS. BUREAU (Oct. 25, 2016), <https://www.bbb.org/native-advertising-added-to-bbb-code-of-advertising>.

as “sponsored advertising content” or “sponsored by.”²⁰⁴ Regardless of its efforts to curtail the potentially deceptive effects of native advertising, the FTC does not have oversight over political ads, which are core political speech and are thus subject to strict First Amendment protections.²⁰⁵ For this reason, the FTC’s enforcement policy regarding native advertising does not apply in the political arena.²⁰⁶

The lack of oversight for political ads is concerning because when used in non-political settings such as games, native political ads have a particularly strong potential for deceiving voters, as users may not expect to see political ads in an entertainment context. This potential for deception is further amplified when the ads are run on mobile platforms that might not feature a disclaimer because of the small-items or impracticable exceptions. Such ads would have several layers of deception: not only would users not know who paid for an ad, but they also may not realize that a mini-game, for example, is even an ad at all. Furthermore, many gamers are young and may be particularly prone to being deceived.²⁰⁷ It has been difficult to find information regarding what disclaimers, if any, Zynga has used on its mobile political games. There also appears to be no data showing whether these ads were used by candidates during the 2016 election cycle. But given that the Obama campaign was interested in video games as early as 2008, and use of digital advertising has only grown since then, it is not hard to imagine that candidates did and will continue to turn to such creative formats in order to meet the challenge of engaging young voters.²⁰⁸ Advertisers like Revolution Messaging have already requested an exemption from the FEC for mobile ads, and others are likely to follow.²⁰⁹ Since the FTC can do nothing to help make native ads more transparent, the FEC should do its part. Closing the small-items and impracticable loopholes would be an important first step, since inherently deceptive

204. *Id.*

205. Amy Sullivan, *Truth in Advertising? Not for Political Ads*, TIME (Sept. 23, 2008), <http://content.time.com/time/politics/article/0,8599,1843796,00.html>.

206. *See id.*

207. The situation becomes even murkier if native ads are purchased by non-profit groups, as such organizations are not required to report the source of their funding to the FEC. However, a full discussion of such “dark money” groups is beyond the scope of this paper. *See Dark Money Basics*, OPENSECRETS, <https://www.opensecrets.org/dark-money/basics> (last visited Jan. 26, 2018). *See generally* Spencer & Wood, *supra* note 49 (using experimental data to show that spending by donor-disclosure-exempt non-profit organizations has increased in the wake of *Citizens United*).

208. *See* Becky Kip, *Are Native Ads the Key to Engaging Millennials in Political Movements?*, HILL (Sept. 27, 2016, 11:35 AM), <http://thehill.com/blogs/pundits-blog/presidential-campaign/298028-are-native-ads-the-key-to-engaging-millennials-in>.

209. *See, e.g.*, Letter from Joseph E. Sandler et al., *supra* note 151, at 1.

native ads are especially likely to deceive voters if they are permitted to run without a disclaimer on “small” platforms such as mobile devices.

C. POTENTIAL FOR SELF-REGULATION BY ONLINE PLATFORMS

Not everyone agrees that government agencies should intervene to make digital ads more transparent.²¹⁰ Nathaniel Persily of Stanford Law School argues that online advertising is too difficult to regulate because the definition of what counts as media has become too vast, as social media, blogs, and digital content platforms have become key political messaging tools.²¹¹ Persily believes that in the digital era, it will not be government agencies, but rather platforms—particularly giants like Google and Facebook—that will enforce regulations through their user policies, due to “business necessity and [their] sense of public obligation.”²¹² Unlike the government, technology platforms do not have to worry about violating the First Amendment by limiting certain kinds of speech.²¹³ Persily posits that technology platforms could set guidelines mandating truthful advertising, require advertisers to disclose financial information to be shared with users, and even set restrictions on the “sources and amounts of expenditures.”²¹⁴ But even Persily admits that such requirements may not always be in the platforms’ “economic self-interest.”²¹⁵

Some Internet platforms are taking proactive steps to promote disclosure.²¹⁶ Snapchat requires that political ads disclose the purchaser’s

210. See, e.g., Persily, *supra* note 170.

211. *Id.*

212. *Id.*

213. *Id.* See also Nathaniel Persily, *Facebook May Soon Have More Power over Elections than the FEC. Are We Ready?*, WASH. POST (Aug. 10, 2016), <http://wapo.st/2b3yWuH> (arguing that the question is not whether social media platforms will regulate political ads, but whether they should treat such ads differently than other forms of advertising).

214. Persily, *supra* note 170.

215. *Id.*

216. After it became known that foreign meddlers had purchased political ads during the 2016 election, Facebook and other social media platforms announced plans to increase transparency for political advertising. See, e.g., Tony Romm & Kurt Wagner, *Facebook Is Taking a Stricter Stance on Political Advertising Ahead of Its Testimony to the U.S. Congress Next Week*, RECODE (Oct. 27, 2017, 1:00 PM), <https://www.recode.net/2017/10/27/16555926/facebook-political-advertising-ads-2016-russia>; Craig Timberg et al., *Russian Ads, Now Publicly Released, Show Sophistication of Influence Campaign*, WASH. POST (Nov. 1, 2017), <http://wapo.st/2zoHJqk>; Kurt Wagner, *Twitter Is Changing Its Advertising Policies Following Russia’s Election Interference*, RECODE (Oct. 24, 2017, 4:00 PM), <https://www.recode.net/2017/10/24/16536934/twitter-change-policy-see-new-advertisements-russia-presidential-election>. Meanwhile, legislators have introduced the Honest Ads Act to increase the amount of information Internet companies would have to disclose about political ads. See Kerry Flynn, *Honest Ads Act Would Regulate Online Political Ads Like TV Commercials*, MASHABLE (Oct. 19, 2017), <http://mashable.com/2017/10/19/honest-ads-online-political-facebook-google-twitter-russia>. In

identity and state whether a candidate authorized them.²¹⁷ The buyers of unauthorized ads must provide Snapchat with contact information for the sponsoring organization.²¹⁸ Snapchat also prohibits “misleading or deceptive” ads and requires that political advertisers abide by the website’s Terms of Service, Community Guidelines, and Advertising Guidelines.²¹⁹ Similarly, Twitter requires that political advertisers “comply with any applicable laws regarding disclosure and content requirements”²²⁰ and is proactive in using disclaimers.²²¹ It labels political ads with a purple “Promoted by” icon to distinguish them from other content.²²²

Google’s policies, on the other hand, currently simply state that advertisers must follow “local campaign and election laws for any area the ads target,” including “election ‘silence periods.’”²²³ However, Google plans to require election-related ads to include a disclaimer that will appear when a user hovers over the content.²²⁴ Facebook, meanwhile, does not mention disclosure in its “best practices” for election-related advertising,²²⁵ but it has plans to introduce “Paid for by” disclaimers for “election-related ads.”²²⁶ Zynga does not include specific details regarding political advertising on its website, in spite of its push into the arena.²²⁷

Despite the encouraging steps taken by some technology companies, it

light of these rapid developments, the disclosure policies for many social media companies are in the process of being amended and revised.

217. *Snapchat Political Advertising Guidelines*, SNAPCHAT, <https://www.snapchat.com/ads/political-guidelines> (last visited Jan. 26, 2018).

218. *Id.*

219. *Id.*

220. *Political Campaigning*, TWITTER, <https://support.twitter.com/articles/20170492> (last visited Jan. 26, 2018).

221. Michelle Castillo, *Twitter Will Now Label Political Ads, Including Who Bought Them and How Much They Are Spending*, CNBC (Oct. 24, 2017, 5:34 PM), <https://www.cnbc.com/2017/10/24/twitter-will-label-political-ads-including-who-bought-and-spend.html>.

222. *Id.*

223. *Political Content*, GOOGLE, <https://support.google.com/adwordspolicy/answer/6014595> (last visited Jan. 26, 2018).

224. Tony Romm, *Google Asked the U.S. Government to Consider New Rules of the Road for Online Political Ads*, RECODE (Nov. 9, 2017, 2:40 PM), <https://www.recode.net/2017/11/9/16629978/facebook-google-twitter-federal-election-commission-fec-russia>.

225. *See Page Best Practices*, FACEBOOK: ELECTIONS, <https://politics.fb.com/page-best-practices> (last visited Jan. 26, 2018).

226. Rob Goldman, *Update on Our Advertising Transparency and Authenticity Efforts*, FACEBOOK: NEWSROOM (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts>.

227. *See Zynga Advertising Guidelines*, ZYNGA, <https://www.zynga.com/legal/zynga-advertising-guidelines> (last visited Jan. 26, 2018). Zynga does ban “[c]ontent that exploits political agendas or uses ‘hot button’ issues for commercial use.” *Id.*

may be that Facebook, Google, and Zynga do not, thus far, include more robust disclosure policies on their websites because, as Persily notes, such practices are not necessarily in the platforms' immediate economic self-interest.²²⁸ Advertisers like native ads precisely because they do not look like ads, and they are therefore less likely to be skipped, blocked, or ignored.²²⁹ When asked to provide more transparency, advertisers complain that the ads lose their effectiveness.²³⁰ Given that advertisers and media platforms are businesses first and foremost, it may seem counterintuitive to create policies that would harm their potential advertising revenues. Yet more transparency does not necessarily conflict with economic self-interest. Studies show that voters *want* more transparency,²³¹ and in the context of non-political sponsored advertising, consumers feel deceived if they cannot distinguish an ad from editorial content.²³² It is not a big stretch to assume that voters would feel similarly misled if they could not distinguish a political ad from an article or a game, especially since politics tend to stir up people's most impassioned sentiments. Consumers are likely to be unhappy with a platform that they feel facilitates deceptive advertising or, at the least, is not as transparent as its competitors. So while more disclosure and disclaimers might hurt ad revenue in the short term, in the long run transparency is likely to be more beneficial to the platforms than the alternative of angering and alienating users.

But willingness or even desire of Internet platforms to self-regulate does not diminish the need for a revised rulemaking by the FEC. In fact, when the FEC opened the matter for comment in 2011, Facebook encouraged the Commission to revise the existing rules.²³³ Attorneys for Facebook pointed out that the Commission's handling of Internet "advertising has been unclear—to sellers of online advertising, to political committees and . . . to Members of Congress," adding that "the Commission's failure to provide a coherent approach to online political advertising has made it harder" for candidates to engage with voters.²³⁴ As

228. See Persily, *supra* note 170.

229. See *Truth in Advertising*, *supra* note 199, at 2.

230. See Sydney Ember, *F.T.C. Guidelines on Native Ads Aim to Prevent Deception*, N.Y. TIMES (Dec. 22, 2015), <https://nyti.ms/2GkNp4X> (noting that the FTC guidelines regarding native ads have caused marketers to "worry that the guidelines could stifle further advancements in an area that they both have come to increasingly rely on.").

231. See, e.g., *Show Me the Money*, *supra* note 6, at 23–26.

232. Lazauskas, *supra* note 2.

233. See Letter from Colin S. Stretch, Deputy Gen. Counsel, Facebook, Inc., to Amy L. Rothstein, Assistant Gen. Counsel, Fed. Election Comm'n 2 (Nov. 14, 2011), <http://sers.fec.gov/fosers/showpdf.htm?docid=98769>.

234. *Id.*

Facebook's comment suggests, a rulemaking by the FEC would help platforms adopt more robust disclosure policies, including disclaimer requirements, because they would have a better sense of what approaches might or might not pass muster with the FEC. Similarly, in 2017, Google encouraged the FEC to update its rules to "provide the clarity that campaigns and other political advertisers need to determine what disclaimers they are required to include."²³⁵ Facebook's and Google's sentiments echo Cynthia Bauerly's argument that a rulemaking would give advertisers more general guidance than one-off advisory opinions that are limited to a particular set of facts.²³⁶

D. A PROPOSAL FOR CLOSING THE LOOPHOLES

While it is admittedly impossible to regulate all Internet communications, it *is* possible to close unnecessary and outdated loopholes like the small-items and impracticable exceptions, which are particularly problematic in a world where the line between ads and content continues to blur. As discussed earlier, empirical studies suggest that disclaimers can support the informational interest identified as important by the Supreme Court, shaping voter perception and perhaps even helping voters to make better decisions.²³⁷ As the Court stated in *Buckley*, providing voters with information about the source of campaign funding can create a more informed electorate,²³⁸ and the electorate cares about being informed.²³⁹ Digital platforms have the technological ability to include disclaimers, so there is no legitimate reason to grant them exceptions that other advertisers do not get.

Nevertheless, in developing new rules the FEC should tread lightly, to avoid interfering with innovation by imposing rigid regulations that would not only stifle creative invention but would quickly become obsolete as new platforms and technologies develop. California's approach is a particularly good model for the FEC to follow, as it gives platforms guidelines but respects their need to experiment with new methods and technologies.²⁴⁰

235. Paresh Dave, *Google Supports U.S. Efforts to Disclose Buyers of Online Political Ads*, REUTERS (Nov. 9, 2017, 6:54 PM), <https://www.reuters.com/article/us-usa-trump-russia-socialmedia/google-supports-u-s-efforts-to-disclose-buyers-of-online-political-ads-idUSKBN1DA099>.

236. See Bauerly, *supra* note 132, at 534.

237. See *supra* Part II.

238. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam).

239. See *Show Me the Money*, *supra* note 6, at 23–26.

240. See *supra* notes 166–67 and accompanying text.

Like the California government, the FEC should require that if an advertisement on an electronic, mobile, or new media platform is limited in size, the ad should include a link to a landing page containing a comprehensive disclaimer. An advertisement should be considered limited in size if it is a small graphic ad, if it is a text ad containing 200 characters or less, or if the text of a full disclaimer would contain more characters than the text of the advertisement itself.²⁴¹ Although California considers ads to be limited in size at 500 characters or less, other states have set the limit at 200,²⁴² closer to the size limitations for text ads set by advertisers like Google.²⁴³ If the advertisement uses a link instead of an embedded disclaimer, the link should be distinct from the rest of the advertisement so that it easily catches the user's eye; this can be accomplished by using a different font style or size, a contrasting color or an alternative distinguishing technique. The links should also contain some identifying information such as the name of the sponsoring group. As several of the FEC Commissioners noted in their concurrence in Google's advisory opinion, links themselves can provide users with useful identifying information.²⁴⁴ However, since users may not always closely read the name of a link, even if it stands out from the contents of the advertisement, the links should be accompanied by a short introductory phrase such as "Ad," "Provided by," "Sponsored by," or another phrase clearly indicating that the content is promotional. Space-limited advertisers should not find it overly burdensome to include such a short phrase, as platforms have not found such requirements overly restrictive in the past. For instance, even Google's space-restricted AdWords include a small shaded box with the word "Ad" to notify the user that the link is an advertisement.

Although providing a link to a landing page is a reasonable disclaimer alternative in some cases, requiring that all platforms include a link would not be a sufficiently flexible solution; for some platforms, a link is simply not feasible. For instance, Snapchat is a contained mobile platform. Most likely, it would not be practical to include a link on a Snapchat advertisement because it would force the user to leave the application and

241. For example, the FEC requires that a message authorized but not financed by a candidate must include a disclaimer, such as "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee;" this particular statement contains 80 characters (95 with spaces). *Special Notices on Political Ads and Solicitations*, FED. ELECTION COMMISSION (Oct. 2006), <http://www.fec.gov/pages/brochures/notices.shtml#wording>. See also 11 C.F.R. 110.11(b)(2) (2017).

242. See *supra* note 165 and accompanying text.

243. See *About Text Ads*, GOOGLE, <https://support.google.com/adwords/answer/1704389> (last visited Jan. 27, 2017).

244. See Concurring Statement, *supra* note 138, at 3.

go to a separate website. Given these limitations, in a revised rule the FEC should say that a rollover disclaimer is an acceptable alternative to a link for size-limited advertisements. In one of its unofficial draft opinions regarding Facebook, some FEC Commissioners indicated willingness to approve this rollover option.²⁴⁵ The FEC should take the next step to codify this language to give advertisers more clarity and assurance when designing alternative disclaimers. Rollover disclaimers, like the kind permitted in California, would let advertisers take advantage of the creative nature of native advertising while providing sponsor information to users who hover over the contents. Such rollover disclaimers must stay visible for a particular duration: California requires that rollover disclaimers remain visible for four seconds, which offers another specific reference point for the FEC to follow.²⁴⁶ But since some users may not realize that the advertisement has a rollover feature unless they hold their cursor over the contents, these ads should also have a short phrase like “Ad” or “Provided by,” as outlined above, making the nature of the material clear to users.

To accommodate technologies that might find both a link and a rollover option impracticable—including technologies that have not yet been invented—the FEC, like California, should also include a broader statement in its rulemaking, allowing platforms to utilize other alternatives by including disclosure information through any other technological avenue that the platform chooses, so long as the content is clearly labeled as an ad and the chosen method provides users with full disclosure information, visible for at least four seconds. Offering technological platforms two specific ways of complying with disclosure requirements while also leaving the door open for companies to devise their own methods strikes a balance, protecting the public’s need for information and transparency without stifling the technology sector’s ability to grow, develop, and exercise creative and business choices. But in order for these alternatives to provide users with adequate notice, regardless of which option a platform and a campaign may choose, the FEC must require that advertisers make it very clear that the content is promotional by placing a small disclaimer in the content, which can be as concise as the two-letter word “Ad.”

In application, a platform like Snapchat, for example, could comply with this proposed FEC rulemaking by using the broadly construed third

245. See Draft C, Advisory Opinion 2011-09, *supra* note 144, at 9.

246. CAL. CODE REGS. tit. 2, § 18450.4(b)(3)(G)(1) (2017).

option. Currently, Snapchat allows advertisers to include extra features and content, which users can access by swiping up after an advertisement finishes playing. A politician could run a video or an even more interactive promotion, like a mini-game, on the platform.²⁴⁷ While the video plays, a small “Ad” logo would appear in the corner, alerting the user that the content is promotional. After the video ends, users could swipe up to see a full disclaimer. Video ads on Snapchat already feature a small “Ad” logo, so this requirement for political ads would not be excessively burdensome or unreasonable. Similarly, since Snapchat allows other advertisers to include more content by swiping up, it can do so for political candidates as well. Other platforms like Facebook and Google can similarly comply with the rule proposed in this Note by either adopting one of the proposed options or by creating their own solution using the flexible third alternative.

Unfortunately, to make any impactful changes, the FEC must find a way to overcome the crippling gridlock that has rendered the agency basically ineffective.²⁴⁸ The votes on the advisory opinions discussed in Part III were largely split along party lines, with Republican-appointed Commissioners wary of imposing disclaimer requirements.²⁴⁹ As such, any action on the part of the FEC requires moving past this internal partisan divide. Ideally, Internet platforms would be guided by the FEC in formulating reasonable solutions, but even if the FEC does not act to issue new rules in the near future, platforms should take proactive steps to be more transparent. False and misleading information is rampant on the Internet, and disclaimers are one small way to promote more transparency online.²⁵⁰ Users are likely to reward platforms for taking proactive action since research suggests that people want more information and transparency.²⁵¹ Twitter already offers a model of how to incorporate disclaimers; others, like Google, Facebook, and Snapchat, could adopt similar promoted icons and use rollover features to run disclaimers. If these options are not desirable, there is no shortage of creative minds within

247. Political advertisers interested in incorporating games into their campaigns may draw upon an example from Snapchat, which partnered with Gatorade to support Serena Williams’s road to her twenty-third Grand Slam victory by running a mini video game that allowed users to play a short tennis match in the role of Williams. See *Gatorade Success Story*, SNAPCHAT, https://storage.googleapis.com/snapchat-web/success-stories/pdf/pdf_gatorade_snapads_en.pdf (last visited Jan. 27, 2018).

248. See Heerwig & Shaw, *supra* note 6, at 1477–78; Press Release, Pub. Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (2012), <https://www.citizen.org/sites/default/files/fec-deadlock-press-statement.pdf> (explaining the even-numbered, bipartisan structure of the FEC, which makes it difficult for the Agency to reach a consensus on challenging matters).

249. See *supra* Part III.B.

250. See Rogers & Bromwich, *supra* note 7; Silverman, *supra* note 7.

251. See *Show Me the Money*, *supra* note 6, at 23–26.

these organizations to produce practical and efficient solutions. Although not as definite as a rulemaking, the FEC's existing advisory opinions, and even some of its drafts, can serve as guideposts for developing alternative disclaimers.

CONCLUSION

With the growing importance of digital advertising and the rise of sponsored content in particular, it is time for the FEC to acknowledge that its current rules lag behind technological changes. Because digital and mobile platforms are capable of creating alternative disclaimers, they should not benefit from the same exemptions designed for lapel buttons, skywriting, or water towers, where size and practicability are more insurmountable obstacles. When advertisers take advantage of non-political contexts such as games to promote political messages through cleverly designed native ads, the existing loopholes for Internet advertising make voters particularly vulnerable to deception, which undermines the informational interest set forth by the Supreme Court in *Buckley*. Moreover, new regulations do not have to shackle platforms' ability to innovate and create. On the contrary, a flexible regulatory approach, as proposed by this Note and as already implemented by states like California, would give advertisers guidance and direction in crafting alternatives to disclaimer requirements while protecting voters from misleading content.