CLC
ADVANCING DEMOCRACY THROUGH LAW

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Submitted electronically to comments@elections.ny.gov

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State Board of Elections
40 North Pearl St., Ste. 5
Albany, NY 12207

Re: Comments on Revised Rulemaking for Implementation of the Democracy Protection Act

Dear Mr. Cartagena,

In accordance with the State Administrative Procedures Act,[1] the Campaign Legal Center ("CLC") respectfully submits these public comments to the New York State Board of Elections ("State Board") in response to the Notice of Emergency Adoption and Revised Rule Making for Implementation of the Democracy Protection Act ("Revised Rule") (I.D No. SBE-21-18-00047-ERP).[2]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Our work promotes every citizen's right to participate in our democracy and to know the true sources of money spent to influence elections. In July, CLC submitted public comments in response to the Notice of Proposed Rule Making for Implementation of the Democracy Protection Act (I.D. No. SBE-21-18-00047-P).[3]

I. Revised Rule for Implementation of the Democracy Protection Act

In August, the State Board adopted the Revised Rule as an emergency regulation pursuant to rulemaking requirements in the Democracy Protection Act

[1] N.Y. APA § 202.
[2] Vol. XL, Issue 35 N.Y. Reg. 11 (Aug. 29, 2018).
[3] Vol. XL, Issue 21 N.Y. Reg. 24 (May 23, 2018).

("Act").[4] The publication of the Revised Rule in the New York State Register on August 29 simultaneously provided public notice of the State Board's revisions to its proposed regulations for the Act, initiating a 30-day period for public comments on the Revised Rule.[5] The Revised Rule will be effective as an emergency measure until November 7, 2018.

CLC supports the majority of changes within the Revised Rule. In particular, we believe the new definitions of "foreign government" and "foreign instrumentality or agent" in the Revised Rule serve to effectuate a central purpose of the Act: protection against foreign interference in New York elections.[6] Despite growing public awareness of Russia's multifaceted campaign to sway the presidential election in 2016,[7] foreign efforts to influence U.S. elections have not abated. In recent months, both Facebook and Microsoft have uncovered foreign-backed attempts to impact the 2018 midterm elections through social media and other digital means.[8]

These recent revelations indicate that foreign entities have adopted more sophisticated tactics to meddle in this year's elections, such as using "advanced security techniques" to avoid detection and employing third parties to purchase social media advertisements.[9] Foreign efforts also have expanded to target groups across the political spectrum; in July, Microsoft disclosed it had detected a Russian-backed plot to hack conservative think tanks in the U.S. that were critical of Kremlin policies.[10] Moreover, Russia appears to have inspired at least one other

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[4] N.Y. Elec. Law § 14-107(5-a); N.Y. A.P.A. § 202(6).

[5] N.Y. A.P.A. § 202(4-a).

[6] "The Democracy Protection Act has become necessary due to the increased foreign involvement in the 2016 presidential election, especially on social media. . . . The act intends on prohibiting foreign involvement in New York elections by requiring all digital ad buyers to register as independent expenditure committees, as they would when purchasing TV time and other traditional ads." Ailin Elyasi, *Governor Cuomo Signs Democracy Protection Act at YU*, YESHIVA UNIV. OBSERVER (May 8, 2018), https://yuobserver.org/2018/05/governor-cuomo-signs-democracy-protection-act-yu/.

[7] *See generally*, MINORITY STAFF OF S. COMM. ON FOREIGN RELATIONS, 115TH CONG., REP. ON PUTIN'S ASYMMETRIC ASSAULT ON DEMOCRACY IN RUSSIA AND EUROPE: IMPLICATIONS FOR U.S. NATIONAL SECURITY (Comm. Print 2018), https://www.foreign.senate.gov/imo/media/doc/FinalRR.pdf. "The Kremlin funds, directly or indirectly, a number of government-organized non-governmental organizations (GONGOs), non-governmental organizations (NGOs), and think tanks throughout Russia and Europe. These groups carry out a number of functions, from disseminating pro-Kremlin views to seeking to influence elections abroad." *Id.* at 47.

[8] Sheera Frenkel & Nicholas Fandos, *Facebook Identifies New Influence Operations Spanning Globe*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/technology/facebook-political-influence-midterms.html.

[9] Nicholas Fandos & Kevin Roose, *Facebook Identifies an Active Political Influence Campaign Using Fake Accounts*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/facebook-political-campaign-midterms.html. "Facebook executives characterized the battle with foreign campaigns as a cat-and-mouse game . . .." *Id.*

[10] David E. Sanger & Sheera Frenkel, *New Russian Hacking Targeted Republican Groups, Microsoft Says*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/politics/russia-cyber-hack.html.

country, Iran, to initiate its own surreptitious influence operation aimed at Western democracies.[11]

The continuing threat of foreign interference in U.S. elections underscores the need for robust action by regulators to safeguard our electoral process. By defining the types of foreign entities prohibited from spending in state and local campaigns, the Revised Rule will help to preserve the integrity of New York's elections against foreign meddling by state-sponsored proxy organizations.[12] We commend the State Board's decision to adopt strong, preventative measures against foreign attacks on our democratic system.

II. CLC Recommendations for the Revised Rule

Overall, the Revised Rule is a reasonable interpretation of the Democracy Protection Act that would improve the transparency of digital campaign advertising and protect against foreign interference in New York elections. CLC recommends the following two changes to the Revised Rule to ensure that the State Board's final rule clearly advances the Act's objectives in 2018 and beyond.

A. Section 6200.10(b)(12): Newspaper Exemption in "Online Platform" Definition

The Revised Rule broadly exempts "any web site, web application, web domain or digital application of a newspaper" from regulation as an "online platform." The term "newspaper" is defined by reference to an existing section of the New York General Construction Law.[13] The Act does not require this blanket

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[11] *See* Frenkel & Fandos, *supra* note 8.

[12] In a 2016 report, the British think tank Chatham House detailed how Russia has developed a diversified network of proxy groups to conduct foreign influence campaigns. These Russian proxies are divisible into three distinct tiers: "The first tier is made up of major state federal agencies, several larger state-affiliated grant-making foundations and a few private charities linked to Russian oligarchs. . . . The second tier comprises a smaller circle of trusted implementing partners and their local associates in the region. These are the groups funded by the state foundations, presidential grants or large companies loyal to the Kremlin, and include youth groups, think-tanks and other smaller foundations, associations of compatriots, and Cossack and military veterans' groups. They are usually members of various public councils or of the Civic Chamber of the Russian Federation. The third tier is formed of groups that share the Kremlin's agenda and vision for the neighbourhood but that work outside formal cooperation channels. Such groups promote an ultra-radical and neo-imperial vocabulary, and often run youth paramilitary camps in the region." ORYSIA LUTSEVYCH, CHATHAM HOUSE, AGENTS OF THE RUSSIAN WORLD: PROXY GROUPS IN THE CONTESTED NEIGHBOURHOOD 10 (April 2016), https://www.chathamhouse.org/sites/default/files/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf.

[13] *See* N.Y. Gen. Constr. Law § 60(a) ("[T]he term 'newspaper' shall mean a paper of general circulation which is printed and distributed ordinarily not less frequently than once a week, and has been so for at least one year immediately preceding such publication or advertisement, and which contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and (except for such a paper which has been printed and distributed not less frequently than once

exemption for newspapers. Rather, the State Board added the exemption in response to public comments by a publishers' association asserting that regulation of newspapers infringes the First Amendment and New York's Election Law.[14]

The U.S. Supreme Court has established that the First Amendment affords heightened protection to the editorial and journalistic functions of the press in order to promote "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[15] Comparably, the Election Law includes a longstanding exemption for "any person, association or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals *in respect to the ordinary conduct of such business*."[16] Like other sections of the Election Law, this statutory exemption seems intended to exclude newspapers' journalistic and editorial activity—i.e., "the ordinary conduct of such business"—from campaign finance regulation.[17]

The special constitutional and statutory protections given to traditional functions of the press do not equate to an unqualified media exemption from all legal requirements.[18] When newspapers and other media engage in activities *beyond* the

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a week for a period of ten years prior to January one, nineteen hundred seventy-five) has been entered at United States post-office as second-class matter. A publication which is distributed or made available primarily for advertising purposes to the public generally without consideration being paid therefor shall not be deemed to be a "newspaper" for the purpose of publication or advertisement of such notice required by law. Notwithstanding any provision of this subdivision to the contrary, a publication which was designated and publishing notice as an official newspaper prior to the year nineteen hundred forty and continued to be so designated and publishing for at least thirty years after such year shall be deemed to be a newspaper within the meaning of this subdivision.").

[14] N.Y. State Board of Elections, Assessment of Public Comment and Recommendations for 9 NYCRR subtitle V Part 6200.10 and 6200.11, https://www.elections.ny.gov/NYSBOE/download/law/AssessmentofPublicCommentsAndRegulations620010and620011.pdf (hereinafter "Public Comment Assessment").

[15] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that the First Amendment prohibits interference with editorial decisions over newspaper content).

[16] N.Y. Elec. Law § 14-124(1) (emphasis added). The exception has been in the statute since at least 1975, and predates the rise of independent expenditures and digital advertisements in modern campaigns. *See* N.Y. State Bd. of Elections Op. 1975-8 (May 14, 1975) (discussing availability of limited exemption in Election Law for "any person, association or corporation engaged in the publication or distribution of any newspaper").

[17] *See* N.Y. Elec. Law § 14-107(1)(b)(i) ("Independent expenditures do not include expenditures in connection with . . . a written news story, commentary, or editorial or a news story, commentary, or editorial distributed through the facilities of any broadcasting station, cable or satellite unless such publication or facilities are owned or controlled by any political party, political committee or candidate").

[18] "As the press has evolved from an assortment of small printers into a diverse aggregation . . . the parallel growth and complexity of the economy have led to extensive regulatory legislation from which the publisher of a newspaper has no special immunity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973); *see also P.A.M. News Corp. v. Butz*, 514 F. 2d 272, 277 (D.C. Cir. 1975) ("It is clear that not every action by the government which affects the press violates the first amendment.").

scope of their newsgathering and editorial operations, the Supreme Court has held that these entities may be subject to generally applicable laws and regulations, including requirements related to advertising sales by newspapers.[19]

Almost no newspaper websites will satisfy the regulatory definition of "online platform," due to the Revised Rule's threshold for monthly digital traffic.[20] But even for the several newspaper sites that may qualify, the attendant responsibility imposed by the Act would not infringe the papers' journalistic and editorial independence in any way. The Act requires an "online platform" only to verify independent expenditures purchased on the platform by receiving a copy of the purchaser's independent expenditure committee registration form.[21] This modest administrative undertaking would not transform newspapers into "surrogates of the State Board,"[22] but rather would enable the agency to fulfill its sole responsibility for the Act's administration and enforcement.[23]

Likewise, the independent expenditure verification would not limit newspapers' ability to carry political advertisements from lawful sources. In the context of political disclosure requirements, courts have found that laws do not violate the First Amendment simply because compliance may have some financial impact in furtherance of important government interests.[24] Here, the verification

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[19] *Pittsburgh Press*, 413 U.S. at 389 (finding that government's interest in prohibiting gender discrimination by employers outweighed First Amendment interest of newspaper in categorizing employment advertisements by gender).

[20] According to the Pew Research Center, the websites of the top 50 U.S. newspapers by circulation averaged about 11.5 million unique monthly visitors in 2017. *Newspapers Fact Sheet*, PEW RESEARCH CENTER (June 13, 2018), http://www.journalism.org/fact-sheet/newspapers/. Under the Revised Rule's threshold of 70 million unique monthly visitors, the only newspapers likely to qualify as "online platforms" would be the New York Times and Washington Post, both of which had over 90 million unique monthly visitors to their websites or digital applications in January 2018. Press Release, CNN Digital, *CNN Remains the Nation's #1 Digital News Source in 2018* (Feb. 16, 2018), http://cnnpressroom.blogs.cnn.com/2018/02/16/cnn-digital-ratings-traffic-january-2018-number-one/.

[21] N.Y. Elec. Law § 14-107-B.

[22] *See* Public Comment Assessment, *supra* note 14 ("According to the Association, forcing online platforms to collect registration forms effectively makes the platforms surrogates of the State Board, potentially violating the First Amendment 'freedom of press' rights of newspapers.").

[23] N.Y. Elec. Law § 14-107(5-a) ("The state board of elections shall maintain and make available online for public inspection in a machine readable format, a complete record of any independent expenditure in the form of a paid internet or digital advertisement required to be filed under . . . this section."); *id.* § 14-126(3) ("Any person who falsely identifies or knowingly fails to identify any independent expenditure as required by subdivision two of section 14-107 of this article shall be subject to a civil penalty . . . in a special proceeding or civil action brought by the state board of elections chief enforcement counsel").

[24] *See Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (upholding Federal Election Campaign Act's reporting requirements despite recognizing disclosure could impose financial burden by deterring some donors from contributing to campaigns); *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 46 n.27 (D.D.C. 2012) ("[C]ourts have consistently upheld the [Federal Election Campaign Act's] organizational, reporting, and

requirement serves two critical interests: ensuring transparency in political advertising and protecting the integrity of New York elections from foreign interference.

In sum, we believe that neither the First Amendment nor the Election Law precludes newspapers from qualifying as "online platforms." In the final rule, we recommend that the State Board remove the total exemption for newspapers within the definition of "online platform."

B. Section 6200.10(b)(13): Definition of "Third-Party Advertising Vendor"

The Revised Rule defines a "third-party advertising vendor" as "any network, advertising agency, advertiser or third-party advertisement serving company that buys and sells advertisement space on behalf of third party websites, search engines, digital applications, or social media sites." The term includes "an ad network, an ad exchange, a demand side platform, or a supply side platform."

Under the Revised Rule, a "third-party advertising vendor" qualifies as an "online platform" if it has 30,000,000 or more unique monthly U.S. visitors, in the aggregate, "on any advertisement space that it has sold or bought for a majority of months during the preceding 12 months as measured by an independent digital ratings service accredited by the Media Ratings Council." This data is publicly available on at least one website, comScore.com. The State Board has explained that inclusion of the "third-party advertising vendor" definition advances the legislature's intention to cover "ad networks" and that failure to address third-party vendors in the Revised Rule "directly risks leaving a large regulatory loophole."[25]

In our prior comments on the State Board's initial regulatory proposal, CLC described the inherent difficulty in trying to codify the diverse array of entities currently involved in the digital advertising ecosystem. Similarly, we cautioned that any regulatory attempt to define programmatic ad services risks becoming outmoded in the near future due to constant evolution in the digital advertising market. While the Revised Rule's definition of "third-party advertising vendor" provides more clarity than the "ad network" term used in the State Board's initial proposal, we still believe this definition could soon be rendered obsolete by forthcoming developments in digital marketing.

In addition, the Revised Rule's method of determining the threshold level of digital traffic to a third-party vendor's advertising space could prove to be problematic. As the State Board noted, much of the public information about traffic to third party-vendors' ad inventories is self-reported. As a result, the State Board would lack a verifiably objective method to determine whether a particular third-party vendor has, in fact, exceeded the threshold for "online platform" status.

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disclosure requirements . . . despite the fact that compliance with such requirements imposes costs that necessarily divert organizational resources away from" the organization's principal activity), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

[25] Public Comment Assessment, *supra* note 14.

In light of these concerns, we reiterate our recommendation for the State Board to assess whether a third-party ad vendor qualifies as an "online platform" on a case-by-case basis. This approach would give the final regulation greater adaptability to future developments in digital marketing tactics. Furthermore, rather than tethering the regulation to a single ratings source, the case-by-case approach would allow the State Board to use a range of metrics in evaluating whether a third-party vendor qualified as an "online platform," based on reliable data that is tailored to the type of financial activity at issue (e.g., directly serving ads, buying or selling ad space on other entities' sites, etc.).

III. Conclusion

Overall, we believe the Revised Rule is a positive and meaningful step toward ensuring greater transparency in political advertising and protecting against foreign interference in New York elections. CLC appreciates the State Board's receptiveness to public feedback during this rulemaking process, and we applaud the agency's effort to implement carefully crafted regulations for the Democracy Protection Act. We would be happy to answer questions or provide additional information to assist the State Board's promulgation of the final rule.

Respectfully submitted,

/s/
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/s/
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