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Submitted electronically at DL_regcomments_SBE@maryland.gov.

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151 West St., Suite 200
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**Re: Comments in Support of Proposed Action 23-156-P,
Adoption of COMAR 33.13.21 Online Platforms**

Dear Chairman Summers and Members of the Board,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the State Board of Elections (“Board”) in support of Proposed Action 23-156-P, adoption of COMAR 33.13.21 Online Platforms (.01-.05) (“proposed rules”), relating to online political ad databases and reporting.¹

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American’s right to an accountable and transparent democratic system.

CLC commends the Board’s efforts to address digital political advertising transparency and its commitment to developing thorough, clear, and functional regulations. We support the proposed rules, and our comments focus on the importance of these policies.

Specifically, these comments discuss the unique threat posed to democracy by a lack of transparency around digital political advertising; explain the strong constitutional foundation for transparency in political advertising; and recommend minor suggested revisions to further clarify the proposed rules.

DISCUSSION

I. Background

The Supreme Court has repeatedly recognized that voters benefit from campaign finance transparency, and that democracy functions better when the interests funding and influencing campaign-related debate are disclosed.² This need is especially apparent in the context of digital political advertising—where anonymity and technical innovations such as microtargeting and user data harvesting enable advertisers to subject voters

¹ See Maryland Register, Vol. 50, Issue 15 at 705, Notice of Proposed Action 23-156-P (July 28, 2023), <https://2019-dsd.maryland.gov/MDRIssues/5015/Assembled.aspx>.

² See, e.g., *Citizens United v. Fed. Election Com’n*, 558 U.S. 310, 339 (2010).

to ever more finely-targeted and often-ephemeral campaign advertising with little disclosure of who is behind the messages.

Without legal requirements ensuring transparency, the rapid expansion of digital political advertising threatens to facilitate the spread of misinformation and disinformation online and undermine voters' right to know who is attempting to influence their votes.

Election Law Article, § 13-405, Annotated Code of Maryland and the proposed rules provide voters with critical information about digital political advertising, enabling Maryland's election system to evolve with developing technologies while protecting against false information, fraudulent actors, and the influence of secret spending in state elections.

A. Digital Political Advertising Presents Unique Threats to Democracy

Digital political advertising has surged in recent years across the country.³ In 2008, U.S. presidential candidates collectively spent \$22.25 million on online political ads. Those numbers have since ballooned to an estimated \$1.4 billion in 2016⁴ and \$2.1 billion in 2020.⁵

Substantial spending for digital political ads is also evident in Maryland. For example, in 2022, digital political ad spending on federal races alone in Maryland totaled an estimated \$58 million.⁶ Moreover, even relatively modest digital advertising expenditures often have an outsized impact in state and local races because overall spending levels are typically lower than in federal elections.⁷

This rapid rise in digital political advertising impacts the public, not only because of its exploding volume and cost, but also because digital communications are fundamentally different from traditional advertising delivery and carry unique risks.

Platforms use “targeting” or “behavioral advertising,” which involves tracking users' actions and preferences to deliver ads based on those characteristics.⁸ Indeed, “[t]he targeting has become so precise that next door neighbors streaming the same true crime show on the same streaming service may now be shown different political ads — based on data about their voting record, party affiliation, age, gender, race or ethnicity, estimated home value, shopping habits or views on gun control.”⁹ This microtargeting is invisible to voters, leaving most recipients of these ads unaware of the process.¹⁰

³ See Tech for Campaigns, *2020 Political Digital Advertising Report*, <http://bitly.ws/M8NR> (noting political digital advertising between 2018 and 2020 grew by 460%, nearly twice the rate of election spending overall).

⁴ Lata Nott, *Political Advertising on Social Media Platforms*, ABA, Jun. 25, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/.

⁵ The Center for Responsive Politics provides an online tool to filter through campaign spending, at *Online Political Ad Spending*, <https://www.opensecrets.org/online-ads>.

⁶ *AdImpact's 2022 Political Cycle-in-Review*, ADIMPACT, 5 (Feb. 28, 2023), available at <https://adimpact.com/2022-cycle-in-review/>.

⁷ See, e.g., Chisun Lee, et al., *Secret Spending in the States*, BRENNAN CTR., 3 (June 2016), <http://bitly.ws/Pe5i>.

⁸ Federal Trade Commission Staff, *FTC Staff Report: Regulatory Principles for Online Behavioral Advertising* (February 2009), <http://bitly.ws/M8NZ>.

⁹ Natasha Singer, *This Ad's for You (Not Your Neighbor)*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/business/custom-political-ads.html>.

¹⁰ See Michael Harker, *Political Advertising Revisited: Digital Campaigning and Protecting Democratic Discourse*, 40 LEGAL STUDIES 151, 153–57 (2020).

As platforms have amassed exponentially larger amounts of user data, they have increasingly fine-tuned their ad targeting capacity.¹¹ While campaigns develop and amass their own databases and supporter lists, these individual campaign databases are dwarfed by the scale of datasets maintained by the biggest advertising platform managers.¹²

These microtargeted ads find the public not only on their social media or the web sites they browse, but also through the apps on their mobile phones and “connected” TV (or “CTV”), the use of smart televisions and streaming devices, which increasingly provide subscribers with lower-tier pricing on streaming services for users willing to tolerate advertising and commercials.¹³

The practice of microtargeting means that online audiences have little understanding of the full range of advertising run by a candidate or advocacy group, including the different messages other voters are being shown. This new ability to secretly direct a range of specially tailored, and perhaps even conflicting, messages to different audiences is incompatible with the core legitimizing aspects of democratic society—such as “publicity and transparency for the deliberative process.”¹⁴

This hyper-targeting is part of an already-siloed online ecosystem where algorithms filter content based on users’ predetermined preferences. This results in a dangerous echo-chamber which “creates an antidemocratic space in which people are shown things with which they already associate and agree, leading to nondeliberative polarization.”¹⁵

Increased transparency, including requiring disclosure of who is paying for digital political ads and making copies of particular ads available to the public, as in the proposed rules and the statute they implement,¹⁶ is essential to countering the opacity currently being cultivated by digital advertising.

Studies show that ads from anonymous groups exert more influence over recipients than ads run by candidates.¹⁷ This is not because the ads themselves were more persuasive. Instead, “it is largely differences in *backlash*, not persuasion” that provide this undeserved boost to anonymous groups’ ads.¹⁸ Otherwise put, unlike when viewing ads from recognized candidates or sponsors, voters have no means of critically assessing or holding accountable those who finance political ads anonymously.¹⁹

Campaign finance disclosure helps voters make reasoned decisions.²⁰ And, “[a]lthough disclosure only weakens—and does not undermine—the impact of

¹¹ See Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WISC. L. REV. 861, 863.

¹² *Id.* at 864.

¹³ AdImpact, *supra* note 6 at 2; see also Alex Weprin, *Why Streaming Services Are Pushing Subscribers to Ad Tiers*, HOLLYWOOD REPORTER (Aug. 23, 2023), <https://www.hollywoodreporter.com/business/business-news/netflix-disney-now-pushing-subscribers-to-ad-tiers-1235572459/>.

¹⁴ See Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 COMMUN. STUDIES 411, 413 (2006).

¹⁵ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1666–67 (2018).

¹⁶ Election Law Article, § 13-405(b), Annotated Code of Maryland.

¹⁷ Travis Ridout, et al., *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 154 (2015).

¹⁸ Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM. POL. RSCH. 383, 403 (2012) (emphasis added).

¹⁹ See Ridout, *supra* note 17 at 164.

²⁰ See Jennifer A. Heerwig, Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1471–72 (2014).

[anonymous] ads . . . disclosure does seem to ameliorate the structural imbalance that favors ‘dark money’ advertising.”²¹ Meaningful disclosure produces a voting base that can make more informed political decisions, in context and with a more critical eye.

While some major online platforms have created their own proprietary databases to provide some public information about political ads disseminated on their platforms,²² these voluntary efforts, which are not mandated and could be discontinued or altered at the discretion of those companies, are an insufficient solution for the digital transparency problem.²³

For example, in a 2020 post-primary report about online influence in U.S. elections, CLC found substantial gaps between reported online expenditures and voluntary, private online political ad archives.²⁴ From February through July 2020, the super PAC Senate Leadership Fund reported to the Federal Election Commission (“FEC”) that it spent over \$450,000 on “online advertising” supporting seven Republican Senate incumbents across the country.²⁵ However, political ad archives maintained by Meta, Google, Snapchat, and Reddit failed to capture a single one of these ads.²⁶ Similar expenditures in Indiana and Iowa by the Democratic-aligned super PACs Future Progress and Democratic Progress were unaccounted for in archives maintained by Meta, Google, Snap (Snapchat’s parent company), and Reddit.²⁷ The gaps left by these self-regulated voluntary private archives will only continue to expand as online advertising rapidly innovates.

Without uniform disclosure requirements for all major platforms, as in these proposed rules and the statutory provisions they implement, the public is still left in the dark about the content in and entities behind many targeted political ads running online.

B. Maryland Joins Other States in Leading to Address the Need for Digital Political Ad Transparency

²¹ Ridout, *supra* note 17 at 163–64.

²² See Victoria Smith Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 NOTRE DAME J. LEGIS. 74,, 78-79 (2021); see, e.g., *Political Advertising in the United States*, GOOGLE AD TRANSPARENCY CENTER, <https://adstransparency.google.com/political?region=US&topic=political>; see also, *Meta Ad Library*, META, https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&media_type=all and *Snap Political Ads Library*, SNAP INC., <https://snap.com/en-US/political-ads>.

²³ For example, social media site X (formerly known as Twitter) debuted a searchable, public archive of paid political ads run on the platform in 2018; by 2023, the public archive was no longer available for ads that ran after November 22, 2019. Users seeking information regarding political ads on X running after that date must submit a Google Form to request data, which (when requested by *Politico*) did not include some paid political ads that appeared to fall under X’s disclosure policy. See Sheera Frenkel, *Facebook and Twitter Expand Peek Into Who’s Behind Their Ads*, N.Y. TIMES (Jun. 28, 2018), <https://www.nytimes.com/2018/06/28/technology/facebook-twitter-political-ads.html>; *Ads Transparency*, X BUSINESS, <https://business.twitter.com/en/help/ads-policies/product-policies/ads-transparency.html> (last visited Aug. 26, 2023); Jessica Piper, *Twitter fails to report some political ads after promising transparency*, POLITICO (Apr. 10, 2023), <https://www.politico.com/news/2023/04/10/twitter-political-ads-transparency-00091077>.

²⁴ Brendan Fischer, et al., *How the 2020 Elections Remain Vulnerable to Secret Online Influence*, CAMPAIGN LEGAL CTR. (Aug. 2020), <https://campaignlegal.org/sites/default/files/2020-08/08-18-20%20Post-Primary%20Digital%20Ad%20Report%20%28330pm%29.pdf>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

While digital political ads continue to proliferate, the federal government has failed to address the threats posed by a lack of transparency in digital political advertising.

Instead, as in the current rulemaking, state governments have stepped up to address the problem posed by unregulated digital electioneering, exploring innovative disclosure models.²⁸ Without the guardrails provided by disclosure laws, the potential harms posed by digital electioneering will only multiply as technologies continue to advance.

Artificial intelligence is already revolutionizing the creation and targeting of digital advertising materials.²⁹ Super PACs and other “dark money” groups can now computer-generate and easily micro tailor ads to manipulate the most vulnerable audiences.³⁰ These technologies allow bad actors to increase the volume and credibility of misleading political ads— and without any disclosure requirements, voters are left in the dark and law enforcement is obstructed.³¹ Maryland’s disclosure laws and the proposed rules provide important protection against these new threats.

II. The Constitutional Underpinnings of Transparency

The Supreme Court has reiterated that disclosure laws serve at least three important government interests: (1) providing “citizens with the information needed to hold . . . elected officials accountable for their positions and supporters;”³² (2) deterring actual political corruption and the appearance of corruption;³³ and (3) gathering the data necessary to detect violations of the law.³⁴ And the public’s informational interest is “alone. . . sufficient to justify” disclosure laws.³⁵

Voters have the right to certain information about the political messages they receive — including information about who pays for those messages.³⁶ Disclosure through reporting, including digital ad archives, allows voters to know who is funding a campaign or influencing government decision-

²⁸ In addition to Maryland, California, Colorado, New Jersey, New York, Vermont, Washington, and Wyoming have all taken steps to establish disclosure requirements for platforms hosting political ads. Five of the seven states also set standards for record-keeping. See Cal. Bus. & Prof. Code §§ 17940–43; Cal. Gov. Code §§ 84503–10; Colo. Const. art. XXVIII, § 2; N.J. Stat. Ann. §§ 19:44A, 19:44B; N.Y. Elec. Law § 14-107-B (including “online platform[s]” in expenditure disclosure requirements); 12 Vt. Stat. Ann. tit. 17 ch. 6; Wash. Rev. Code § 42.17A.345; Wyo. Stat. §§ 22-25-101, 22-25-110; see also Carolina Menezes Cwajg, *Transparency Rules in Online Political Advertising: Mapping Global Law and Policy*, UNIV. OF AMSTERDAM, 48–94 (Oct. 2020), <http://bitly.ws/M8R7>.

²⁹ See Heejun Lee & Chang-Hoan Cho, *Digital Advertising: Present and Future Prospects*, 39 INT’L J. OF ADVERTISING 332, 336 (2020).

³⁰ See Cameron Joseph, *AI Political Ads Are Here, and No One Knows How to Handle Them*, VICE NEWS (Apr. 27, 2023), <https://www.vice.com/en/article/epvxn7/ai-political-ads-republicans-biden>.

³¹ See Ekstrand & Fox, *supra* note 22 at 83.

³² *Citizens United*, 558 U.S. at 370-71.

³³ *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

³⁴ *Id.*

³⁵ *Citizens United*, 558 U.S. at 369.

³⁶ The Supreme Court has long recognized the importance of transparency in a variety of contexts, including candidate elections, ballot initiatives and lobbying. See, e.g., *Buckley*, 424 U.S. at 67 (candidate elections); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (ballot initiative); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) (“Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . [and] will be told ‘who has proposed [a measure],’ and ‘who has provided funds for its circulation.’” (second alteration in original)); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 299 (1981) (“The integrity of the political system will be adequately protected if [ballot measure] contributors are identified . . .”); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding federal lobbying disclosure statute).

making.³⁷ This helps voters determine who supports which positions and why, allowing them to make fully informed decisions when they cast their ballots. As the Supreme Court has repeatedly recognized in decades of decisions upholding campaign finance disclosure provisions:

[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.³⁸

Requiring disclosure of the sources of funding for election-related speech has been a feature of American campaign finance law for more than a century,³⁹ and the Supreme Court has consistently rejected challenges to electoral transparency laws, repeatedly emphasizing their constitutional validity.⁴⁰

The Supreme Court's decision in *Citizens United* opened the door to unlimited corporate independent expenditures and ultimately led to the creation of super PACs, making corporations an increasingly attractive vehicle to funnel unlimited funds to political committees and other independent spenders while concealing the true source of those funds.⁴¹

The Court in *Citizens United* assumed that these new forms of unlimited spending would be transparent, observing that “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁴²

Effective disclosure, including (and especially) in digital advertising is essential to protect “[t]he right of citizens to inquire, to hear, to speak, and to

³⁷ See *Gaspee Project v. Mederos*, 13 F.4th 79 at 91 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022) (“The donor disclosure alerts viewers that the speaker has donors and, thus, may elicit debate as to both the extent of donor influence on the message and the extent to which the top five donors are representative of the speaker's donor base . . . [in *Citizens United*] the Court recognized that the disclaimers at issue were intended to insure that the voters are fully informed . . .”(internal quotations and citation omitted)).

³⁸ *Buckley*, 424 U.S. at 66-67 (internal quotation marks and footnote omitted). In *Buckley*, the Supreme Court articulated the constitutional standard for disclosure laws and upheld federal disclosure requirements, explaining that disclosure served three important purposes: “providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions.” *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (listing the “important state interests” identified in *Buckley*), *overruled in part on other grounds by Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010). The first of these, the public's informational interest, is “alone sufficient to justify” disclosure laws. *Citizens United*, 558 U.S. at 369; *see also*, *Gaspee Project*, 13 F.4th at 86.

³⁹ See Publicity of Political Contributions Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 822-24 (1910).

⁴⁰ See *Buckley*, 424 U.S. at 64-68 (upholding Federal Election Campaign Act disclosure requirements); *McConnell*, 540 U.S. at 194-99 (upholding McCain-Feingold Act's federal disclosure requirements); *Citizens United*, 558 U.S. at 366-71 (same); *see also Citizens Against Rent Control*, 454 U.S. at 299-300 (expressing approval of disclosure in the ballot initiative context); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. at 792 & n.32 (striking down corporate expenditure ban in part because disclosure sufficed to enable “the people . . . to evaluate the arguments to which they are being subjected”).

⁴¹ See *Citizens United*, 558 U.S. at 365-69; *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (The D.C. Circuit's decision in *SpeechNow*, issued shortly after *Citizens United*, directly gave rise to super PACs by striking down the contribution limits applicable to political committees that make only independent expenditures).

⁴² *Citizens United*, 558 U.S. at 370; *see also Buckley*, 424 U.S. at 67 (“A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.”).

use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it”⁴³ outlined by the Supreme Court in *Citizens United*. As discussed in Part I and consistent with this precedent, the proposed rules plainly promote compelling government interests.⁴⁴

III. Minor Suggested Revisions

We recommend one change to the proposed rules and have identified a few minor suggested technical changes the Board may wish to consider.

First, we recommend the Board add language to the safe harbor provision of the proposed rule clarifying that an online platform may not rely on information provided by an ad purchaser if the platform “knows or has reason to know the information is false.” As the statute makes clear, platforms may only rely on such information “in good faith,”⁴⁵ and reliance on information the platform knows or has reason to know is false clearly would not be in good faith.

Second, to the extent that it is standard practice in COMAR to define terms via cross-reference to statute or other regulations, the terms “political committee,” “candidate,” “participating organization,” and “qualifying paid digital communication” may benefit from definitional cross-references. Similarly, the reference to an “out-of-State political committee required to file a campaign finance report” may similarly benefit from a cross-reference to relevant filing requirement in Election Law Article, § 13-301, Annotated Code of Maryland.

Conclusion

CLC thanks the Board for its consideration of the foregoing comments and recommendations regarding this important rulemaking. We would be happy to answer questions or provide additional information to assist the Board’s rulemaking process.

Respectfully submitted,

s/ Elizabeth D. Shimek
Elizabeth D. Shimek
Senior Legal Counsel

⁴³ *Citizens United*, 558 U.S. at 339. The Supreme Court has recognized that disclosure does not meaningfully inhibit First Amendment interests and actually advances those interests. *See id.*

⁴⁴ While the Fourth Circuit previously held Maryland’s statutory requirements could not be applied to news outlets, *see Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), the proposed rules explicitly exclude news organizations and websites owned or controlled by a press organization. Additionally, the proposed rules apply only to platforms with at least \$10,000,000 in gross revenue. The law is thus narrowly tailored to reach only large and highly influential platforms where the bulk of advertising and influence takes place. *Compare id.* at 522 (finding fault in Maryland’s prior inclusion of small news platforms).

⁴⁵ Election Law Article, § 13-405(d)(2), Annotated Code of Maryland.