



October 24, 2018

Submitted electronically to kford@lso.idaho.gov

Sen. Lodge and Rep. Wood, Co-Chairs
2018 Campaign Finance Reform Interim Committee
Idaho Legislature

Statement of Austin Graham, Campaign Legal Center

Chairs Lodge and Wood,

Thank you for inviting me to participate in today's meeting. My name is Austin Graham and I am Legal Counsel for the Campaign Legal Center's State and Local Reform Program. The Campaign Legal Center is a nonpartisan, nonprofit organization that works to protect and strengthen campaign finance laws at all levels of government.

Last year, the Campaign Legal Center submitted written testimony to this committee about campaign finance disclosure, and we were happy to learn that the Idaho Legislature is again considering campaign finance reform for next session.

Today, I'd like to talk about three topics related to transparency in political spending: U.S. Supreme Court precedent; disclosure of electioneering communications; and online campaign advertising.

U.S. Supreme Court Disclosure Precedent

I'll begin with an overview of the Supreme Court's recent decisions on campaign finance disclosure. In 2010, the Court decided *Citizens United v. FEC*.¹ The opinion is most well-known for its invalidation of federal law's

¹ 558 U.S. 310 (2010).

longstanding prohibition on corporations and unions making direct expenditures in federal elections.

However, *Citizens United* was also a major ruling in favor of disclosure. Eight of the nine Supreme Court Justices joined the part of the decision upholding federal law’s electioneering communication disclosure requirements as applied to *Hillary: The Movie*, a video on-demand documentary, and to commercial advertising for the film.

In *Citizens United*, the Supreme Court recognized that “disclosure is a less restrictive alternative to more comprehensive regulations of [political] speech” since it “impose[s] no ceiling on campaign-related activities.”² Further, the Court explained that disclosure advances a critical government objective by providing voters with information about who is making public communications about a candidate before an election.³ The Court maintained disclosure served this informational interest even if a public communication did not amount to “express advocacy” for or against a specific candidate’s election.⁴

The Court concluded that the interest in informing voters about sources of political messaging was sufficiently important to justify including disclaimers on 10-second advertisements promoting *Hillary: The Movie*, because “[ev]en if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”⁵

Thus, *Citizens United* unequivocally affirmed the constitutionality of disclosure requirements for political advertising. More recently, in 2017, the Supreme Court again signaled its view that disclosure is constitutional by summarily affirming a lower court decision that rejected an as-applied challenge to federal disclosure requirements for electioneering communications.⁶

Electioneering Communication Disclosure

Next, I’d like to discuss the disclosure of electioneering communications. At the federal level, Congress enacted reporting requirements for electioneering communications in the early 2000s.⁷ The regulation of these communications was meant to close a major loophole in federal law that had enabled political

² *Id.* at 366, 369.

³ *Id.* at 367.

⁴ *Id.* at 369.

⁵ *Id.*

⁶ *Indep. Inst. v. Fed. Election Comm’n*, 137 S. Ct. 1204 (2017), *aff’g* 216 F. Supp.3d 176 (D.D.C. 2016).

⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

groups to fund advertising referring to federal candidates without having to file disclosure reports so long as the advertisements avoided the use of “express advocacy” language, such as “vote for,” “vote against,” “support,” or “defeat.”⁸ Thus, the enactment of electioneering communication disclosure expanded transparency requirements to cover a more comprehensive range of public communications relating to candidates.

Many states, including Idaho, have also enacted disclosure requirements for electioneering communications in state and local elections. Currently, Idaho defines an “electioneering communication” as a public communication that refers to a state candidate and is distributed within 30 days of a primary or 60 days of a general election.⁹ The 30/60-day pre-election windows under Idaho’s statute mirror the timeframes used in the federal definition of “electioneering communication.”¹⁰

However, multiple states require reporting of electioneering communications within a longer timeframe than the 30/60-day periods in federal law. For instance, Alabama’s definition of “electioneering communication” covers communications that reference a candidate and are publicly distributed within 120 days of a primary or general election.¹¹ Under Massachusetts law, an “electioneering communication” includes a communication that is publicly distributed within 90 days of either a primary or general election.¹² Likewise, both Maryland and Washington State define “electioneering communication” to include a communication that refers to a candidate during the 60-day period before an election.¹³

Similarly, many states have defined “electioneering communication” to include additional types of media beyond those covered under federal law,

⁸ See *McConnell v. Fed. Election Comm’n*, 540 U.S. 90, 126-29 (2002).

⁹ Idaho Code Ann. § 67-6602(f).

¹⁰ 52 U.S.C. § 30104(f)(3).

¹¹ Ala. Code. § 17-5-2(6).

¹² Mass. Gen. Laws ch. 55, § 1.

¹³ Md. Code Ann., Elec. Law § 13-307(a)(3); Wash. Rev. Code § 42.17A.005(22). See also Ohio Rev. Code § 3517.1011(A)(7)(a) (“‘Electioneering communication’ means any broadcast, cable, or satellite communication that refers to a clearly identified candidate and that is made during either of the following periods of time: (i) If the person becomes a candidate before the day of the primary election at which candidates will be nominated for election to that office, between the date that the person becomes a candidate and the thirtieth day prior to that primary election, and between the date of the primary election and the thirtieth day prior to the general election at which a candidate will be elected to that office; (ii) If the person becomes a candidate after the day of the primary election at which candidates were nominated for election to that office, between the date of the primary election and the thirtieth day prior to the general election at which a candidate will be elected to that office.”).

including internet and electronic media.¹⁴ In fact, Idaho’s existing definition of “electioneering communication” encompasses a broader range of media than federal law, as it includes direct mail and printed communications.¹⁵ Therefore, the federal definition of electioneering communication is not an outer limit on the timing or scope of political advertisements that states may classify as electioneering communications.

Online Political Advertising

Finally, I would like to discuss online political advertising. According to the research firm Borrell Associates, approximately \$1.4 billion was spent on online advertisements in federal, state, and local elections in 2016.¹⁶ This figure represented almost an 800% increase over digital campaign spending in 2012.¹⁷ The amount spent on online campaign advertising also exceeded the total spent on political ads on cable TV for the first time in 2016.¹⁸ The growing prominence of digital advertising in campaigns is likely to continue. By one estimate, digital advertising in the 2018 midterm elections will reach \$1.9 billion.¹⁹

This rapid growth in digital advertising has been fueled by digital media’s ubiquity and its unique capacity for targeting individual voters, along with the relatively low effort and cost of placing digital ads. But campaign finance law has largely failed to keep pace with the exponential growth of digital

¹⁴ See, e.g., 10 Ill. Comp. Stat. 5/9-1.14(a) (defining “electioneering communication” to encompass an “Internet communication”); Utah Code Ann. § 20A-11-101(14) (defining “electioneering communication” to cover a communication “disseminated through the Internet”); Iowa Code § 68A.401A (requiring a political organization to report an “electronic communication in any form or content” made for issue advocacy referring to a legislative or statewide candidate). For more information about state laws expanding electioneering communication disclosure, see Brennan Ctr. for Justice, *States Expand Definition of Electioneering Communication to Guard against Corruption* (Feb. 7, 2013), <https://www.brennancenter.org/analysis/state-electioneering-communication-definitions>.

¹⁵ Idaho Code Ann. § 67-6602(f)(1) (“‘Electioneering communication’ means any communication broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences, or telephone calls”). The federal definition of “electioneering communication” is limited to broadcast, cable, or satellite communications. 52 U.S.C. § 30104(f)(3)(A)(i).

¹⁶ BORRELL ASSOCIATES, *THE FINAL ANALYSIS: POLITICAL ADVERTISING IN 2016*, Jan. 3, 2017, <https://www.borrellassociates.com/shop/the-final-analysis-political-advertising-in-2016-detail>; see also Kate Kaye, *Data-Driven Targeting Creates Huge Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, ADAGE (Jan. 3, 2017), <https://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

¹⁷ Borrell Associates, *supra* note 16.

¹⁸ *Id.*

¹⁹ Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, OPENSECRETS (March 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

advertising in recent elections. For example, many jurisdictions' campaign finance laws, including Idaho's, do not define "electioneering communication" to explicitly include internet advertisements, which leaves voters in the dark about who is funding a substantial amount of candidate-related advertising online.

The lack of disclosure around digital advertising also directly facilitated Russia's illicit efforts to influence the 2016 presidential election using social media and other electronic means.²⁰ Unfortunately, foreign efforts to influence U.S. elections have not stopped. 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.²¹

The continuing threat of foreign interference in U.S. elections underscores the need for lawmakers to ensure online political campaign spending is transparent and free from foreign meddling. While congressional efforts have stalled, multiple states have enacted new disclosure requirements for online political advertising within the past year.²²

As this committee assesses potential amendments to Idaho's campaign finance law, I hope you will consider measures to increase the transparency

²⁰ See Amanda Becker, *What we know about U.S. probes of Russian meddling in 2016 election*, REUTERS (May 11, 2017), <https://www.reuters.com/article/us-usa-trump-russia/what-we-know-about-u-s-probes-of-russian-meddling-in-2016-election-idUSKBN1872Y6> ("The Central Intelligence Agency, the Federal Bureau of Investigation and the National Security Agency concluded in a report . . . that Russian President Vladimir Putin ordered a campaign not just to undermine confidence in the U.S. electoral system but to affect the outcome. . . . Putin's associates hacked information, paid social media 'trolls' and backed efforts by Russian government agencies and state-funded media to sway public opinion, the agencies said."); see also Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>.

²¹ 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>; 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>.

²² Online Electioneering Transparency and Accountability Act, H.D. 981, 2018 Leg., 438th Sess. (Md. 2018) (requiring disclosure of "qualifying paid digital communications"); Democracy Protection Act, S. 7509-C, Pt. JJJ, 2018 N.Y. Laws Ch. 59 (N.Y. 2018) (requiring disclosure of independent expenditures for "paid internet or digital advertisements"); A.B. 2188, 2018 Cal. Stat. Ch. 754 (Cal. 2018) (increasing disclosure of "electronic media advertisements"); H. 828, 2018 Vt. Act 129 (Vt. 2018) (amending definitions of "electioneering communication" and "mass media activity" to include "electronic or digital communications" and "Internet advertisements," respectively); H. 2938, 65th. Leg., Reg. Sess. (Wash. 2018) (amending definitions of "electioneering communication" and "political advertising" to include any "digital communication").

of online political advertising in Idaho elections.

Thank you for allowing me to address the committee today. As you continue to consider changes to Idaho's law, I would be happy to provide additional information or answer questions about disclosure to assist the committee.

Respectfully submitted,

/s/

Austin Graham
Legal Counsel, State & Local Reform Program
Campaign Legal Center
1411 K Street, Suite 1400
Washington, D.C. 20005
(202) 856-7915
agraham@campaignlegalcenter.org