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Submitted electronically to [CommAsst@fppc.ca.gov](mailto:CommAsst@fppc.ca.gov)

Richard C. Miadich, Chair  
California Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811

Dear Chair Miadich and Members of the Task Force,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the FPPC’s Digital Transparency Task Force regarding the questions for “Discussion of the Digital Political Advertisement Archive” listed on the Task Force’s May 29 meeting agenda.<sup>1</sup>

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels. 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 a responsive and transparent democratic system.

CLC applauds the FPPC’s creation of the Digital Transparency Task Force to give careful consideration to the important legal and policy questions around the regulation of digital advertisements in elections. Ensuring transparency of digital political ads presents unique challenges for election officials due to the distinctive features of online advertising, including the ability to target communications to highly specific audiences and the ephemeral nature of much digital content. By studying the national landscape and regulatory trends in this evolving field, the Task Force will enable the FPPC to develop effective digital ad disclosure policies that deliver critical information to the public as campaigns, committees, and other groups increasingly rely on the internet to target and communicate with California voters.

Our written comments address questions (a) through (d) under “Discussion of Digital Political Advertisement Archive” on the Task Force’s May 29 meeting agenda. Part I concerns the question of whether California should create and maintain a government-hosted archive of digital political ads; Part II discusses the

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<sup>1</sup> <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/Task-Force/may-2020/DITTF%20MAY%20Agenda.pdf>.

scope of political ads that should be subject to an archiving requirement; Part III describes what information should be included in the archive for each political ad; and Part IV addresses who should be responsible for providing the information about digital ads maintained in the archive.

## **I. California Should Establish a Government-Hosted Public Online Archive of Digital Advertisements in State Elections**

CLC strongly recommends that California establish a government-hosted online political ad archive to provide the public with access to information about digital advertisements related to state elections. As the volume of online advertising in contemporary U.S. elections continues to grow,<sup>2</sup> a number of state and local jurisdictions have adopted archiving requirements for digital political advertisements to augment the transparency of these ads.<sup>3</sup> Among their benefits, publicly accessible and searchable archives of digital political ads present the most effective solution to the problem of “dark” digital ads in elections: online political advertisements that are microtargeted to specific segments of the population but otherwise invisible and inaccessible to the rest of the public, including law enforcement officials, journalists and watchdog groups, and voters outside of the target audience who want to learn more about election-related messaging.<sup>4</sup>

By ensuring online political ads microtargeted to a small audience are preserved and available for review by the public at large, digital ad archives are key to strengthening the transparency of online political advertising and enforcing campaign finance laws in the Information Age. Moreover, because longstanding federal law already requires publicly accessible records to be kept regarding the sources, cost, and distribution of political advertising on TV and radio, the creation

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<sup>2</sup> By one estimate, total digital ad spending in federal, state, and local elections will reach \$1.3 billion in the 2019-2020 cycle. Kate Gibson, *Spending on U.S. digital political ads to top \$1 billion for first time*, CBS NEWS (Feb. 12, 2020), <https://www.cbsnews.com/news/spending-on-us-digital-political-ads-to-cross-1-billion-for-first-time/>.

<sup>3</sup> See, e.g., N.Y. Elec. Law § 14-107(5-a); L.A. Mun. Code § 49.7.31(C)(2). Maryland also adopted political ad archiving requirements for online platforms in 2018—its law requires a wide range of platforms to host public archives on their websites. Md. Code, Elec. Law § 13-405(b). In a consent judgment issued earlier this month, the state agreed to a permanent injunction barring enforcement of Maryland’s digital archiving law against a group of regional newspapers whose websites qualified as “online platforms” under the state law. See Pamela Wood, *Maryland settles challenge over law regulating online campaign ads*, BALTIMORE SUN (May 6, 2020), <https://www.baltimoresun.com/politics/bs-md-pol-settlement-newspapers-20200506-7q67acrdu5dypgn7vc3juvnku-story.html>.

<sup>4</sup> See Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center’s Erin Chlopak*, HEWLETT FOUNDATION (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/>.

of digital ad archives ads helps to institute greater symmetry in the regulation of online political advertisements and ads distributed via more traditional media.<sup>5</sup>

One of the primary policy questions surrounding digital ad archives is whether the state government or private online platforms should be responsible for creating and maintaining the archives. For a number of reasons, CLC believes that government-hosted archives are preferable. First, a government-hosted archive provides a centralized repository of comprehensive and standardized information about digital advertising in elections; under this approach, the public can rely on the government-hosted archive as a “one-stop shop” for *all* digital ad information regardless of where the ads were originally displayed. The centralization of digital advertisement information in a government-hosted archive also lessens the importance of delineating which websites and applications qualify as “online platforms” for archiving purposes, and facilitates more effective legal oversight by state authorities who can identify errors and omissions when uploading ad data to the archive.

Second, a government-hosted archive avoids a piecemeal approach to transparency and ensures that all digital ads subject to regulation are publicly disclosed. When only certain platforms are required to host archives, sponsors of digital ads can evade transparency requirements by routing their ad spending to smaller platforms that are not subject to archiving requirements.<sup>6</sup> This sort of evasion would be impermissible with a government-hosted archive, however.

Third, a government-hosted ad archive ensures the long-term preservation of digital ad information. Platform-hosted ad archives, particularly archives hosted by smaller, less established platforms, pose an inherent risk that the public could lose access to political ad information if the platforms fold at some point in the future. A government-hosted archive thus provides more certainty of the continued availability of public information about digital political advertisements in the event that some online platforms on which ads were distributed cease to exist.

Finally, a government-hosted public archive enables the accessibility of digital political ads distributed on online platforms without imposing compliance costs on smaller platforms. A concern about burdening smaller platforms was among the reasons cited by the Fourth Circuit Court of Appeals when it affirmed an injunction against Maryland’s digital political ad archiving requirement for online platforms with 100,000 or more unique monthly U.S. users.<sup>7</sup> To be sure, the Fourth Circuit’s

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<sup>5</sup> See 47 U.S.C. § 315(e); 47 C.F.R. §§ 73.1943, 76.1701.

<sup>6</sup> See Brendan Fischer & Maggie Christ, *Digital Transparency Loopholes in the 2020 Elections*, CAMPAIGN LEGAL CENTER (April 2020), [https://campaignlegal.org/sites/default/files/2020-04/04-07-20 Digital Loopholes 515pm .pdf](https://campaignlegal.org/sites/default/files/2020-04/04-07-20%20Digital%20Loopholes%20515pm.pdf) (documenting how only 4% of a group’s FEC-reported digital political spending appeared in public archives maintained by Facebook, Google, and Snapchat).

<sup>7</sup> *Wash. Post v. McManus*, 944 F.3d 506, 522 (4th Cir. 2019) (concluding that Maryland’s digital ad archive law is “too broad because it fails to distinguish between platforms large and small”).

ruling is narrow, focusing on unique characteristics of Maryland’s digital ad law as well as the law’s stated objective of combatting foreign interference. Nevertheless, the decision highlights important considerations for the FPPC’s Digital Transparency Task Force to keep in mind regarding the imposition of archive responsibilities on online platforms.

Importantly, online platforms can still play a part in ensuring effective online advertising disclosure even if they do not host digital ad archives. In New York State, online platforms are required verify that each purchaser of a digital independent expenditure ad is properly registered with the State Board of Elections at the time of the ad’s purchase;<sup>8</sup> a platform that fails to collect a copy of an ad sponsor’s registration statement will be assessed a civil penalty.<sup>9</sup> New York’s verification process thereby utilizes online platforms as a backstop to secure compliance with digital ad disclosure rules while avoiding the burdens on “neutral third-party platforms” that concerned the Fourth Circuit in its decision enjoining Maryland’s law.<sup>10</sup>

For the foregoing reasons, CLC strongly supports California’s creation of a government-hosted archive of digital political advertisements.

## **II. California’s Online Ad Archive Should Include a Broad Range of Political Advertising**

CLC recommends that California’s online ad archive encompass a comprehensive range of political advertisements disseminated online, including advertising paid for by candidates and committees, independent expenditure ads, and certain public communications identifying state candidates or ballot measures within 45 days of an election but not expressly advocating for or against those candidates or measures.<sup>11</sup> By covering the broadest possible scope of digital political advertisements, the state’s online ad archive will most effectively improve public access to information about election-related advertising, preclude dissemination of “dark” political ads, and aid in the enforcement of the Political Reform Act’s disclosure requirements.

Existing laws and legislation concerning digital ad archives vary considerably in their coverage of political ads. For example, the federal Honest Ads Act would apply archive requirements to digital political advertisements that relate to a federal candidate or election, or to “a national legislative issue of public importance.”<sup>12</sup> On the other hand, New York’s Democracy Protection Act added new archiving requirements only for digital independent expenditure ads.<sup>13</sup> While the California Legislature may need to adopt new legislation to extend archiving requirements to the full array of advertising covered under the Honest Ads Act, the Digital

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<sup>8</sup> N.Y. Elec. Law § 14-107-b(1).

<sup>9</sup> *Id.* § 14-126(7).

<sup>10</sup> *Wash. Post.*, 944 F.3d at 516-17, 523.

<sup>11</sup> *See* Cal. Gov’t Code § 85310.

<sup>12</sup> S. 1356, 116th Cong., § 8 (2019).

<sup>13</sup> N.Y. Elec. Law § 14-107(5-a).

Transparency Task Force should consider at least including all digital political advertisements subject to disclosure under the Political Reform Act as part of the state's online ad archive.

### **III. The Online Ad Archive Should Include Comprehensive Information About Each Political Advertisement**

CLC also suggests making comprehensive information available for each political advertisement included in California's online ad archive. Providing information about the source, cost, dates, and distribution of each political ad in the archive will maximize the informational value of the archive to the public, and also assist the FPPC with oversight and enforcement. In general, CLC recommends including:

- i. A copy of the advertisement;
- ii. Identification of the advertisement's sponsor, including:
  - a. If the sponsor is a candidate, the name of the candidate, the candidate's authorized committee, and the treasurer of the candidate's authorized committee;
  - b. If the sponsor is a political committee, the name of the committee and the treasurer of the committee; or
  - c. If the sponsor is a person other than a candidate or political committee, the name of the person, the name, address, and phone number of an individual point of contact for the person, and a list of the chief executive officers or members of the executive committee or board of directors for the person.
- iii. Identification of the online platform that disseminated the advertisement;
- iv. The amount paid to the online platform to disseminate the advertisement;
- v. The dates on which the advertisement was displayed, or contracted to be displayed, through the services provided by the online platform;
- vi. A description of the demographic or geographic audience, if any, targeted by the advertisement;
- vii. The number of people to whom the advertisement was disseminated directly, or expected to be disseminated, by the online platform; and
- viii. Identification of each candidate (including name and public office sought by the candidate) or ballot measure referenced by the advertisement.

### **IV. The Sponsors of Political Advertisements Should Provide Required Information for the Online Ad Archive**

The sponsors of political ads (i.e., the entities paying for them) should be responsible for collecting and providing ad copies and other required information for the state's

public archive. As the original sources of political advertising, ad sponsors are best positioned to promptly submit comprehensive information about their advertisements to state officials. And California would be on solid constitutional footing in requiring the collection and disclosure of this information by the sponsors of political ads, who are unquestionably “direct participants in the political process.”<sup>14</sup>

In California, candidates, political committees, and other organizations that raise or spend significant amounts of money in state elections are required to file regular reports with the FPPC;<sup>15</sup> the existing reporting system applicable to these entities provides a well-established framework for introducing filing requirements specific to digital ads. Likewise, focusing digital ad filing requirements on the direct sponsors of political ads relieves the FPPC of having to determine who is responsible for submitting information about digital political advertisements that are disseminated through complex ad networks, in which multiple entities are involved in the placement of the ads on third-party websites or applications. Accordingly, we suggest that California require the sponsors of digital political ads to assume responsibility for filing information about their ads with state officials.

### Conclusion

CLC supports the Digital Transparency Task Force’s decision to study the important questions around regulation of digital advertising in California elections. We appreciate having the opportunity to provide input on these questions and would be happy to provide additional information to assist the Task Force in assessing options for digital ad disclosure.

Respectfully submitted,

/s/

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Director, Federal Reform

/s/

Austin Graham  
Legal Counsel

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<sup>14</sup> *Wash. Post*, 944 F.3d at 516 (recognizing that “governments have long required, and the Supreme Court has long upheld, the publication and retention [by ‘direct participants in the political process’] of certain information in connection with elections”); *see also Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (explaining that expenditures by candidates and political committees may be subject to disclosure requirements because “[t]hey are, by definition, campaign related.”).

<sup>15</sup> *See* Cal. Gov’t Code §§ 84100–84511.