
MICROTARGETED POLITICAL ADS: AN INTRACTABLE PROBLEM

*John M. King**

ABSTRACT

American democracy is facing a novel threat: the surgical delivery of polarizing and manipulative political ads. Modern marketing technologies give political campaigns the power to target voters in such a precise manner that citizens who live on the same street, or even in the same building, may see entirely different political content. And because campaigns keep secret the way they target their audiences, there is little opportunity for political rivals, journalists, or even more scrutinizing citizens to rebut mistruths. In effect, the marketplace of ideas—a foundational concept of First Amendment doctrine—has become so shattered and distorted that it no longer resembles a broad and competitive marketplace at all.

Legislators recognize the dangers that microtargeted political ads pose, but they have not crafted a solution. Because First Amendment doctrine staunchly protects political speech and virtually prohibits the government from regulating or proscribing speech based on its content, Congress cannot enact legislation that bans or regulates microtargeted political ads. Such ads will continue to do harm, and the law cannot prevent this from happening. The law can, however, mitigate the damage.

Mandated disclosures can give opposing campaigns, journalists, and voters the information they need to evaluate deceptive political ads and engage in remedial counterspeech. Thoughtful legislation that accounts for the capabilities of modern marketing technologies, takes inspiration from regulations in the digital advertising space, and respects First Amendment principles and jurisprudence, can put the marketplace of ideas back together.

* J.D. Candidate, Boston University School of Law, 2022; B.S. Journalism, Emerson College, 2014. Thank you to Professors Jay Wexler and Woodrow Hartzog for their guidance and support. And a special thanks to my mother, Mary King, and father, Charles King, who have been an endless source of inspiration and encouragement.

CONTENTS

INTRODUCTION	1131
I. FIRST AMENDMENT PROTECTIONS	1136
A. <i>Content-Based Versus Content-Neutral Restrictions</i>	1137
B. <i>Categories of Speech and Measures of First Amendment Protection</i>	1140
C. <i>Surviving Intermediate, Exacting, or Strict Scrutiny</i>	1144
II. EXISTING INEFFECTIVE SOLUTIONS.....	1146
A. <i>Ineffective Federal Legislative Proposals</i>	1147
1. The Protecting Democracy from Disinformation Act.....	1147
2. The Banning Microtargeted Political Ads Act.....	1150
B. <i>A Developing Trend of Self-Regulation</i>	1153
C. <i>The Honest Ads Act</i>	1156
III. DISCLOSURE REQUIREMENTS FOR MICROTARGETED POLITICAL ADS.....	1158
A. <i>Drafting a Microtargeting Disclosure Amendment</i>	1161
B. <i>Do Disclosures Go Far Enough?</i>	1165
CONCLUSION.....	1167

INTRODUCTION

In 2014, Cambridge Analytica used a trove of data, some of which was stolen from Facebook, to psychologically profile, target, and send ads to “neurotic” North Carolinians.¹ The ads depicted war and unrest abroad as a strategy to support Senator Thom Tillis’s campaign.²

In 2016, the Trump campaign used data “on almost 200 million American voters” to design an algorithm that would sort voters in battleground states into a “[d]eterrence” ad campaign made to persuade viewers to stay home on election day.³ The campaign disproportionately targeted people of color; Black people made up 61% of Georgia’s deterrence category even though Georgia’s population is 32% Black.⁴

That same year, Russian-linked accounts on Facebook spent roughly \$100,000 on ads featuring controversial messages regarding religion, gun control, and race relations; the accounts precisely targeted the ads at impressionable viewers to stoke political turmoil.⁵ One such ad featured Jesus arm wrestling the devil—the caption read, “Satan: If I win Clinton wins! Jesus: Not if I can help it!”⁶

This type of ad content, which some might consider problematic, is neither novel nor unique in American history. One might liken the contentious subject matter to President Lyndon B. Johnson’s 1964 “Daisy Girl” advertisement that implied electing Johnson’s political rival, Barry Goldwater, would result in nuclear holocaust.⁷ What is novel, rather, is how modern political ads reach voters. Forums that currently need not follow disclosure standards required by other mediums, such as radio and television, disseminate modern political ads

¹ Jeremy B. Merrill & Olivia Goldhill, *These Are the Political Ads Cambridge Analytica Designed for You*, QUARTZ (Jan. 20, 2020), <https://qz.com/1782348/cambridge-analytica-used-these-5-political-ads-to-target-voters/>.

² *Id.*

³ Job Rabkin, Guy Basnett, Ed Howker, Janet Eastham & Heidi Pett, Channel 4 News Investigations Team, *Revealed: Trump Campaign Strategy to Deter Millions of Black Americans from Voting in 2016*, CHANNEL 4 NEWS (Sept. 28, 2020) [hereinafter *Revealed: Trump Campaign*], <https://www.channel4.com/news/revealed-trump-campaign-strategy-to-deter-millions-of-black-americans-from-voting-in-2016> [<https://perma.cc/NNK3-YVQG>]; see Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *Firm that Assisted Trump Exploited Data of Millions*, N.Y. TIMES, Mar. 18, 2018, at 1N, 13.

⁴ *Revealed: Trump Campaign*, *supra* note 3.

⁵ Barbara Ortutay & Amanda Seitz, *How Microtargeted Political Ads Are Wreaking Havoc on Our Elections*, L.A. TIMES (Feb. 1, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story/2020-02-01/how-microtargeted-political-ads-are-wreaking-havoc-on-our-elections>.

⁶ *The Social Media Ads Russia Wanted Americans to See*, POLITICO (May 10, 2018, 11:49 AM), <https://www.politico.com/story/2017/11/01/social-media-ads-russia-wanted-americans-to-see-244423>.

⁷ *Peace, Little Girl: [Daisy Political Spot]*, LIBR. OF CONG., <https://www.loc.gov/item/mbrs01185386/> [<https://perma.cc/G9DL-MS8C>] (last visited Feb. 19, 2022) (describing the telecast as “one of the most controversial political advertisements ever made”).

using algorithmic targeting fueled by vast quantities of behavioral and demographic data.⁸ These microtargeted political ads distributed online, particularly on social media, present new and concerning problems for American democracy.

Microtargeting can be defined as “a strategic process intended to influence voters through the direct transmission of stimuli, which are formed based on the preferences and characteristics of an individual.”⁹ In practice, data brokers and data collectors gather vast quantities of behavioral and demographic data, carving out discrete categories of voters predicted to respond in a particular manner to certain messaging.¹⁰ For example, Cambridge Analytica used data from 50 million Facebook profiles to predict qualities such as neuroticism, fair-mindedness, credulousness, interest in militarism or violent occultism, and many more—qualities alleged to “provide a uniquely powerful means of designing political messages.”¹¹ A campaign then uses those predicted qualities to deliver advertisements in such a precise manner that “one person in one specific household [could] see a specific ad . . . [a]nd their neighbor could see a different ad.”¹²

Influencing impressionable likely voters is not inherently concerning; some might call that the goal of any political campaign. What is concerning, however, is how microtargeted political ads contravene one of the predominant theories of First Amendment doctrine: that the “ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [our] wishes safely can be carried out.”¹³

Microtargeted political ads eliminate this “marketplace of ideas” concept by giving political campaigns the ability to algorithmically target precise groups of voters in ways competing political campaigns cannot replicate. This is because targeting criteria are protected technology, as is the data fed through those

⁸ Lata Nott, *Political Advertising on Social Media Platforms*, A.B.A. HUM. RTS. MAG., June 2020, at 6, 7 (explaining that social media platforms, like Facebook and Twitter, need not comply with First Amendment requirements and allow microtargeting methods that newspapers and television are not capable of).

⁹ Orestis Papakyriakopoulos, Simon Hegelich, Morteza Shahrezaye & Juan Carlos Medina Serrano, *Social Media and Microtargeting: Political Data Processing and the Consequences for Germany*, BIG DATA & SOC’Y, July-Dec. 2018, at 1, 2.

¹⁰ *See id.*

¹¹ Rosenberg et al., *supra* note 3 (“Of those [Facebook profiles], roughly 30 million . . . contained enough information, including places of residence, that the company could match users to other records and build psychographic profiles. Only about 270,000 users — those who participated in the survey — had consented to having their data harvested.”).

¹² Ortutay & Seitz, *supra* note 5 (quoting Luca Cian, “a professor at the Darden School of Business who focuses on how marketing affects political campaigns”).

¹³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing conception of the marketplace of ideas as bedrock principle of First Amendment jurisprudence); *see* *Brandenburg v. Ohio*, 395 U.S. 444, 451-57 (1969) (Douglas, J., concurring) (solidifying Holmes’s conception).

criteria to produce an audience. Thus, political campaigns using microtargeting need not put their messages to the test in a competitive market; instead, they may target the suggestible, avoid the scrutinizing, and hide their work from dissenting voices. In effect, the once-broad marketplace of ideas, where “Daisy Girl” was distributed, can be so finely broken apart that it does not resemble a competitive marketplace at all. As a result, outlandish ideas, blatant mistruths, and thoughts considered unacceptable in reasonable communities can thrive if one targets the right audience.

Ironically, First Amendment doctrine prohibiting content-based discrimination under the rationale that such regulations “raise[] the specter that the Government may effectively *drive certain ideas or viewpoints from the marketplace*” precludes prohibiting or significantly regulating microtargeted political ads.¹⁴ In other words, First Amendment jurisprudence meant to protect the marketplace of ideas is preventing legislators from limiting activity that threatens that very marketplace.

This is because proposed legislation meant to regulate or prohibit microtargeted political ads must distinguish political messaging from nonpolitical messaging to regulate the former. Making that distinction would inevitably trigger strict scrutiny as a content-based subject matter restriction on a protected category of speech.¹⁵ While strict scrutiny is not necessarily “‘strict’ in theory and fatal in fact,” as some legal scholars have suggested in the past,¹⁶ strict scrutiny poses a formidable barrier for campaign speech restrictions¹⁷ and would almost certainly invalidate currently proposed federal microtargeted political ad legislation.¹⁸

¹⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (emphasis added) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

¹⁵ See *id.* at 383-84 (stating that some “areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)” (emphasis omitted)). Far from “proscribable content,” political ads are a form of political speech, perhaps the most stringently protected category of speech. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007))); see also *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015) (invalidating town’s sign code for subjecting specific subject matter to differential treatment regardless of whether it targeted viewpoints within that subject matter).

¹⁶ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹⁷ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 845 (2006) (noting that campaign speech restrictions survived strict scrutiny analysis just 24% of the time).

¹⁸ See *infra* Part II.

Thus, because of a virtually insurmountable constitutional obstacle, advertisers are free to opportunistically balkanize the electorate and serve polarizing ad content to audiences with precise behavioral and demographic qualities in such a way that leaves few opportunities for remedial counterspeech.¹⁹ Empirical studies have shown that microtargeted political ads contribute to “(1) an increased willingness and ability to deliver messages on wedge issues that would be extremely divisive in a more public forum” as well as “(2) voter discrimination and de facto disenfranchisement, (3) a chilling of political participation due to perceived violations of voters’ privacy, and (4) a general trend toward single issue politics that leads to increased partisanship among voters and ambiguous political mandates for elected representatives.”²⁰ Microtargeting also provides an opportunity for politicians or the entities that support them to send contradictory messages with less fear of consequence. Because microtargeting is so precise, one could send messaging advocating for *X* and admonishing *X* simultaneously to different individuals. While this strategy has not been employed to a significant extent that we know of, the threat still looms. For example, groups supporting Senator Thom Tillis could have supplemented one of his advertisements humanizing refugees in Syria and arguing that he would “protect our allies abroad”²¹ with another advertisement echoing candidate Donald Trump’s claims likening U.S. refugee and immigration policies to “importing extremism.”²² With precise targeting, one could distribute both advertisements at once to court discrete groups of voters that add up to a larger overall faction without fearing that viewers would recognize and criticize the contradiction.

This is not to say that microtargeted political ads are, by their nature, immoral, deceptive, or problematic. Indeed, one cannot ignore the potential benefits of such ads. For budget-constrained political outsiders, microtargeted political ads provide a cost-effective method of speaking to a candidate’s most valuable targets.²³ And those targets are not always impressionable neurotics. Advertisers

¹⁹ Traditionally, whether there was an opportunity for remedial counterspeech was considered in terms of time; for example, incitement to imminent lawless action would not receive First Amendment protection. *See* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). However, time is inconsequential if speech recipients cannot be identified for the purposes of exposing falsehoods and fallacies through discussion.

²⁰ Solon Barocas, *The Price of Precision: Voter Microtargeting and Its Potential Harms to the Democratic Process*, PLEAD’12, Nov. 2012, at 31, 31.

²¹ Team John Bolton, *Refugee – Support Thom Tillis*, YOUTUBE (Oct. 25, 2014), <https://www.youtube.com/watch?v=BkOCAWFUAYU> [<https://perma.cc/JP6L-XZN5>].

²² *Transcript: Donald Trump’s Foreign Policy Speech*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html>.

²³ Dipayan Ghosh & Ben Scott, *Facebook’s New Controversy Shows How Easily Online Political Ads Can Manipulate You*, TIME MAG. (Mar. 19, 2018, 12:38 PM), <https://time.com/5197255/facebook-cambridge-analytica-donald-trump-ads-data/> (“[Brad]

could just as easily target “swing voters or infrequently voting partisans who often abstain from voting”²⁴—worthy goals that could increase democratic participation.

While these benefits regarding data-driven political microtargeting are compelling, and have been realized (to an extent) by door-to-door canvassers in some European countries,²⁵ they are outweighed by far more pronounced potential problems in the American political system—problems European Union countries do not face. This is because of the United States’ (1) lax data privacy rules and a lack of federal data privacy regulation making vast quantities of personal and behavioral data available to data brokers and online platforms, (2) two-party political system providing greater campaign budgets and greater incentive to fragment voter blocs, and (3) lack of rules regarding the transparency of online political ads.²⁶ These qualities make microtargeted political ads uniquely dangerous to American democracy.

Fortunately, lawmakers have recognized these dangers, as reflected by two federal bills that propose regulating or completely proscribing microtargeted political ads.²⁷ Unfortunately, these bills are most likely invalid under the First Amendment because singling out *political* ads is a content-based distinction.²⁸

This Note argues that federal legislation regulating microtargeted political ads is necessary to inform the electorate and prevent confusion, that currently proposed legislation is incapable of passing First Amendment muster, and that amending proposed disclosure regulations for online political ads provides the most feasible path toward remedying the problems microtargeted political ads present. Part I analyzes the legal barrier posed by the First Amendment, synthesizing case law regarding content-based regulations, campaign ad regulations, strict and exacting scrutiny survivability, and other relevant topics. Part II reviews proposed solutions regarding microtargeted political ads, addressing the probability that current federal bills would survive a First Amendment challenge and the benefits and pitfalls of current self-regulation. Part III presents a different approach, relying on amending proposed disclosure

Parscale, who [was] chief of Trump’s 2020 efforts, said his candidate’s Facebook ads were 100 or 200 times more cost-effective than those placed by the Clinton campaign for the presidency.”).

²⁴ Simon Kruschinski & André Haller, *Restrictions on Data-Driven Political Micro-Targeting in Germany*, 6 INTERNET POL’Y REV. 1, 2 (2017).

²⁵ See, e.g., *id.* (“[P]olitical parties in the US and Europe seem to have built a resurgent interest in an originally ‘premodern’ campaign tool to mobilise voters and ultimately generate votes: door-to-door canvassing.”).

²⁶ See Frederik J. Zuiderveen Borgesius, Judith Möller, Sanne Kruikemeier, Ronan Ó Fathaigh, Kristina Irion, Tom Dobber, Balazs Bodo & Claes de Vreese, *Online Political Microtargeting: Promises and Threats for Democracy*, 14 UTRECHT L. REV. 82, 89-91 (2018).

²⁷ See *infra* Section II.A (describing Congressman David Cicilline’s Protecting Democracy from Disinformation Act and Congresswoman Anna Eshoo’s Banning Microtargeted Political Ads Act).

²⁸ See *infra* Section II.A.

regulations for online political ads to include disclosures regarding microtargeting.

I. FIRST AMENDMENT PROTECTIONS

“Congress shall make no law . . . abridging the freedom of speech, or of the press”²⁹ Free speech is a foundational American value, and the First Amendment provides exceptionally broad protection against government regulation of speech.³⁰ Indeed, according to past analyses, federal courts have applied strict scrutiny review in more free speech cases than any other area of law.³¹

Whether a law survives a First Amendment challenge largely depends on the level of scrutiny applied.³² Thus, any discussion of viability regarding microtargeted political ad legislation should first consider whether lawmakers could draft a bill triggering only intermediate scrutiny review, a “deferential form of review,”³³ or exacting scrutiny review, a difficult and nondeferential standard,³⁴ or whether strict scrutiny review would inevitably apply, “which nearly always proves fatal.”³⁵ To this end, one must ask three pivotal questions. First, would such a law be a content-based restriction on expression, or a content-neutral time, place, or manner restriction?³⁶ Second, what category of

²⁹ U.S. CONST. amend. I.

³⁰ CARR CTR. FOR HUM. RTS. POL’Y, HARVARD KENNEDY SCH., REIMAGINING RIGHTS & RESPONSIBILITIES IN THE U.S. 3 (2021), https://carrcenter.hks.harvard.edu/files/cchr/files/201007_rr-executive-summary.pdf?m=1602106101.

³¹ Winkler, *supra* note 17, at 844.

³² Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 809-17 (analyzing 111 courts of appeals cases in which intermediate scrutiny was applied in First Amendment context and finding that government action was sustained nearly three-quarters of the time); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 238 (2012) (claiming that “almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny”). *But see generally* Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM’N L. & POL’Y 349, 352 (2011) (describing how courts avoid applying strict scrutiny by manipulating “the content-based/content-neutral dichotomy”).

³³ Kendrick, *supra* note 32, at 237.

³⁴ See *Wash. Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019).

³⁵ Kendrick, *supra* note 32, at 237.

³⁶ *Id.* at 235 (“The two basic ideas behind the content-discrimination principle are that it is usually wrong for the government to regulate speech because of what it is saying and that it is usually acceptable, as a First Amendment matter, for the government to regulate speech for reasons other than what it is saying.”); see *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

speech would the law implicate and what measure of First Amendment protection does that category of speech normally receive³⁷—the fullest measure of First Amendment protection or some lesser measure of protection?³⁸ And, third, depending on which level of scrutiny is applied, could the law satisfy it?³⁹

A. *Content-Based Versus Content-Neutral Restrictions*

The Supreme Court has long held that content-based restrictions on speech are presumptively invalid and that proscribing speech or expressive conduct because of the ideas expressed is generally prohibited.⁴⁰ The government bears the burden of proving the constitutionality of any such restriction, which requires satisfying strict scrutiny—i.e., proving the restriction is narrowly tailored to promote a compelling government interest and that no less restrictive alternative is available.⁴¹ But what exactly does prohibiting speech or conduct based on the “ideas expressed” mean?

In *Police Department of the City of Chicago v. Mosley*,⁴² the Supreme Court reasoned that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject

³⁷ See *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010) (stating that the First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office” and that “[l]aws that burden political speech are ‘subject to strict scrutiny’” (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (describing categories of proscribable speech such as obscenity, defamation, fighting words, and libel); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (“[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,” and is subject to “modes of regulation that might be impermissible in the realm of noncommercial expression.” (second alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))).

³⁸ See *Citizens United*, 558 U.S. at 366-67 (subjecting disclaimer and disclosure requirements to “exacting scrutiny” and validating a statute requiring disclosures on “televised electioneering communications”); Millicent Usoro, Note, *A Medium-Specific First Amendment Analysis on Compelled Campaign Finance Disclosure on the Internet*, 71 *FED. COMM’NS L.J.* 299, 315 (2019) (“A medium-specific analysis is necessary to formulate any First Amendment jurisprudence for speech on the Internet because courts have not historically applied a consistent level of scrutiny for government regulation across other mediums of communication.”). *But see Wash. Post*, 944 F.3d at 506 (questioning whether exacting scrutiny or strict scrutiny should apply to act requiring online publishers and platforms to disclose information regarding paid political ads).

³⁹ As a preliminary matter, microtargeted political ad legislation cannot escape First Amendment scrutiny as an alleged regulation of conduct rather than speech. Targeting political ads specifically ensures such legislation would involve “conduct ‘sufficiently imbued with elements of communication’ to implicate the First Amendment” and would be “related ‘to the suppression of free expression.’” *United States v. Eichman*, 496 U.S. 310, 313-14 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

⁴⁰ *R.A.V.*, 505 U.S. at 382.

⁴¹ See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813-17 (2000).

⁴² 408 U.S. 92 (1972).

matter, or its content.”⁴³ The *Mosley* Court tied its ruling to the philosophy that content-related restrictions on expressive activity would undermine the nation’s “commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁴⁴ In the years following *Mosley*, the Court applied two different tests to discern what types of restrictions were content-based as opposed to content-neutral, leading to, as some scholars put it, “a confused, inconsistent, and highly malleable body of law.”⁴⁵ This may have been rectified by *Reed v. Town of Gilbert*,⁴⁶ where the Court attempted to reconcile the two tests.⁴⁷ But the *Reed* decision also resulted in stricter doctrine that enlarges the scope of what is content-based, making it significantly harder for the government to defend laws that implicate the First Amendment.⁴⁸

Under *Reed*, a law that “draws distinctions based on the message a speaker conveys”⁴⁹ is said to regulate speech “on its face” and thus triggers strict scrutiny. For example, regulating speech by subject matter is facially content-based and receives strict scrutiny review.⁵⁰ Moreover, laws that are “facially content neutral” but can only be justified with “reference to the content of the regulated speech” or “were adopted by the government ‘because of disagreement with the message [the speech] conveys,’” are also treated as content-based and thus subject to strict scrutiny.⁵¹

Importantly, *Reed* likewise explains that speech regulations that treat viewpoints neutrally can nevertheless be content based because “[t]he First Amendment’s hostility to content-based regulation [also] extends . . . to

⁴³ *Id.* at 95 (ruling Chicago ordinance prohibiting picketing within 150 feet of school on subjects other than labor disputes was unconstitutional for distinguishing between labor picketing and other picketing).

⁴⁴ *Id.* at 96 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁴⁵ Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 234 (footnotes omitted) (“In one line of cases, the Court has insisted that laws are content-based whenever they treat speakers differently because of the content of their speech—that is to say, whenever they employ explicit content distinctions. In another line of cases, the Court has instead insisted that laws are content-based only when they cannot be justified by a content-neutral purpose—that is to say, when the government cannot adequately demonstrate that the distinction the laws draw furthers some purpose other than to restrict speech because the government dislikes its content, or fears its communicative effects.”).

⁴⁶ 576 U.S. 155 (2015).

⁴⁷ *Id.* at 163-64; Lakier, *supra* note 45, at 235 (arguing that *Reed* implicitly overruled a line of cases employing one of the tests for content neutrality). It remains unclear whether the Court agrees with this reading.

⁴⁸ Lakier, *supra* note 45, at 235 (“[W]e are already seeing evidence of *Reed*’s effects across the country, as courts apply strict scrutiny to—and strike down—laws that previously were, or likely would have been, upheld as content-neutral prior to *Reed*.”).

⁴⁹ *Reed*, 576 U.S. at 163-64.

⁵⁰ *Id.*

⁵¹ *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

prohibition of public discussion of an entire topic.”⁵² “For example,” the Court explained, “a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.”⁵³

Extending the *Reed* Court’s hypothetical, a ban on the use of sound trucks altogether could potentially evade strict scrutiny as a purely content-neutral alternative.⁵⁴ To illustrate, the recent *Barr v. American Association of Political Consultants, Inc.*⁵⁵ decision upheld a Telephone Consumer Protection Act prohibition on robocalls to cellphones after severing an amendment that impermissibly allowed such calls made for the purpose of collecting debts owed to the federal government.⁵⁶ This type of restriction does not draw distinctions based on viewpoint or subject matter; on the contrary, it restricts commerce or conduct while imposing only an incidental burden on speech that is not directed at certain content nor particular speakers.⁵⁷

However, whether strict scrutiny applies in such a situation turns on the government’s justification for the law. For instance, turning back to the sound truck hypothetical, banning the use of sound trucks for noise abatement purposes would likely escape strict scrutiny, but banning sound trucks solely to ensure those trucks could not broadcast political speech would trigger strict scrutiny as a facially content-neutral law with a justification that references content.⁵⁸ Thus, almost any⁵⁹ microtargeted political ad legislation that targets “political” speech as a topic would automatically trigger strict scrutiny.⁶⁰ Further, any legislation aiming to ban microtargeting entirely (which this Note will argue is untenable)⁶¹

⁵² *Id.* at 169 (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980)).

⁵³ *Id.*

⁵⁴ See Kendrick, *supra* note 32, at 238 (“[A] law that on its face bans ‘political speech’ is content based. A law that bans sound trucks because they are used to disseminate political messages is also content based. And a law that bans sound trucks because they are noisy is content neutral.”).

⁵⁵ 140 S. Ct. 2335 (2020).

⁵⁶ *Id.* at 2343-44 (concluding that Congress “impermissibly favored debt-collection speech over political and other speech” and that severing amendment at issue would ensure speech from political actors and debt collectors would be treated equally).

⁵⁷ See *id.* at 2347 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)).

⁵⁸ See *Reed*, 575 U.S. at 164 (noting that “restrictions in the Sign Code that apply to any given sign . . . depend[s] entirely on the communicative content of the sign,” distinguishing between signs meant to inform readers “of the time and place [of] a book club,” and those that express views of how one should vote); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that city’s sound-amplification guideline is a valid restriction under First Amendment because it is “justified without reference to the content of the regulated speech”).

⁵⁹ Notably, legislation that targets political speech to mandate disclosures may trigger only exacting scrutiny review. See *infra* Section I.B (outlining various levels of scrutiny used to analyze regulations under the First Amendment).

⁶⁰ See *Reed*, 575 U.S. at 169.

⁶¹ See discussion *infra* Part III.

would trigger strict scrutiny if its justification is to ameliorate harms caused by microtargeted political ads.⁶²

B. *Categories of Speech and Measures of First Amendment Protection*

A speech regulation may prohibit or regulate certain content without automatically triggering strict scrutiny. Indeed, for some categories of speech—such as fighting words,⁶³ libel,⁶⁴ defamation,⁶⁵ and obscenity⁶⁶—content restrictions are permissible.⁶⁷ And while these categories are limited, and their regulation is itself scrutinized for impermissible content discrimination,⁶⁸ this categorization illustrates that different varieties of speech enjoy different levels of First Amendment protection. For instance, speech that incites immediate illegal conduct, fighting words, and obscenity receives limited, if any, First Amendment protection.⁶⁹

Commercial speech—speech that “propos[es] a commercial transaction, which occurs in an area traditionally subject to government regulation”⁷⁰—historically did not receive First Amendment protection.⁷¹ Examples of commercial speech might include advertisements for services or mandated

⁶² See Kendrick, *supra* note 32, at 238 (noting that “case law strongly suggests” that a law is content-based “either (1) on its face or (2) in its purpose” (footnote omitted)). Such legislation would fall under the second example Professor Kendrick provides as a law that bans an entire activity solely to eliminate that activity’s ability to spread political messages.

⁶³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (describing fighting words as words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

⁶⁴ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (acknowledging the history of Supreme Court rulings that do not “protect libelous publications”).

⁶⁵ *Id.* at 279-80 (holding that defamatory false statements said with “actual malice” are not protected by the First and Fourteenth Amendments).

⁶⁶ *Miller v. California*, 413 U.S. 15, 24 (1973) (reasoning that obscenity is “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”).

⁶⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting that these categories of speech may be regulated because of their “constitutionally proscribable content”).

⁶⁸ See *id.* at 384 (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.”); see also *Virginia v. Black*, 538 U.S. 343, 361-63 (2003) (upholding Virginia ban on cross burning with intent to intimidate because basis for such content discrimination was same as basis for proscribing intimidating messages at large).

⁶⁹ R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 324 (2016) (arguing that libel has received some First Amendment protection following *N.Y. Times Co. v. Sullivan*).

⁷⁰ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

⁷¹ See Kelso, *supra* note 69, at 370 (citing Supreme Court’s review of New York City sanitary code prohibiting commercial handbill distribution using Equal Protection and Due Process Clause analysis in *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942)).

warning labels on hazardous consumer products. Today, this speech receives a “limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”⁷² This “limited measure of protection” allows the government to regulate various types of commercial speech, including “commercial messages that do not accurately inform the public about lawful activity, . . . forms of communication more likely to deceive the public than to inform it, [and] commercial speech related to illegal activity.”⁷³ Moreover, the government may regulate commercial speech that neither deceives nor relates to illegal activity if such regulation satisfies intermediate scrutiny review, meaning that the regulation serves a substantial governmental interest, directly advances that interest, and is no more extensive than necessary to serve that interest.⁷⁴ In this way, the government may prohibit radio advertisements for out-of-state lotteries to respect nonlottery states’ policies,⁷⁵ or a state bar association may regulate mail advertisements directed at personal injury victims in the interest of privacy.⁷⁶

First Amendment commercial speech protections are justified primarily because of the informational value that speech provides to consumers.⁷⁷ Thus, the Supreme Court allows the government to require factually accurate disclosures⁷⁸ to serve that interest, reasoning that a speaker’s interest in refusing to provide such disclosures is minimal so long as such disclosures are justified and not unduly burdensome.⁷⁹ This allows the government to mandate warning labels or disclaimers that alleviate confusion or prevent deception, as such disclosures “trench much more narrowly on an advertiser’s interests than do flat

⁷² *Ohralik*, 436 U.S. at 456 (explaining that protecting commercial and noncommercial speech the same could dilute force of the First Amendment’s protections to noncommercial speech).

⁷³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563-64 (1980) (citations omitted).

⁷⁴ *See id.* at 564-66.

⁷⁵ *See, e.g., United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (upholding ban on lottery advertising by radio station in nonlottery state due to the government’s “substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries”).

⁷⁶ *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (upholding Florida Bar rules prohibiting lawyers from mailing solicitations to personal injury or wrongful death clients within thirty days of an accident because of government interest in “protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers”).

⁷⁷ *See Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct.*, 471 U.S. 626, 637 (1985) (asserting that commercial speech, even if in the form of “advertising pure and simple,” is entitled to full First Amendment protection so long as it is not false or deceptive).

⁷⁸ For example, a mandated warning label on a hazardous consumer product is permissible. In the political speech context, a mandated disclosure often looks like the ubiquitous “I’m candidate X, and I approve this message” at the end of television ads.

⁷⁹ *Zauderer*, 471 U.S. at 651 (stating that unduly burdensome disclosure requirements may chill protected commercial speech).

prohibitions on speech.”⁸⁰ However, these types of compelled speech mandates are scrutinized, and often flatly rejected, outside of the commercial context.⁸¹

Political speech, particularly speech related to campaigns for political office, receives the First Amendment’s “fullest and most urgent application.”⁸² However, the Supreme Court has distinguished between regulations that ban or limit political speech and those that merely impose disclosure and disclaimer mandates; the former is reviewed under strict scrutiny, while the latter is reviewed under a more forgiving “exacting scrutiny” standard.⁸³ The reason for this is similar to the reasoning justifying mandated disclosures in commercial speech—such disclosures provide informational value to citizens.⁸⁴ Unlike a ban or limit on speech, required disclosures introduce more information into the marketplace of ideas, providing transparency and insight for individuals to make informed decisions.

Exacting scrutiny requires “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”⁸⁵ But Supreme Court case law and a recent Fourth Circuit ruling show that disclosure requirements need not “prevent anyone from speaking” for exacting scrutiny to apply.⁸⁶ That is, the Court has considered whether such requirements could chill

⁸⁰ *Id.*

⁸¹ *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (setting doctrinal foundation for compelled speech with justification that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”); *see also* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”).

⁸² *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

⁸³ *See* *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (upholding federal disclaimer and disclosure requirements for corporate electioneering communications for movie broadcast via video-on-demand). The same year *Citizens United* was decided, the Court upheld Washington State’s referendum disclosure mandates under the State’s Public Records Act and gave further credibility to the exacting scrutiny standard. *See* *Doe v. Reed*, 561 U.S. 186, 196 (2010) (“We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed ‘exacting scrutiny.’”). The most important difference between strict scrutiny and exacting scrutiny here is that strict scrutiny requires a regulation to be the least restrictive means available to accomplish the government’s objective, while exacting scrutiny does not require a regulation to be the least restrictive. In other words, the existence of alternative, less restrictive means for achieving a governmental objective will not invalidate a regulation reviewed under exacting scrutiny. *See infra* Section I.C.

⁸⁴ *Citizens United*, 558 U.S. at 370 (“[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

⁸⁵ *Id.* at 366-67 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)).

⁸⁶ *See* *McConnell v. FEC*, 540 U.S. 93, 201 (2003), *overruled by* *Citizens United*, 558 U.S. at 366.

speech, for example, by chilling donations to political campaigns out of fear donors could be exposed to retaliation.⁸⁷

In *Washington Post v. McManus*,⁸⁸ the Fourth Circuit claimed Maryland's Online Electioneering Transparency and Accountability Act ("OETAA"), which required online publishers (e.g., platforms like Facebook and even small newspapers) to self-publish paid political ad information,⁸⁹ failed exacting scrutiny review in part because the law created observable chilling effects.⁹⁰ Importantly, the *McManus* court found it significant that the Maryland law imposed speech burdens on third-party platforms instead of "direct participants in the political process."⁹¹ This disparity of burdens, the court asserted, provided a reason for platforms, which publish political ads primarily for revenue, to forego carrying them to avoid legal liability and the cost of compliance.⁹² Such an issue was especially pronounced because the Maryland law applied equally to social media giants like Facebook and to small, local newspapers.⁹³ Interestingly, the court noted its decision did "not expound upon the wide world of social media and all the issues that may be pertinent thereto," choosing instead to resolve the challenge solely in reference to the plaintiff smaller press entities.⁹⁴

⁸⁷ *Citizens United*, 558 U.S. at 370-71 (finding no showing that disclosure requirements would chill speech).

⁸⁸ 944 F.3d 506 (4th Cir. 2019).

⁸⁹ Online Electioneering Transparency and Accountability Act, ch. 834, 2018 Md. Laws 4220 (codified as amended at MD. CODE ANN., ELEC. LAW §§ 13-401, 13-404, 13-304, 13-306, 13-307, 13-221 (West 2021)).

⁹⁰ *McManus*, 944 F.3d at 516-17 (describing how Google "stopped hosting political advertisements in the state" and how several other Maryland publishers claimed they would have to follow suit because of OETAA).

⁹¹ *Id.* at 516 (emphasis omitted). In fact, the *McManus* court questioned whether exacting scrutiny, instead of strict scrutiny, applied at all because of such burdens on third-party participants. According to the court, direct political participants, by necessity, would have to contend with disclosure burdens to succeed at the ballot box, but neutral third parties—driven by revenue alone—could simply choose not to host political ads if confronted with onerous disclosure burdens. *See id.* In this way, the government could censor political speech by regulating third-party platforms instead of the direct participants. *See id.* Thus, because the OETAA disclosure burdens created "a constitutional infirmity distinct from garden-variety campaign finance regulations," it was plausible that strict scrutiny was more appropriate; the court declined to decide which level of scrutiny applied, however, noting that the OETAA failed both types of review. *See id.* at 515-17, 520.

⁹² *Id.* at 516 ("[T]o avoid the Act's various sanctions the Publishers here have claimed that they would have to acquire new software for data collection; publish additional web pages; and disclose proprietary pricing models. Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?" (citations omitted)).

⁹³ *Id.* at 522-23. Notably, the court claimed this disparity also created a narrow tailoring problem; the law was meant at its core to address foreign election interference problems. Sweeping in small publishers the government could not prove had fallen victim to foreign meddling ensured the law had "burden[ed] too much and further[ed] too little." *Id.* at 523.

⁹⁴ *Id.* at 513.

Outside of disclosure requirements on political ads, any law that burdens political speech is subject to strict scrutiny.⁹⁵ Therefore, much of this Note will discuss strict and exacting scrutiny applications, and only briefly discuss intermediate scrutiny application, to the regulation or prohibition of all microtargeting—political, commercial, or otherwise.

C. *Surviving Intermediate, Exacting, or Strict Scrutiny*

All forms of scrutiny require some justifying governmental interest and some degree of fit between statutory means and the government's desired ends.⁹⁶ A rudimentary way to differentiate between each level of scrutiny is to consider how strong the governmental interest must be and how close the fit between the statutory means and ends must be.⁹⁷

For example, a regulation will pass intermediate scrutiny review so long as it “advances *important* governmental interests unrelated to the suppression of free speech and *does not burden substantially more speech than necessary* to further those interests,”⁹⁸ while a regulation triggering strict scrutiny requires a “*compelling* governmental interest” for which “*no less restrictive alternative exists*.”⁹⁹ An important governmental interest can be much weaker¹⁰⁰ than a compelling governmental interest.¹⁰¹ Not burdening “substantially more speech than necessary” means that the government may draft regulations that incidentally burden speech unrelated to the stated governmental interest and that the existence of a less restrictive alternative satisfying the governmental interest will not invalidate the regulation.¹⁰² Strict scrutiny demands the opposite; the existence of a less restrictive alternative will invalidate the regulation, and a court may carefully review overinclusiveness (i.e., whether the regulation

⁹⁵ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (invalidating federal law prohibiting corporate electioneering communications thirty days before federal primary elections and sixty days before federal general elections).

⁹⁶ See Bunker et al., *supra* note 32, at 358.

⁹⁷ See *id.* (“The key under both framings of the rule for intermediate scrutiny is that a significant or important interest is lesser than a compelling interest under strict scrutiny, and that the narrow tailoring prong demands less precise a fit between the statutory means and ends.”).

⁹⁸ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (emphasis added).

⁹⁹ See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813-14 (2000) (emphasis added).

¹⁰⁰ See *Turner Broad. Sys.*, 520 U.S. at 189-90 (finding that “promoting fair competition in the market for television programming” was important interest).

¹⁰¹ See Bunker et al., *supra* note 32, at 364-72 (defining compelling justifications as protecting against “highly serious, even catastrophic harms” in some interpretations and promoting “unusually important interest” in others (first quoting Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1302 (2007); and then quoting *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O’Connor, J., dissenting))).

¹⁰² See *Turner Broad. Sys.*, 520 U.S. at 189, 217-18.

burdens too much unrelated speech) and underinclusiveness (i.e., whether the regulation ineffectively advances the governmental interest) in its analysis.¹⁰³

Exacting scrutiny occupies a middle position between intermediate and strict scrutiny review, requiring a “sufficiently important” governmental interest¹⁰⁴ and “not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”¹⁰⁵ Importantly, exacting scrutiny is “most notably formulated in numerous and varied electoral campaign finance regulation and related cases,”¹⁰⁶ meaning it is particularly relevant here.

Exploring distinctions between and definitions of “important,” “sufficiently important,” and “compelling” in First Amendment law is worthy of a separate paper entirely.¹⁰⁷ For the purposes of this Note, these differentiations require only brief analysis: because the Supreme Court has explicitly recognized a sufficiently important informational interest with respect to election disclosures,¹⁰⁸ and “a compelling interest in protecting voters from confusion and undue influence,”¹⁰⁹ these same interests should be sufficient in relation to regulating microtargeted political ads.

Narrowly tailoring the fit between statutory means and ends is a more complex task, as case law shows that even (arguably) *de minimis* changes in regulations could make the difference.¹¹⁰ Additionally, while the Court has called disclosure requirements “a less restrictive alternative to more comprehensive regulations of speech,”¹¹¹ the *McManus* decision shows that

¹⁰³ See *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (describing elements of government’s regulation of corporate electioneering communications as both overinclusive and underinclusive); see also Bunker et al., *supra* note 32, at 372 (arguing there are three elements that comprise the narrow tailoring analysis: (1) the overinclusiveness inquiry, (2) underinclusiveness inquiry, and (3) least restrictive means inquiry).

¹⁰⁴ *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)).

¹⁰⁵ *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)); see *Wash. Post v. McManus*, 944 F.3d 506, 523 (4th Cir. 2019) (“[T]he touchstone for exacting scrutiny is whether there is ‘a fit that is not necessarily perfect, but reasonable.’” (quoting *McCutcheon*, 572 U.S. at 218)).

¹⁰⁶ R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 209 (2016).

¹⁰⁷ See Bunker et al., *supra* note 32, at 364 (“[T]he exact nature of a compelling interest has perplexed even the finest legal minds.”); Fallon, *supra* note 101, at 1321-25. See generally Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny’s Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406 (2016) (arguing that state-interest inquiry does not carry much significance in heightened scrutiny analysis).

¹⁰⁸ See *Citizens United*, 558 U.S. at 369.

¹⁰⁹ See *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion).

¹¹⁰ See *id.* at 208-11 (upholding prohibition on campaigning within 100 feet of polling places but analyzing reductions to twenty-five feet).

¹¹¹ *Citizens United*, 558 U.S. at 369.

such regulations can lend themselves to overinclusive and underinclusive tailoring problems.¹¹²

II. EXISTING INEFFECTIVE SOLUTIONS

There are two proposed federal bills that aim to either prohibit microtargeted political ads¹¹³ or merely regulate them.¹¹⁴ This Part reviews each in turn, explaining why, if passed, they would most likely fail a First Amendment challenge. Part II also evaluates a self-regulatory trend that some argue may effectively moot federal legislation, explaining why these hopes are misplaced. Finally, this Part assesses the Honest Ads Act, a bill introduced to the Senate in 2017 that requires purchasers and publishers of online political advertisements to disclose information about those advertisements.¹¹⁵ Part III argues that amending this bill to require purchasers and publishers to disclose ad targeting criteria and the general characteristics of the audience that has already received

¹¹² Wash. Post v. McManus, 944 F.3d 506, 521 (4th Cir. 2019) (finding OETAA too narrow in some respects and too broad in others due to inclusion of press and small platforms “within the Act’s ambit”). Additionally, the Court found that the OETAA was fatally underinclusive because, while the Act aimed to combat foreign election interference by regulating paid campaign ads, the state conceded that most foreign influence was carried out in unpaid posts and did not support certain candidates or ballot initiatives. *See id.*

¹¹³ The “Protecting Democracy from Disinformation Act” holds online platforms accountable for using microtargeting in online political ads and protects the right of the people to decide what is true. Specifically, the bill:

- Restricts Microtargeting: Only allows advertisers and online platforms to use age, gender, and location when targeting political ads.
- Improves Transparency: Requires disclosure and reporting on who paid for an ad, how much it cost, whom an ad is aimed at, and who saw the ad.
- Holds Online Platforms Accountable: Provides enforcement through the Federal Election Commission’s existing authority, a private right of action, and criminal penalties for online platforms and ad intermediaries that knowingly and willfully violate the Act.

Press Release, David Cicilline, Congressman, House of Reps., Cicilline Bill Will Crack Down on Spread of Misinformation in 2020 Elections (May 21, 2020), <https://cicilline.house.gov/press-release/cicilline-bill-will-crack-down-spread-misinformation-2020-elections> [<https://perma.cc/9ZQ6-K7QF>].

¹¹⁴ The *Banning Microtargeted Political Ads Act* prohibits online platforms, including social media, ad networks, and streaming services, from targeting political ads based on the demographic or behavioral data of users. The bill applies to all electioneering communications and advocacy for candidates, and violations will be enforced by the Federal Election Commission and through a private right of action. Targeting ads to broad geographies – states, municipalities, and congressional districts – is permitted under the bill, as is targeting individuals who opt in to receive targeted ads.

Press Release, Anna G. Eshoo, Congresswoman, House of Reps., Rep. Eshoo Introduces Bill to Ban Microtargeted Political Ads (May 26, 2020), <https://eshoo.house.gov/media/press-releases/rep-eshoo-introduces-bill-ban-microtargeted-political-ads> [<https://perma.cc/Z4GS-NSJA>].

¹¹⁵ S. 1989, 115th Cong. (2017).

the ad is the most constitutionally feasible solution to microtargeted political ad concerns.

A. *Ineffective Federal Legislative Proposals*

While the proposed federal bills below aim to regulate microtargeted political ads via vastly different methods, they will inevitably be subject to a similar First Amendment strict scrutiny analysis. This Note argues that neither proposal would satisfy this analysis. In fact, it appears that the first proposal discussed was not drafted to realistically attract enough votes in the House of Representatives, let alone survive constitutional analysis once made into law.¹¹⁶

1. The Protecting Democracy from Disinformation Act

Congressman David Cicilline of Rhode Island introduced the Protecting Democracy from Disinformation Act (“PDFDA”) on May 26, 2020.¹¹⁷ Broadly speaking, the PDFDA is designed to:

prohibit online platforms and certain intermediaries from targeting the dissemination of political advertisements to a specific group of individuals on the basis of online behavioral data or on the basis of demographic characteristics shared by members of the group, to require online platforms and certain intermediaries to maintain public records of certain political advertisements, and for other purposes.¹¹⁸

The statute would accomplish its goal by restricting targeting on the basis of group demographics other than age, gender, and geographic areas of ZIP code size or larger¹¹⁹ and requiring a disclosure describing “the demographic characteristic on which the group was targeted.”¹²⁰ Enforcement is achieved through a private right of action, which any aggrieved person can bring against a covered online platform for up to \$100,000 in damages per violation and three times that amount for knowing or willful violations.¹²¹

As an aside, these enforcement provisions are telltale signs that the PDFDA was never actually intended to become law. Analogizing to Congress’s years-

¹¹⁶ See *infra* text accompanying notes 119-25.

¹¹⁷ H.R. 7012, 116th Cong. (2020) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 11 (codified as amended in scattered sections of 52 U.S.C.)).

¹¹⁸ *Id.* p.mbl.

¹¹⁹ *Id.* sec. 2(a), § 325(a)(2)(B).

¹²⁰ *Id.* sec. 2(a), § 325(a)(4)(A)(i). An example of this might include a notice on a political ad reading, “This ad was delivered to men over 50 in the 33301 ZIP code.” According to the PDFDA, this disclosure must be “made in a clear and conspicuous manner,” which is achieved “if the statement is displayed onscreen above the qualified political advertisement in the format in which the advertisement appears.” *Id.* sec. 2(a), § 325(a)(4)(B).

¹²¹ *Id.* sec. 2(a), § 325(c) (describing covered online platforms as “any public facing website, web application, or digital application (including a social network or search engine) which sells qualified political advertisements and has 50,000,000 or more unique monthly United States visitors or users”).

long inability to pass federal data privacy legislation, private rights of action against online platforms are deeply polarizing on Capitol Hill.¹²² On the one hand, a private right of action can be an important tool for supplementing public enforcement and guaranteeing remedies for harmed individuals; on the other hand, industry representatives worry such provisions open the floodgates to frivolous lawsuits.¹²³ Regarding the PDFDA, frivolous lawsuits should be a very real concern due to the bill's broad definition of "qualified political advertisement."¹²⁴ Combine this with a particularly severe damages provision and it becomes clear that pro-industry representatives would not support the PDFDA.¹²⁵ Nonetheless, the PDFDA provides an insightful opportunity to examine how a reviewing court might apply strict scrutiny.

The PDFDA triggers strict scrutiny in two ways. First, it recommends a facially content-based subject matter restriction by singling out "political" advertisements.¹²⁶ Second, the PDFDA is a ban or limit on political speech, not a regulation that provides informational value like mandated disclosures.¹²⁷

Triggering strict scrutiny requires the government to show that the PDFDA is the least restrictive means of advancing the government's interest and that the PDFDA is neither overinclusive nor underinclusive.¹²⁸ Meeting this standard with the PDFDA's requirements is untenable.

Admittedly, we do not know what governmental interest the PDFDA specifically promotes,¹²⁹ but one might fairly predict its justifications include preventing campaigns and foreign actors from using microtargeting "to manipulate voters with high volumes of misleading information that is virtually impossible to keep track of."¹³⁰ One might presume this is a sufficiently

¹²² Cameron F. Kerry & John B. Morris, Jr., *In Privacy Legislation, a Private Right of Action Is Not an All-or-Nothing Proposition*, BROOKINGS INST. (July 7, 2020), <https://www.brookings.edu/blog/techtank/2020/07/07/in-privacy-legislation-a-private-right-of-action-is-not-an-all-or-nothing-proposition/> [<https://perma.cc/9S4Q-R36E>].

¹²³ *Id.*

¹²⁴ H.R. 7012 sec. 2(a), § 325(e) (describing qualified political advertisements as any advertisement that "communicates a message relating to any political matter of national importance").

¹²⁵ Kerry & Morris, *supra* note 122 (describing disagreement among legislators regarding damage awards in private rights of action).

¹²⁶ *See supra* Section I.A (explaining implications of distinction between content-based and content-neutral restrictions); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 168-69 (2015).

¹²⁷ *See supra* Section I.B (explaining that strict scrutiny review is applied to regulations banning or limiting political speech and exacting scrutiny review is applied to regulations imposing disclosure and disclaimer mandates); *see also* Citizens United v. FEC, 558 U.S. 310, 366-67 (2010).

¹²⁸ *See Citizens United*, 558 U.S. at 362; Bunker et al., *supra* note 32, at 372.

¹²⁹ This may have been purposeful: if the PDFDA was challenged, the government might have leeway to creatively frame its governmental interest instead of being locked into a governmental interest put forth in the bill itself.

¹³⁰ Press Release, David Cicilline, *supra* note 113.

compelling governmental interest, given that the Supreme Court has approved regulations meant to protect voters from “confusion and undue influence.”¹³¹

Even so, the PDFDA would inevitably fail a narrow tailoring analysis because it suffers an extreme overinclusiveness problem, as microtargeted political ads—or to be more specific, political ads that use more than age, gender, and ZIP code to target voters—do not necessarily mislead voters.¹³² For example, an ad that targeted voters by predicted political affiliation and served a reminder to vote before election day could not be called misleading. Thus, the PDFDA threatens more speech than it intends to target.

This is, essentially, the same tactic the *McManus* court admonished regarding the OETAA’s overbroad regulation of advertisements disseminated by small publishers that the government could not prove had been influenced by foreign election interference operations.¹³³ The PDFDA makes no attempt to differentiate between microtargeted political ads that manipulate and mislead voters, and microtargeted political ads with benign, perhaps even beneficial, ends.¹³⁴ As discussed, narrow tailoring analysis does not respect this type of throw-the-baby-out-with-the-bathwater approach because it is overinclusive.¹³⁵

One could argue the PDFDA is underinclusive as well, although not necessarily because it fails to address all types of harmful microtargeted political ads. Instead, the bill is underinclusive because it does not address the primary ways in which campaigns on online platforms manipulate voters with misinformation. In *McManus*, the Fourth Circuit recognized that the OETAA, which was chiefly meant to prevent foreign interference in Maryland’s elections by regulating paid advertisements, failed to address the primary mechanism foreign actors used to meddle in elections—unpaid posts.¹³⁶ By analogy, the PDFDA contains the same shortfalls because regulating only paid microtargeted political ads does not sufficiently curtail the myriad of unpaid, organic ways in which “high volumes of misleading information” manipulates voters.¹³⁷ That the

¹³¹ See *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion).

¹³² See *Kruschinski & Haller*, *supra* note 24, at 2-4 (explaining some benefits of political ad microtargeting).

¹³³ See *supra* note 93 and accompanying text.

¹³⁴ H.R. 7012, 116th Cong. sec. 2(a), § 325(e) (2020) (regulating all “search engine marketing, display advertisements, video advertisements, native advertisements, and sponsorships” that are either “made by or on behalf of a candidate” or “communicate[] a message relating to any political matter of national importance”).

¹³⁵ *Bunker et al.*, *supra* note 32, at 372 (explaining that courts will invalidate a law that “restricts more speech than necessary to achieve its goal”).

¹³⁶ *Wash. Post v. McManus*, 944 F.3d 506, 521 (4th Cir. 2019) (“Russian influence was achieved “primarily through unpaid posts” on social media. The Act leaves this primary mechanism completely unaddressed.” (quoting Brief of Appellants at 6, *McManus*, 944 F.3d 506 (No. 19-1132), 2019 WL 1595779, at *6)).

¹³⁷ See Press Release, David Cicilline, *supra* note 113.

government cannot, in any viable manner, constitutionally regulate unpaid, organic posts on online platforms is irrelevant.¹³⁸

Finally, the government would have a hard time arguing against plausible and effective alternative means of preventing campaigns from misleading and manipulating voters in a less restrictive means analysis.¹³⁹ Is constraining geography to a maximum of a single ZIP code size necessary, or would such matters of distance be litigated as intensely as they have in the past?¹⁴⁰ Are there other demographic metrics that one could include in targeting schemes without appreciably increasing the risk of spreading misinformation? Would disclosure mandates—publishing a historical log of political advertisements as Facebook does, for example¹⁴¹—effectively remedy the issue of tracking the misinformation and where it comes from? A reviewing court would find the PDFDA unconstitutional if it answered any of these questions—or dozens of others not considered here—in the affirmative, as it most certainly would.

2. The Banning Microtargeted Political Ads Act

California Congresswoman Anna Eshoo’s Banning Microtargeted Political Ads Act (“BMPAA”)¹⁴² is unfortunately subject to a similar analysis. The BMPAA regulates largely the same type of online platform as the PDFDA, instituting an (albeit less costly) penalty enforced by a private right of action that “any person alleging a violation” can bring.¹⁴³ However, the BMPAA does not outright prohibit microtargeting; instead, it imagines an express consent regime that only allows targeting¹⁴⁴ by geography or if “the sponsor of the advertisement

¹³⁸ See *McManus*, 944 F.3d at 521 (“Maryland has offered no support for the proposition that courts should place a thumb on the exacting scrutiny scale for laws that are the ‘least unconstitutional’ among available options. Nor could it. The First Amendment makes plain that any law burdening free speech must rise or fall on its own merits.”).

¹³⁹ See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”).

¹⁴⁰ Cf. *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992) (plurality opinion) (litigating minimum distance necessary to separate protesters from polling places to protect voters from intimidation in degrees of feet).

¹⁴¹ *Requirements for Ads About Social Issues, Elections or Politics in the US*, META FOR BUS. [hereinafter *Requirements for Ads*], <https://www.facebook.com/business/m/one-sheets/ads-with-political-content-us> [<https://perma.cc/TYQ7-TK7K>] (last visited Feb. 19, 2022). Facebook has recently changed its name to Meta, but this Note will continue referring to the entity as Facebook for clarity.

¹⁴² H.R. 7014, 116th Cong. (2020) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 11 (codified as amended in scattered sections of 52 U.S.C.)).

¹⁴³ *Id.* sec. 2(a), § 325(d).

¹⁴⁴ *Id.* sec. 2(a), § 325(b)(2)(A). Importantly, “targeting” is defined broadly in the BMPAA, covering “any computational process (including one based on algorithmic models, machine learning, statistical analysis, or other data processing or artificial intelligence

provides the covered online platform with a truthful written attestation that the individual has provided express affirmative consent.”¹⁴⁵

In other words, the BMPAA does not require a platform like Facebook to provide a pop-up or profile settings that allow users to check a box to receive microtargeted political ads. What the BMPAA mandates is that microtargeted political ad *sponsors* provide a written statement that its targets have consented to receiving advertisements and to disclosures of their personal information.¹⁴⁶

To put it another way, a campaign cannot use targeting until an individual consents to being targeted and consents to having their personal information disclosed to a platform for the purposes of targeting. That is, a campaign cannot truly use conventional nongeographic online advertising at all. What a campaign can do under this proposed regulation is collect subscribers independently (somehow) and then upload that subscriber list to a platform for retargeting purposes.¹⁴⁷

Strict scrutiny would apply to the BMPAA for the same reasons it would apply to the PDFDA; it proposes a facially content-based subject matter restriction by singling out “political” advertisements, and it does not merely require disclosures.¹⁴⁸

The key difference between the BMPAA and the PDFDA is the opt-in regime, which one might argue better serves First Amendment values.¹⁴⁹ Ultimately though, *better* service of First Amendment values does not mean satisfying or avoiding strict scrutiny. Thus, even if we take for granted the governmental interests the BMPAA advances are sufficient, the bill inevitably faces underinclusiveness, overinclusiveness, and least restrictive means problems considering its tailoring.

techniques) . . . based on personal information” as well as sharing lists of individuals with advertising platforms. *Id.* sec. 2(a), § 325(a)(2)(A).

¹⁴⁵ *Id.* sec. 2(a), § 325(b)(2).

¹⁴⁶ *Id.*

¹⁴⁷ For those who do not think this creates a significant barrier for campaigns, imagine a budding upstart politician canvassing with a form that reads, “sign here to receive advertisements, and so we can share your personal information with others for the purposes of advertising.” Granted, this says nothing of the fact that this regime destroys the opportunity for candidates to use paid advertisements to spread their messages in the first instance.

¹⁴⁸ See *supra* Section I.A (describing difference between content-based and content-neutral restrictions); *Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015); *supra* Section I.B (providing categories of speech and relevant measures of First Amendment protections); *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

¹⁴⁹ One scholar made this argument in a press release for the Office of Congresswoman Eshoo. Frank Pasquale, Professor at the University of Maryland Francis King Carey School of Law, claimed the bill respected First Amendment values because “[a]nyone who wants to opt-in to specific microtargeting can do so. The bill just flips the default, ensuring that the vast majority of us who do not want such ads are not exposed to them, and do not have to engage in endless opt-outs to protect ourselves from them.” Press Release, Anna G. Eshoo, *supra* note 114.

More specifically, the BMPAA's opt-in regime will not make it more likely to survive strict scrutiny. *Bolger v. Youngs Drug Products Corp.*¹⁵⁰ upheld the right of addressees to "give notice to a mailer that they wish no further mailings" but ruled that the government could not prohibit unsolicited mail unless it was directed at a captive audience.¹⁵¹ That is to say, the Supreme Court has already expressed its reluctance to uphold regulations that institute opt-in requirements. This is particularly significant here because the *Bolger* Court struck down the federal statute at issue as an unconstitutional restraint on commercial speech, which makes it all the more unlikely the Court would favor similar regulations in the political speech context.¹⁵²

Perhaps most obviously, however, the BMPAA is severely overinclusive—arguably more overinclusive than the PDFDA because that bill at least permitted political ad targeting based on age and gender as well as geography.¹⁵³ The BMPAA only allows geographic targeting for individuals who do not explicitly opt in to receiving ads from a sponsor.¹⁵⁴ For example, a campaign targeting all female Alabamians of voting age would violate the BMPAA even if one could not plausibly claim such an ad was microtargeted or that such an ad was de facto false, misleading, or manipulative.

Another problem is that the opt-in requirement functionally eliminates most if not all of the benefits related to targeted political advertising (micro or otherwise), thus lending itself to invalidation under least restrictive means analysis. This is because online advertising is primarily used to broadcast a message to a new, larger audience. The BMPAA prevents ad sponsors from advertising to new audiences by requiring that they receive consent from individuals *before* disseminating ads. New and larger audiences cannot be reached because a campaign must know and receive consent from each individual member of its audience (that is not targeted based on geography alone) before advertising. At that point, why bother?

Ironically, a winning least restrictive means argument a BMPAA opponent could use is already incorporated within the bill itself. The BMPAA mandates that consent may not be "received through or by the aid of the covered online platform."¹⁵⁵ But why not? Nothing prevents online platforms from designing notifications that signify "freely given, specific, informed, unambiguous"

¹⁵⁰ 463 U.S. 60 (1983).

¹⁵¹ *Id.* at 72 (holding prohibition of unsolicited mail unconstitutional as violation of First Amendment commercial speech); *see also* *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970) ("We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient.").

¹⁵² *Bolger*, 463 U.S. at 69.

¹⁵³ *See* H.R. 7012, 116th Cong. sec. 2(a), § 325(a)(2)(B) (2020).

¹⁵⁴ *See* H.R. 7014, 116th Cong. sec. 2(a), § 325(b)(2)(A) (2020).

¹⁵⁵ *Id.* sec. 2(a), § 325(b)(2)(B).

consent.¹⁵⁶ And such a mandate would be less restrictive—particularly for fledgling campaign operations that do not have the network or infrastructure to effectively build a list of ad recipients.¹⁵⁷

All things considered, it is exceedingly likely that the BMPAA would be found unconstitutional on these grounds or others showing that it is not the least restrictive means available and prohibits too much speech unrelated to the bill’s governmental interest to survive strict scrutiny.

B. *A Developing Trend of Self-Regulation*

Because satisfying First Amendment muster is so difficult, one could argue that private sector self-regulation is warranted. Fortunately, many of the largest social media platforms have already adopted such measures. Understanding what self-regulations have been embraced by leading platforms may also help illustrate what prospective legislation could garner support. More importantly, self-regulation may inform a court’s First Amendment analysis similar to how the *McManus* court referred to Google’s decision to no longer accept state and local election ads in Maryland as a result of the OETAA.¹⁵⁸ For instance, a court might put less weight on the chilling effects and burdens imposed by a law that requires online platforms to host political ad information in a searchable library¹⁵⁹ if that court considers that some online platforms are already self-enforcing such requirements.¹⁶⁰ Ultimately though, this Section explains why self-regulation is helpful yet incapable of effectively combating microtargeting harms. Consider, first, some trends among the big social media players.

Facebook has imposed several requirements for ads about social issues, elections, or politics in the United States, including identity and location confirmation, disclaimers, and submission into a searchable public ad library

¹⁵⁶ *Id.* (describing type of consent sponsors must receive from individuals).

¹⁵⁷ The story of once-long shot candidate, now nationally known political upstart, Congresswoman Alexandria Ocasio-Cortez presents a cogent example. Ocasio-Cortez’s dark-horse victory in New York’s 14th Congressional District and rise as a national political figure is, in no small part, due to her aggressive Facebook marketing strategy; as of July 2020, she had spent five times more on Facebook ads than the next biggest digital advertiser in the House of Representatives. Nick Corasaniti, *A.O.C.’s Digital Juggernaut*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/aoc-facebook-ads.html>. If Ocasio-Cortez was expected to receive consent from every individual she advertised to prior to disseminating ads on online platforms, one could fairly question whether she would have become a national political figure.

¹⁵⁸ *Wash. Post v. McManus*, 944 F.3d 506, 517 (4th Cir. 2019).

¹⁵⁹ *See id.* at 514-15 (explaining that OETAA’s requirement that online platforms host political ads in searchable format posed a risk of chilling speech and spoke “to the burden imposed by the Act”).

¹⁶⁰ Rob Leathern, *Expanded Transparency and More Controls for Political Ads*, META (Jan. 9, 2020), <https://about.fb.com/news/2020/01/political-ads/> [<https://perma.cc/DM7J-SQ4S>] (describing Facebook’s Ad Library policies regarding political ads). Whether deciding the constitutionality of a statute dependent upon the policies and investments of big tech companies is a positive development is a bigger question for another article.

that holds all electoral or political ads for a period of seven years.¹⁶¹ More controversially, the company has also refused to set fact-checking standards for political ads.¹⁶² And according to whistleblower testimony from a former Facebook product manager, Facebook’s algorithm makes it “substantially” cheaper to run an “angry, hateful, divisive ad than . . . a compassionate, empathetic ad.”¹⁶³ While these policies do not speak directly to microtargeting, they do cast doubt on whether social media giants can reliably self-regulate when their current methods of driving engagement for ad revenue consequently intensify polarization.¹⁶⁴ In other words, if polarizing content increases engagement and engagement increases revenue, why would Facebook implement policies that reduce polarization?

Twitter also moved to “stop all political advertising on [its platform] globally” on October 30, 2019.¹⁶⁵ Why? There are two answers: first, Twitter CEO Jack Dorsey explained in a series of tweets that the company believes “paying for reach” removes the need to create agreeable political messaging that naturally earns reach through follows and retweets, which it views as problematic.¹⁶⁶ Second (and not explicitly said), political ad revenue is simply not worth the cost.¹⁶⁷ Not only does Twitter avoid potential credibility harms by refusing to carry political ads,¹⁶⁸ it also discards the need to build transparency measures

¹⁶¹ *Requirements for Ads*, *supra* note 141.

¹⁶² Mike Isaac & Cecilia Kang, *Facebook Keeps Policy Protecting Political Ads*, N.Y. TIMES, Jan. 10, 2020, at B1, B6 (describing Facebook’s refusal to take down misleading political ads produced by Trump campaign and Senator Elizabeth Warren’s presidential campaign).

¹⁶³ Isobel Asher Hamilton, *Facebook Whistleblower Frances Haugen Says It’s Cheaper to Run ‘Hateful’ Ads on the Platform than Other Kind of Adverts. ‘We Are Literally Subsidizing Hate.’* BUS. INSIDER (Oct. 26, 2021, 5:30 AM), <https://www.businessinsider.com/facebook-whistleblower-frances-haugen-cheaper-to-run-hateful-ads-2021-10>.

¹⁶⁴ PAUL M. BARRETT, JUSTIN HENDRIX & J. GRANT SIMS, NYU STERN, CTR. FOR BUS. & HUMAN RTS., FUELING THE FIRE: HOW SOCIAL MEDIA INTENSIFIES U.S. POLITICAL POLARIZATION—AND WHAT CAN BE DONE ABOUT IT 8 (2021), https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/613a4d4cc86b9d3810eb35aa/1631210832122/NYU+CBHR+Fueling+The+Fire_FINAL+ONLINE+REVISED+Sep7.pdf [<https://perma.cc/9YSZ-9NAB>].

¹⁶⁵ Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), <https://twitter.com/jack/status/1189634371407380480>. In other words, one cannot pay to show a political Twitter post to a greater amount of people.

¹⁶⁶ *Id.*

¹⁶⁷ See Rachel Lerman & Barbara Ortutay, *Twitter Bans Political Ads Ahead of 2020 Election*, ASSOCIATED PRESS (Oct. 30, 2019), <https://apnews.com/article/63057938a5b64d3592f800de19f443bc> (claiming that Twitter received \$3 million in political ad spending during 2018 midterm election and \$824 million in third-quarter revenue alone).

¹⁶⁸ Dorsey, *supra* note 165 (“Internet political ads present entirely new challenges to civic discourse: machine learning-based optimization of messaging and micro-targeting, unchecked misleading information, and deep fakes. All at increasing velocity, sophistication, and overwhelming scale. These challenges will affect ALL internet communication, not just political ads. Best to focus our efforts on the root problems, without the additional burden and

similar to Facebook’s political ad library or construct fact-checking regimes that deny ads that spread misinformation.¹⁶⁹

Google’s policies mirror the regulations proposed by the PDFDA, “limiting election ads audience targeting to . . . age, gender, and general location (postal code level).”¹⁷⁰ Importantly, Google has made clear that it never offered election ad microtargeting in the first place.¹⁷¹

Regardless of these platform’s stated policies on election ads, promising self-regulatory trends should not dissuade legislators from passing microtargeted political ad legislation. Critically, the social media landscape can change drastically in a short period of time, and the data available to emerging players is more likely to increase rather than decrease. While some key players have embraced self-regulation, this does not reduce the need for comprehensive legislation regarding microtargeted political ads. Indeed, the quick emergence (and perhaps equally speedy demise) of Parler shows how turbulent, varied, and unpredictable the field of social media platforms is.¹⁷²

And this says nothing about microtargeting outside of conventional social media networks. Data from smart TVs is making it possible to deliver targeted ads on network television.¹⁷³ Additionally, popular applications like Spotify are constantly improving their ad targeting tools.¹⁷⁴ And rapidly growing apps like

complexity taking money brings. Trying to fix both *means fixing neither well, and harms our credibility.*” (emphasis added)).

¹⁶⁹ Twitter has had trouble enough moderating unpaid hateful and misinformative speech. Kate Conger, *Dorsey, Under Fire from Both Parties, Defends Labeling Tweets*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/technology/dorsey-under-fire-from-both-parties-defends-labeling-tweets.html> (highlighting criticism Twitter received from politicians who, on one side claimed its policies reflected bias, and on other side claimed its policies had not done enough to counter misinformation).

¹⁷⁰ Scott Spencer, *An Update on Our Political Ads Policy*, GOOGLE: KEYWORD BLOG (Nov. 20, 2019), <https://blog.google/technology/ads/update-our-political-ads-policy/> [<https://perma.cc/N4XC-MZFR>].

¹⁷¹ *Id.*

¹⁷² *Capitol Riots: Parler Boss Says He Has Been Fired by the Board*, BBC NEWS (Feb. 4, 2021), <https://www.bbc.com/news/business-55929385> [<https://perma.cc/7P5W-QAXK>]. Amanda Silberling, *Right-Wing Social App Parler Raises \$20M in Funding*, TECHCRUNCH (Jan. 7, 2022, 3:53 PM), <https://techcrunch.com/2022/01/07/right-wing-social-app-parler-raises-20m-in-funding/> [<https://perma.cc/3GXJ-GWAC>] (describing Parler’s history and uncertain future).

¹⁷³ Joe Flint, *Targeted Ads Headed Soon to Network TV*, WALL ST. J. (Nov. 10, 2020, 8:50 AM), <https://www.wsj.com/articles/targeted-ads-headed-soon-to-network-tv-11605016201> (“The television industry’s Holy Grail—targeted advertising in which next-door neighbors could see different commercials during the same TV show—is expected to become a reality next year . . .”).

¹⁷⁴ *See Targeting on Ad Studio*, SPOTIFY ADVERT., <https://ads.spotify.com/en-US/help-center/targeting-ad-studio/> [<https://perma.cc/88SX-NCH4>] (last visited Feb. 19, 2022) (specifying targeting policies regarding location, interest, real-time context, genre, and fan); Robert Williams, *Spotify’s Self-Serve Ad Platform Beefs Up Audience Targeting*, MKTG. DIVE (Aug. 2, 2019), <https://www.marketingdive.com/news/spotify-self-serve-ad-platform-beefs->

TikTok,¹⁷⁵ which may not have precise ad targeting abilities, nonetheless independently support integrations with data providers, direct integrations for advertisers who have already collected user data, and lookalike audience targeting—all of which make microtargeting possible.¹⁷⁶ In other words, the world of microtargeting is far larger than a handful of social media giants. Therefore, determining the necessity of microtargeted political ad legislation based on the policies of those giants alone would be a mistake.

Additionally, regardless of what self-regulatory regimes exist now, nothing stops these platforms from changing policies in the future or ineffectively enforcing policies in the present. Indeed, some platforms claim to ban political advertising yet fail to monitor and enforce their own rules. For example, during the 2020 presidential election, influencers paid by a progressive agency funded in part by Democratic political organizations posted anti-Trump get-out-the-vote content that collected hundreds of thousands of views just two weeks before the general election; the influencers did not disclose they had been paid, and TikTok did nothing to enforce its policy prohibiting political ads.¹⁷⁷ Self-regulation is too uncertain and too unreliable to prevent microtargeted political ad harms. Some form of federal legislation is necessary.

C. *The Honest Ads Act*

Fortunately, federal legislation that aims to constitutionally regulate online political ads has already been proposed. The Honest Ads Act (“HAA”) requires disclaimer statements similar to those required for radio and television on online electioneering communications on online platforms receiving “50,000,000 or more unique monthly United States visitors or users for a majority of months during the preceding 12 months.”¹⁷⁸ It also mandates that such platforms keep a publicly available library of any request to purchase qualified political

up-audience-targeting/560103/ [https://perma.cc/7E6Z-3BEH] (describing how Spotify improved its advertising tools to target segments of its 124 million free service listeners according to their interests).

¹⁷⁵ John Koetsier, *Massive TikTok Growth: Up 75% This Year, Now 33X More Users Than Nearest Direct Competitor*, FORBES (Sept. 14, 2020, 7:50 PM), <https://www.forbes.com/sites/johnkoetsier/2020/09/14/massive-tiktok-growth-up-75-this-year-now-33x-more-users-than-nearest-competitor/?sh=45d7d3bb4fe4> (“About one in six people in the United States is now a weekly user of TikTok . . .”).

¹⁷⁶ See *Ad Targeting*, TIKTOK: BUS. HELP CTR., <https://ads.tiktok.com/help/article?aid=9600> [https://perma.cc/B6W8-M9RB] (last visited Feb. 19, 2022).

¹⁷⁷ See, e.g., MOZILLA FOUND., THESE ARE NOT POLITICAL ADS: HOW PARTISAN INFLUENCERS ARE EVADING TIKTOK’S WEAK POLITICAL AD POLICIES 3, 6-7 (2021), https://assets.mofoprod.net/network/documents/TikTok-Advertising-Report_e5GrWx5.pdf [https://perma.cc/ML58-M8V2]; Sophia Smith Galer, *Anti-Trump TikTokers Not Declaring Paid Content*, BBC NEWS (Oct. 19, 2020), <https://www.bbc.com/news/election-us-2020-54555798> [https://perma.cc/99YQ-V3HY].

¹⁷⁸ See S. 1989, 115th Cong. sec. 8(a), § 304(j)(3)(B) (2017) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 304, 86 Stat. 11, 14 (codified as amended at 52 U.S.C. § 30104)).

advertisements exceeding \$500 in aggregate.¹⁷⁹ This library must include “a digital copy of the qualified political advertisement” as well as a “description of the audience targeted by the advertisement [and] the number of views generated from the advertisement.”¹⁸⁰

The probability that the HAA can pass First Amendment scrutiny in this form is high, as the bill’s language reflects the drafters’ cognizance of Supreme Court precedent.¹⁸¹ Moreover, the HAA avoids strict scrutiny analysis by only mandating disclaimer and disclosure requirements, which have been subject to exacting scrutiny review.¹⁸²

The *McManus* court’s overinclusiveness concerns are irrelevant because the HAA regulates only platforms of a certain size.¹⁸³ While one could claim that the HAA is underinclusive because it does not combat unpaid misinformation, this argument should be unavailing for two reasons. First, combating misinformation is not the sole governmental objective of the HAA; the bill’s purpose is to “uphold the United States Supreme Court’s well-established standard that the electorate *bears the right to be fully informed*.”¹⁸⁴ Second, *Citizens United*, referring to a similar decision in *McConnell*, rejected underinclusive arguments that would have invalidated an act that imposed disclosure requirements on broadcast ads but not on print or online ads.¹⁸⁵ One should presume that, if an act that does not impose disclosure requirements across all mediums was not invalid for underinclusiveness, then an act that does not impose disclosure requirements on every type of speech—paid or unpaid—within a medium should be not be invalid for underinclusiveness.

Finally, under exacting scrutiny, the government bears the burden of showing that the HAA employs “not necessarily the least restrictive means but . . . a

¹⁷⁹ *Id.* sec. 8(a), § 304(j)(1)(A).

¹⁸⁰ *Id.* sec. 8(a), § 304(j)(2)(B). Notably, the bill does not specify what is meant by “a description of the audience targeted.” Does this refer to characteristics? Interests? Whether a campaign used algorithmic targeting? Or would a vague description suffice (e.g., likely voters in New London County)?

¹⁸¹ *Id.* sec. 2 (“The purpose of this Act is to enhance the integrity of American democracy and national security by improving disclosure requirements for online political advertisements in order to uphold the United States Supreme Court’s well-established standard that the electorate bears the right to be fully informed.” (emphasis added)).

¹⁸² See *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).

¹⁸³ See *supra* note 112 and accompanying text.

¹⁸⁴ S. 1989 sec. 2 (emphasis added); see *Citizens United*, 558 U.S. at 369 (holding that “informational interest” was sufficient governmental interest to justify application of disclosure requirements to broadcast political ads). To clarify the import here, a combatting misinformation justification can lead to overinclusiveness because not all ads inherently misinform. Promoting the right of the electorate to be fully informed perfectly fits for disclosures because they always provide informational value and thus inform the electorate.

¹⁸⁵ See *Citizens United*, 558 U.S. at 368.

means narrowly tailored to achieve the desired objective.”¹⁸⁶ This is a burden disclosure regulations have met in the past.¹⁸⁷

It is also important to note that—unlike the PDFDA and BMPAA, which stand virtually no chance of passing into law¹⁸⁸—the HAA has already attracted support from big social media entities, signaling it would be more tolerable for pro-industry representatives.¹⁸⁹ While this does not inform an analysis of constitutionality, it shows that the HAA can more realistically become law in the first place.

There is just one problem with the proposed bill: it does not currently address or attempt to regulate microtargeted political ads.¹⁹⁰ The remainder of this Note explains how the HAA should be amended to mitigate the harms created by microtargeted political ads while preserving its constitutional character. Importantly, amending the HAA in this way means incorporating such regulations into a bill specifically designed to pass First Amendment muster and conjure political support, considerations that are both necessary and strategic.

III. DISCLOSURE REQUIREMENTS FOR MICROTARGETED POLITICAL ADS

This Note began by describing the problems inherent with microtargeted political ads, providing examples as to how they have already caused harm.¹⁹¹ Part I synthesized pertinent First Amendment doctrine and principles relevant to regulating political ads, mapping out the rigid framework such regulations must fit into to avoid invalidation. Part II applied this framework to two currently proposed bills that attempt to regulate microtargeted political ads, showing that both face inevitable invalidation if passed into law. It also explored self-regulatory trends, explaining why these developments fall short of a reliable solution. Finally, it analyzed the legality and limitations of another proposed bill, the HAA, that aims to regulate digital political ads while satisfying First Amendment scrutiny. Part III puts these findings together and proposes a novel path forward by recommending amendments to the HAA.

The most desirable approach to easing the country’s concerns with microtargeted political ads—concerns that the marketplace of ideas is being

¹⁸⁶ *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

¹⁸⁷ *See Citizens United*, 558 U.S. at 369 (explaining that “disclosure is a less restrictive alternative to more comprehensive regulations of speech”).

¹⁸⁸ *See supra* Section II.A (delineating reasons why PDFDA and BMPAA are unlikely to become law).

¹⁸⁹ *See, e.g.,* Leathern, *supra* note 160 (“[W]e are arguing for regulation that would apply across the industry. The Honest Ads Act is a good example — legislation that we endorse and many parts of which we’ve already implemented Frankly, we believe the sooner Facebook and other companies are subject to democratically accountable rules on this the better.”).

¹⁹⁰ *See* S. 1989, 115th Cong. (2017).

¹⁹¹ *See supra* note 3 and accompanying text (describing how algorithm targeted certain populations to dissuade them from exercising their right to vote).

balkanized and distorted—is to give the public notice that it is being subjected to a warped and fragmented marketplace. Legislators can do this with mandated disclosures on online political ads.

As a matter of policy, this is the best approach for two reasons. First, disclosures favor the First Amendment principle that debate should be “uninhibited” and not a state-regulated activity.¹⁹² By mandating disclosures instead of prohibiting ways in which one may target an audience, the marketplace of ideas remains a forum of “free trade.”¹⁹³ Second, disclosures favor “wide-open”¹⁹⁴ debate by providing informational value to voters instead of constraining the ways in which campaigns spread their messages.¹⁹⁵

As a matter of necessity, disclosures are the only way that legislators can constitutionally remedy microtargeted political ad harms. As this Note’s review of First Amendment jurisprudence shows, any attempt to ban methods of online ad targeting based on whether an ad is political would trigger strict scrutiny. And as shown above, the bills that attempt to regulate such ads in this way, the BMPAA and PDFDA, are woefully unfit to pass strict scrutiny analysis. But there is a broader point here: practically speaking, no federal legislation can constitutionally ban or constrain methods of microtargeting for political ads because such legislation cannot pass least restrictive means, overinclusiveness, and underinclusiveness inquiries as is necessary to satisfy strict scrutiny.

One can discern this solely by considering what the government’s compelling interest would be in constraining microtargeting capabilities for political ads and evaluating whether legislators could possibly craft any law to narrowly fit that interest. Combating foreign election interference, as the OETAA intended,¹⁹⁶ would not do. Taking for granted that this interest is compelling, such a law would be overinclusive because the vast majority of microtargeted political ads are not part of foreign election interference operations. There is a “compelling interest in protecting voters from confusion and undue influence,”¹⁹⁷ but does all microtargeting necessarily confuse or unduly influence voters? Surely not. This Note began with the presumption that microtargeting can just as easily spread valuable information and increase democratic participation.¹⁹⁸ One can repeat this exercise *ad infinitum*; there simply is not a compelling governmental

¹⁹² See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁹³ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁹⁴ See *Mosley*, 408 U.S. at 96 (quoting *N.Y. Times Co.*, 376 U.S. at 270).

¹⁹⁵ See *supra* notes 103-04 and accompanying text (noting how Supreme Court has recognized interests in disclosures and protecting voters).

¹⁹⁶ See Online Electioneering Transparency and Accountability Act, ch. 834, 2018 Md. Laws 4220 (codified as amended at MD. CODE ANN., ELEC. LAW §§ 13-401, 13-404, 13-304, 13-306, 13-307, 13-221 (West 2021)).

¹⁹⁷ See *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion).

¹⁹⁸ See *supra* notes 23-24 and accompanying text (describing possible benefits of microtargeting in certain situations).

interest that can be narrowly tailored to justify eliminating microtargeting methods specifically for political ads.

For the sake of argument, it is true that legislators could potentially escape strict or exacting scrutiny altogether by passing a law prohibiting not just political ad microtargeting but all microtargeting.¹⁹⁹ The Supreme Court has accepted that “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”²⁰⁰ However, such a strategy is untenable because of a sheer lack of political appetite and because of the harm it would do to the marketing industry;²⁰¹ every industry that relies on targeted advertising; and even the average consumer, who might appreciate receiving ads that are relevant to their interests and characteristics. Additionally, the courts would apply strict scrutiny and invalidate such legislation if the intended effect was solely to inhibit political ad targeting capabilities.²⁰² A legislative remedy should be particular to political ads, but it cannot be if it aims to proscribe the technical features of microtargeting.

Mandating disclosures is the only alternative. The question, then, is how should such disclosures be designed to mitigate microtargeting harms? In theory, effective disclosures should provide enough information to increase opportunities for remedial counterspeech and thus decrease the incentive for campaigns to deliver contradictory messages,²⁰³ send messages “on wedge issues that would be extremely divisive in a more public forum,” or employ targeting that would cause voter discrimination and disenfranchisement.²⁰⁴ But designing effective disclosures for microtargeted political ads is not straightforward.

The HAA already mandates some disclosure requirements for online political ads and requires publication of a political ad library.²⁰⁵ Legislators should go one step further and amend the HAA to require making all political ad targeting information publicly available and to mandate specific standard notices to review a political ad’s targeting.

¹⁹⁹ See *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346-48 (2020).

²⁰⁰ *Id.* at 2342.

²⁰¹ See *IAB Internet Advertising Revenue Report for 2020 Shows 12.2% Increase in Digital Advertising, Despite COVID-19 Economic Impacts*, CISION: PR NEWswire (Apr. 7, 2021, 11:00 AM), <https://www.prnewswire.com/news-releases/iab-internet-advertising-revenue-report-for-2020-shows-12-2-increase-in-digital-advertising-despite-covid-19-economic-impacts-301263566.html> [<https://perma.cc/H4PU-UFC2>] (“[S]ocial media advertising revenues reached \$41.5 billion in 2020. That 16.3% year-over-year growth attributes social media with nearly 30% of all internet advertising revenue (29.6%).”).

²⁰² See *supra* note 58 and accompanying text (providing example of situation where court would apply strict scrutiny and invalidate such statute).

²⁰³ See *supra* notes 19-23 and accompanying text.

²⁰⁴ See Barocas, *supra* note 20, at 31, 33.

²⁰⁵ See S. 1989, 115th Cong. sec. 8(a), § 304(j)(2) (2017).

Part III proceeds in two sections. Section III.A discusses the difficulties in drafting an HAA amendment, describing the complexities of defining microtargeting and designing a standard notice or system that effectively mitigates microtargeting harms. Section III.B discusses whether these microtargeting disclosures can generally do enough to mitigate microtargeting harms.

A. *Drafting a Microtargeting Disclosure Amendment*

To effectively mandate disclosures on microtargeted political ads, one must consider what microtargeting is in practice. Unfortunately, defining microtargeting is difficult because microtargeting is ambiguous as a practical marketing term. Consider the definition of microtargeting provided above: “[A] strategic process intended to influence voters through the direct transmission of stimuli, which are formed based on the preferences and characteristics of an individual”;²⁰⁶ while this definition is informative, it is not effective as a statutory definition because terms like “preferences” and “characteristics” are vague and do not capture some of the more sophisticated microtargeting practices.

The BMPAA and PDFDA skirt the issue by instead defining what is allowable targeting criteria and what is forbidden, rather than focusing on when an online political ad becomes microtargeted. The BMPAA prohibits all targeting unless it is solely geographic in nature or the recipients have given consent.²⁰⁷ The PDFDA prohibits targeting based on behavioral data and prohibits targeting based on demographic data unless that demographic targeting pertains to age, gender, or geography and a disclosure is provided with a description of what demographic targeting criteria is used.²⁰⁸ Neither proposal is effective because, as Part II above showed, the legislature cannot constitutionally prohibit targeting criteria for political ads; it may only mandate disclosures. While choosing not to explicitly define microtargeting may be ideal, neither proposal requires disclosures that are sufficiently comprehensive.

To illustrate the problem, imagine the BMPAA merely required disclosures for what it forbids—i.e., disclosures for all political ads that use targeting criteria other than geography. Is this helpful? Arguably not because the disclosure would say too little. For example, a political ad that targeted neurotic North Carolinians might carry a disclosure reading, “You are seeing this ad based on your location in North Carolina *and other criteria*.” This is not specific enough to provide sufficient informational value to voters and mitigate microtargeting harms. In other words, it provides no notice to the viewer that they were targeted as part of a small and impressionable group. To the contrary, this simplistic disclosure makes the ad appear benign.

²⁰⁶ See Papakyriakopoulos et al., *supra* note 9, at 2.

²⁰⁷ H.R. 7014, 116th Cong. sec. 2(a), § 325(a)-(b) (2020).

²⁰⁸ H.R. 7012, 116th Cong. sec. 2(a), § 325(a)(1)-(4) (2020).

Repeating this exercise with the PDFDA, the disclosed information becomes more specific and valuable, but there are other practical problems. The PDFDA lays out additional demographic categories—age, gender, and geographic area of ZIP code size or larger—and, importantly, outlines a thorough definition of “online behavioral data.”²⁰⁹ A political ad using these targeting criteria might carry a disclosure reading, “This ad was sent to men between the ages of eighteen and thirty-four in Greendale, Colorado, who exhibited particular online behavior.”

Three considerations show why this PDFDA-type disclosure falls short of an ideal solution despite its breadth. First, there are far more demographic categories than the three identified in the PDFDA that could be used with precision and without disclosure. Facebook, to name one social media giant, allows targeting by language, level of education, multicultural affinity, political leaning, relationship status, job title, child’s age, interests—which includes hundreds of options—and more, none of which are accounted for in the PDFDA.²¹⁰

Second (and relatedly), the sheer amount of available demographic targeting criteria eliminates the possibility that a mandated disclosure on an ad itself could list everything important. Just age, gender, and geography could pose a problem if an ad targeted multiple ZIP codes with variable gender and age criteria.²¹¹

Third, as comprehensive as these disclosures are, they do not account for arguably the most problematic type of microtargeting: microtargeting using hidden algorithmic criteria. Facebook’s Lookalike Audiences tool presents an example.²¹² The Lookalike Audiences tool works by supplying Facebook with a source list of individuals—say, 20,000 email addresses—and using artificial intelligence to distribute ads to new individuals who share qualities with that

²⁰⁹ *Id.* sec. 2(a), § 325(a)(1)(C) (“[T]he term ‘online behavioral data’ means, with respect to an individual, information that is tracked, collected, or maintained about an individual’s actions or activities online, including information relating to an individual’s activity across businesses, distinctly branded websites, applications, or services . . .”).

²¹⁰ See *Audience Insights*, META FOR BUS., <https://www.facebook.com/business/insights/tools/audience-insights> [<https://perma.cc/S9ZT-85BU>] (last visited Feb. 22, 2022). Please note that viewing Facebook Audience Insights requires logging in to a Facebook account. For a more intuitive overview of Facebook’s targeting capabilities, refer to the following infographic. Mary Lister, *All of Facebook’s Ad Targeting Options (in One Epic Infographic)*, WORDSTREAM (Dec. 20, 2021), <https://www.wordstream.com/blog/ws/2016/06/27/facebook-ad-targeting-options-infographic> [<https://perma.cc/5XW2-TW6Q>].

²¹¹ Imagine one political ad that targeted women between the ages of eighteen and thirty-four and men between the ages of fifty-five and sixty-five in one ZIP code, used the same criteria in another ZIP code, and swapped the age and gender splits in a third ZIP code. How could a disclosure display all this information effectively with limited space?

²¹² See *About Lookalike Audiences*, META FOR BUS., <https://www.facebook.com/business/help/164749007013531?id=401668390442328> (last visited Feb. 19, 2022); see also Peter Kafka, *Facebook’s Political Ad Problem, Explained by an Expert*, VOX: RECODE (Dec. 10, 2019, 8:00 AM), <https://www.vox.com/recode/2019/12/10/20996869/facebook-political-ads-targeting-alex-stamos-interview-open-sourced>.

source audience.²¹³ The problem is that we do not know how tools like this identify shared qualities or which shared qualities they identify, and thus we know extraordinarily little about how ad recipients are targeted.²¹⁴ Because the PDFDA intended to prohibit this practice outright, it does not mandate sufficient disclosures related to it.²¹⁵

An ideal disclosure solution should embrace that microtargeting does not require a precise definition to address the problems it causes. Instead, an ideal disclosure will notify the public that it may be subjected to hyper-specific ads that fragment the marketplace of ideas and provide information sufficient to encourage wide open debate and transparency.

Legislation that requires a hyperlink on political advertisements directing users to disclosed targeting information would present one effective approach. This practice can be informed by relevant digital advertising disclosure best practices, such as FTC guidance that requires that such links be obvious, styled consistently, labeled properly, and assessed for effectiveness by monitoring click-through rates.²¹⁶ This also solves the problem that digital ads contain too little space for effective disclosures.²¹⁷ To balance the need for specific and accurate disclosures with limited space, ads could be required to include a hyperlink reading, “Why am I seeing this political ad?”²¹⁸ that would direct viewers to a page containing all of that ad’s pertinent targeting criteria.

But what targeting criteria is pertinent? Or rather, what information about the ad’s targeting is most helpful for the ad recipient and for mitigating potential microtargeting harms? Here, the most valuable information falls into two buckets: information regarding targeting and data regarding the ad’s actual distribution.

Targeting information refers to the demographic, behavioral, and algorithmic criteria the campaign uses to distribute the ad. For instance, the HAA requires that online platforms maintain a record containing “a description of the audience targeted by the advertisement”²¹⁹ while the PDFDA requires “a description of the advertisement’s targeted audience, including information on the audience’s age, gender, and geographic location” as well as “a description of the

²¹³ See Kafka, *supra* note 212.

²¹⁴ See *id.* (relaying interview with former Facebook security executive about Facebook’s ad policy). Specifically, the Lookalike Audiences tool never reports what constitutes a similarity.

²¹⁵ See H.R. 7012, 116th Cong. § 325(a)(1)(C), (a)(2) (2020).

²¹⁶ FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 7 (2013).

²¹⁷ See *id.* at ii.

²¹⁸ Unlike the feature Facebook uses, this approach would preferably appear on the ad itself and would not require clicking through a dropdown menu. See Sreethu Thulasi, *Understand Why You’re Seeing Certain Ads and How You Can Adjust Your Ad Experience*, META (July 11, 2019), <https://about.fb.com/news/2019/07/understand-why-youre-seeing-ads/> [<https://perma.cc/Y4XU-WKZZ>].

²¹⁹ S. 1989, 115th Cong. sec. 8(a), § 304(j)(2)(B) (2017).

advertisement's audience as predicted by an algorithm."²²⁰ Ideally, the HAA should mandate more specific targeting information disclosures while remaining cognizant of the *McManus* court's warning about the potential chilling effects of overly burdensome disclosure requirements.²²¹ To that end, one clear solution is to mandate disclosure of all the targeting criteria the platform itself allowed the campaign to use. This is the most straightforward solution for an online platform to implement because it merely means publishing an ad's selected criteria in an additional space.²²² Moreover, it would provide the greatest amount of informational value to the ad recipient and would encourage open debate and counterspeech by telling politicians and campaign surrogates how their opponents are targeting members of the electorate.

Unfortunately, this does not account for algorithmic targeting. Turning back to Facebook's Lookalike Audiences tool as an example, an online platform could not publish a campaign's source list for obvious data privacy reasons, and simply disclosing that an ad uses Lookalike Audiences—or any algorithmic tool for that matter—with nothing more provides very little informational value.

This is where data regarding an ad's actual distribution is most helpful. While the HAA provides some information to users in this regard (requiring that ads disclose the number of views they generate along with a description of the audience they target)²²³ the PDFDA requires a much more robust disclosure, mandating that online platforms provide "a description of the advertisement's actual audience as determined on the basis of data provided in an online platform user's profile, including information on the audience's age, gender, geographic location, race, ethnicity, and political affiliation" as long as that platform collects such information with respect to such advertisements.²²⁴ While this might sound ambitious, one should note that Facebook provides much of this data in its Ad Library already.²²⁵

Providing this breadth of information to the electorate solves the problem of defining microtargeting. It allows individual voters to decide whether the information they receive is dispersed widely enough to accurately reflect a politician's platform and provides data regarding whether the information has received appropriate scrutiny. Additionally, it provides competing campaigns with the tools necessary to deliver rebuttals. In this way, mandated disclosures make fracturing and manipulating the marketplace of ideas far more difficult.

²²⁰ H.R. 7012, 116th Cong. sec. 2(a), § 325(b)(2)(C), (D) (2020).

²²¹ See *Wash. Post v. McManus*, 944 F.3d 506, 516-17 (4th Cir. 2019).

²²² Obviously, the online platform already holds this exact information in its ad management tool.

²²³ S. 1989 sec. 8(a), § 304(j)(2)(B).

²²⁴ H.R. 7012 sec. 2(a), § 325(b)(2)(E).

²²⁵ See, e.g., *Ad Library*, META, <https://www.facebook.com/ads/library/> (last visited Feb. 22, 2022) (choose "Issues, Elections, or Politics" from dropdown; then search in search bar for "Joe Biden"; then click "See Summary Details" under any result under "Ads from Joe Biden").

Most importantly, this remedy can satisfy exacting scrutiny and thus survive a First Amendment challenge. Supporting the right of the electorate to be fully informed is a sufficiently important governmental interest according to the Supreme Court.²²⁶ And it goes without saying that mandated disclosures related to ad targeting bear a substantial relation to this interest.

B. *Do Disclosures Go Far Enough?*

One could argue that, unfortunately, the microtargeting approach described above is insufficient because it presumes that voters will be diligent, curious, and technically savvy enough to click through and study political ad disclosures. After all, the FTC casts doubt on this solution by recommending that entities “incorporate [disclosures] into the ad whenever possible.”²²⁷ The accumulation problem—which emphasizes that the common person neither wants, understands, nor uses mandated disclosures because of the gratuitous number of disclosures they are subjected to in daily life—casts doubt on the solution as well.²²⁸ But these criticisms miss three important points.

First, campaign disclosures are treated differently as compared to mandated consumer products disclosures. For example, there is documented support that “disclosure aids voters by enabling them to identify candidate ideology, and in turn, to select candidates they believe best reflect their own views.”²²⁹ At the same time, state campaign finance disclosure laws are “positively, and statistically significantly, associated with affirmative answers to the questions ‘Do people have a say [in government]?’ and ‘Do officials care [what people like them think]?’”²³⁰ Both analyses suggest that, despite accumulation, the average voter wants, understands, and uses campaign disclosures.

Second, this criticism fails to appreciate the value of publishing targeting information publicly and thus providing that data to opposing campaigns, journalists, and other influential parties. Using this data, these groups can engage in remedial counterspeech and uncover unsavory campaign tactics as they unfold. Referring back to a recent example, consider whether a campaign would even attempt to launch a deterrence ad campaign that disproportionately targeted

²²⁶ See *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

²²⁷ FTC, *supra* note 216, at ii.

²²⁸ See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 705-09 (2011) (describing, comically, a day in the life of “Chris Consumer” as he journeys from one mandated disclosure to another).

²²⁹ Jennifer A. Heerwig & Katherine Shaw, *Through A Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1473 (2014) (describing findings in Michael W. Sances, *Is Money in Politics Harming Trust in Government? Evidence from Two Survey Experiments*, 12 ELECTION L.J. 53, 62 (2013)).

²³⁰ *Id.* (bracketed material in original) (quoting David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 33-34 (2006)).

people of color²³¹ if it risked near-immediate detection. Not only might that campaign suffer politically due to its unpopular tactics, but its efforts would also likely fail after the news about its attempts broke or if opposing parties launched get-out-the-vote campaigns using the same targeting criteria.

Put another way, mandated publication of ad content and targeting criteria in public databases destroys the very thing that makes microtargeted political ads harmful—that is, they destroy the ability to spread messages *secretly* to discrete groups. Consider the following description an executive at a major advertising firm used while explaining how to vary political advertising according to user demographics:

This message is only for women. Only in these ethnicities and only at this income and education level. We're going to tell this story to them. Then we're going to tell a completely different story to this different ethnic group, a different story to immigrants, a different story to businesspeople. And we're going to whip everyone into a froth and *no one else is going to see the other messages*.²³²

Publishing political ad content and targeting data libraries would greatly undermine this tactic because *any* person could review *any* ad content. The result is that campaigns would likely reconsider using the tactic in the first place. Thus, it is not necessary for every individual voter to diligently study political ad disclosures; the presence of disclosures will eliminate much of the harm before it ever begins.

Third, and as the title of this Note suggests, mandated disclosures are as far as the legislature *can* go in mitigating microtargeted political ad harms. The analysis in Part II shows that attempting to regulate microtargeted political ads will necessarily trigger strict scrutiny review, which is too difficult for legislation of this scope and subject to reliably satisfy. Mandating disclosures—i.e., managing the harms created by microtargeted political ads—is the only viable alternative.

Amending the HAA to require ad targeting disclosures is the most effective means of doing this. The HAA stands on a foundation created by a bipartisan coalition, increasing its odds of becoming law.²³³ And, notably, the HAA forgoes some more polarizing provisions that have prevented bills regulating

²³¹ See *supra* note 3 and accompanying text (describing Trump campaign's efforts to deter people of color from voting).

²³² Katie Joseff, Joel Carter & Samuel Woolley, *The Disturbing Implications of Increasingly Narrow Political Ad Targeting*, BROOKINGS INST. (Feb. 11, 2021), <https://www.brookings.edu/techstream/the-disturbing-implications-of-increasingly-narrow-political-ad-targeting/> [<https://perma.cc/HC2A-VDQ5>] (emphasis added).

²³³ This fact, however, should not be overstated. The HAA was initially introduced by Democratic Senator Mark Warner and Republican Senator John McCain, but only Democratic senators (thirty in total) and one Independent senator have joined as cosponsors since then.

online activities from becoming law for years.²³⁴ That the HAA has already received industry support is yet another indication that the bill has the backing necessary to become law.²³⁵

CONCLUSION

Microtargeted political ads create real problems for American democracy, encouraging extreme views, increasing partisanship, incentivizing misrepresentations regarding candidates' policies, perpetuating voter disenfranchisement and discrimination, and much more. Political campaigns, fueled by advances in the breadth and sophistication of data collection, are finding ever more innovative ways to shatter the marketplace of ideas into discrete silos. These silos prevent the broader public from scrutinizing political messages and drag down the quality of our discourse.

The First Amendment prevents Congress from prohibiting or regulating political ad microtargeting outright. Indeed, the only two currently proposed bills that attempt to regulate or ban microtargeted political ads are destined to fail a First Amendment challenge as content-based regulations of speech that cannot satisfy strict scrutiny.

This seemingly intractable problem may have a remedy, however. By focusing legislative efforts on creating comprehensive and innovative mandated disclosure requirements, lawmakers can break down the divisions microtargeting creates without infringing on First Amendment rights. Giving voters information about how they are targeted will inform them as to whether these messages have been appropriately scrutinized in the marketplace or whether a campaign may be misleading them with fringe ideas.

²³⁴ For example, whereas the PDFDA and BMPAA recommend a private right of action, this type of enforcement mechanism, which has haunted federal data privacy legislation negotiations for years, is noticeably absent from the HAA.

²³⁵ See *supra* note 189 and accompanying text (noting how HAA has received support from large social media entities).