October 16, 2019

Rep. Zoe Lofgren
Chair
Committee on House Administration
1401 Longworth House Office Building
Washington, D.C. 20515

Rep. Rodney Davis
Ranking Member
Committee on House Administration
1740 Longworth House Office Building
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RE: H.R. 4617, the Stopping Harmful Interference in Elections for a Lasting Democracy (SHIELD) Act

Dear Chairperson Lofgren and Ranking Member Davis:

The American Civil Liberties Union (ACLU), on behalf of its 3 million members, supporters and activists, writes to urge the House Administration Committee to address our significant First Amendment concerns with the Stopping Harmful Interference for a Lasting Democracy Act of 2019 (SHIELD Act)[1] during the bill's markup on Wednesday, October 16, 2019. There is no doubt that foreign governments, foreign political parties, and foreign nationals maliciously interfered with a U.S. election in 2016, and the danger that they will do so again in 2020 is very real. We are glad to see Congress train its gaze on finding ways to prevent such interference from happening again. However, any legislative changes made to address that problem must be narrowly tailored to avoid infringing upon civil liberties. The SHIELD Act, as it currently stands, strikes the wrong balance, sweeping too broadly and encompassing more speech than necessary to achieve its legitimate goals. The ACLU stands ready to work with the Committee to address these concerns as the bill moves through the legislative process.

Expansion of Limitation of Foreign Nationals Participating in Political Advertising

The SHIELD Act would expand the current prohibition[2] on foreign governments, political parties, and nationals[3] engaging in political

[1] Stopping Harmful Interference for a Lasting Democracy Act (SHIELD Act), H.R. 4617, 116th Cong. (2019).
[2] 50 U.S.C. § 30121.
[3] *Id.* § 30121(b) (Foreign nationals are foreign governments, political parties, their agents, and any other person that is not a U.S. Citizen or a U.S. national and is not lawfully admitted for permanent residence.).

advertisements in four new ways.[4] First, the bill would also extend the blackout periods for engaging in communications that refer to candidates for federal office to online communications. As discussed below, we recognize that expanding Federal Election Campaign Act's (FECA) provisions to include paid online advertisements would serve the law's legitimate purposes.[5] However, we remain concerned about the breadth of the communications covered by this provision.

Most troubling, all covered foreign nationals, including any non-citizen who is not a permanent resident of the U.S., would be prohibited from placing paid advertisements in any medium that "promote, support, attack, or oppose" (PASO) the election of a candidate. Furthermore, foreign governments, foreign political parties, and their agents would be prohibited from engaging in paid advertisements regarding national legislative issues of public importance in an election year.

Courts rightfully view complete prohibitions on truthful political speech with extreme skepticism.[6] The breadth of the SHIELD Act's new prohibitions on foreign nationals' speech and the subjective nature of the standards to be applied will place outright bans on truthful, nonmisleading, constitutionally protected speech by persons located within the United States. They will also impede the rights of U.S. citizens to receive critical, truthful information about the world from certain speakers.[7]

Looking to the prohibition on paid advertisements that PASO a candidate, it is encouraging that the prohibition refers only to communications that PASO *the election of* a candidate.[8] However, we are concerned that the PASO standard is nonetheless vague and subjective and will prohibit speech that is clearly constitutionally protected. Arguably, any communication that mentions a candidate, or elected official, in the context of a public policy issue could be seen as "supporting" or "attacking" that candidate's election.[9] For

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[4] H.R. 4617, § 205. First, foreign nationals will not be allowed to pay for communications placed or promoted for a fee on an online platform that refers to a clearly identified candidate for Federal office and is disseminated within 60 days before a general, special, or runoff election, and within 30 days of a primary election or a convention or caucus of a political party to nominate a candidate. Second, foreign nationals will be prohibited from paying for broadcast, cable or satellite communications, or for communications placed or promoted for a fee on a website, web application, or digital application, that promotes, supports, attacks or opposes the election of a clearly identified candidate for Federal, State or local office. Third, foreign governments, foreign political parties, and their agents will be prohibited from paying for a broadcast, cable, or satellite communication, or for any communication which is placed or promoted for a fee on an online platform that discusses an issue of national legislative importance during a federal election year. Fourth, foreign governments, foreign political parties, and their agents will be forbidden from compensating any person for internet activity that promotes, supports, attacks or opposes the election of a clearly identified candidate.

[5] ACLU, Letter to the House of Representatives Opposing H.R. 1 (2019), *available at* https://www.aclu.org/aclu-letter-opposing-hr-1-people-act-2019; ACLU, Letter to Nevan F. Stipanovich, Assistant General Counsel to the Federal Election Commission (2018), *available at* https://www.aclu.org/letter/aclu-comment-fec-public-communication.

[6] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 344, 347 (1995).

[7] Kleindienst v. Madel, 408 U.S. 753, 762-63 (1972) (recognizing that the First Amendment encompasses a right to receive information and ideas).

[8] H.R. 4617, § 205.

[9] *See Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976) ("The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals or government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.").

instance, people that have received protection from deportation under the Deferred Action for Child Arrivals (DACA) program, under the SHIELD Act, may not be able to take out a paid advertisement referring to President Donald Trump's immigration policies because such an ad arguably opposes President Trump's reelection.

The restriction on foreign governments and foreign political parties engaging in paid advertisements about national legislative issues of public importance during an election year will have similarly perverse consequences.[10] Under that provision, if the governments of Germany, Canada, and France wanted to take out a nationwide advertisement during the Super Bowl in 2020 explaining why it is so important for the United States to recommit to the Paris Climate Agreement, the SHIELD Act would forbid that speech. The scope of what would be a "national legislative issue of public importance" is also exceedingly broad and vague. It is not at all clear the breadth of the speech that would be prohibited by this provision, which alone makes it unconstitutionally overbroad.

In neither example are the speakers explicitly asking voters to elect or defeat a specific candidate. Instead, they would be speaking on issues that concern them where they need the support of American citizens. However, the SHIELD Act would prohibit them from purchasing advertisements to engage in it.

The ACLU supports restricting foreign interference in our elections; however, the SHIELD Act goes too far by placing a complete ban on truthful, nonmisleading issue advocacy to the detriment of the public and the First Amendment.

Restrictions on Exchange of Non-Public Campaign Material

The SHIELD Act would prohibit candidates, their committees and affiliated individuals from providing or offering to provide nonpublic campaign material to a foreign government, foreign political party, their agents, or anyone if there was reason to believe that person would provide the information to a covered foreign national.[11] The SHIELD Act does not require those sharing the information to intend that a communication in support of the candidate or attacking an opponent result. The SHIELD Act also defines "nonpublic campaign material" broadly to mean any material produced by the candidate or committee that has not been made publicly available and is not otherwise in the public domain.

Federal law already prohibits soliciting contributions to campaigns from foreign nationals.[12] The SHIELD Act would add to that a prohibition on the communication of truthful information with foreign nationals solely because that information is not publicly available. The government certainly has a compelling interest in preventing foreign government and foreign political parties from corrupting, or appearing to corrupt, our political candidates. However, restrictions on the communication of truthful information must be narrowly tailored to achieve the government's interests. Without additional limitations on the communication of "nonpublic campaign information"—like a requirement that the information communicated be material to the election or that the information was

[10] H.R. 4617, § 205.
[11] H.R. 4617, § 301.
[12] 50 U.S.C. § 30121.

communicated with the intent of receiving election-related help from the covered foreign national—this provision would be unconstitutionally overbroad.

HONEST Ads Act

The ACLU agrees that the definition of public communication in the Federal Election Campaign Act (FECA) should be expanded to include online advertising (i.e., paying to place an advertisement on another entity's internet web site), as Tile I, Subtitle B of the SHIELD Act (Honest Ads Act) would do.[13] We recognize that online advertising generally, and campaign advertising specifically has exploded in recent years and expanding FECA's provisions to include paid online advertisements would serve the law's legitimate purposes.

Nonetheless, the ACLU still has significant concerns with the substantive tests for determining whether specific communications are subject to regulation and our concerns are not altered by our general support for this provision.[14] Furthermore, the ACLU does not support every aspect of the Honest Ads Act's method for expanding the regulation of online campaign-related communications. For example, for congressional campaigns, online communications would not be required to be directed at the relevant electorate to be regulated as "electioneering communications."[15] Thus, the Honest Ads Act would regulate online ads that appear *outside* of candidates' districts, to persons with no power to vote for or against the candidate. The current definition of "electioneering communications" is already problematic and overbroad.[16] For that reason, under the Honest Ads Act, it is possible that purely issue-related ads mentioning candidates would now be subject to FEC regulation, *even when those viewing the ads have no power to vote for or against the candidate mentioned*. Without limiting the provision to speech within a candidate's district, the Honest Ads Act would unconstitutionally expand the definition of electioneering communications for online ads beyond the bounds permitted by the Supreme Court.[17]

Combatting Deceptive Practices

In addition to the problems posed by our country's aging and under-resourced elections infrastructure, recent elections in the United States and around the world have shown the increasing sophistication and success of disinformation campaigns intentionally misleading

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[13] *Id.* §§ 111 – 117.
[14] ACLU, Letter to the House of Representatives Opposing H.R. 1 (2019), *available at* https://www.aclu.org/aclu-letter-opposing-hr-1-people-act-2019; ACLU, Letter to Nevan F. Stipanovich, Assistant General Counsel to the Federal Election Commission (2018), *available at* https://www.aclu.org/letter/aclu-comment-fec-public-communication.
[15] H.R. 4617, § 114.
[16] Electioneering communications are broadcast, cable, or satellite communications that refer to a federal candidate and are made within 60 days of a general election or 30 days of a primary election, 52 U.S.C. § 30104(f)(3). Communications that refer to a candidate in the context of an important public policy issue may have nothing to do with supporting or opposing that candidate's election, and yet that speech would trigger a disclosure requirement. When an organization's speech has no relationship to the election or defeat of a candidate, the disclosure of that organization's donors would do little, if anything, to serve the public's interest in knowing who is providing substantial support to the election or defeat of candidates.
[17] *See McConnell v. FEC*, 540 U.S. 93, 206 (2003) (upholding the definition of electioneering communications *because the vast majority of the communications are intended to influence an election*).

people to prevent or hinder them from voting.[18] Title III, Subtitle B of the SHIELD Act (The Deceptive Practices and Voter Intimidation Act) would prohibit intentionally communicating knowingly false statements about the time, place, or manner of voting, or qualifications to vote with the intent to impede or prevent another person from voting.[19] This provision is directed at conduct that is intended to prevent people from voting, and we support it.

However, while we understand the intention, we remain concerned about the provision criminalizing intentionally false statements about candidate endorsements. The Constitution protects false speech, even knowingly false speech, because speech needs "breathing space" in order to be truly free.[20] Although the government may in some circumstances restrict knowingly false speech, such restrictions must be appropriately tailored to an overriding governmental interest. Even though this provision would require that violators have the intent to impede voting rights, it is difficult to say whether the prohibition against false speech regarding who endorsed a candidate is sufficiently tied to the government's legitimate interests in protecting the franchise. For example, the Act prohibits false statements made by "candidates, campaign supporters, and individuals acting independently and using only their own modest resources, whether made on the eve of an election, when the option for reply is limited, or months in advance," when there is ample opportunity to address the issue through counterspeech.[21]

Conclusion

We applaud Congress for attempting to limit the interference of foreign adversaries in our elections. However, Congress should not do so at the expense of the First Amendment. The ACLU urges the House Administration Committee to amend the SHIELD Act to address our concerns and protect the rights of everyone in this country to communicate in their chosen manner about important political issues.

Sincerely,

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National Political Director

Kate Ruane
Senior Legislative Counsel

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[18] *See* Wendy R. Weiser and Adam Gitlin, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption*, Brennan Center for Justice, 2016, *at* https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Ballot_Security_Voter_Intimidation.pdf.; Wendy Weiser and Vishal Agraharkar, *Ballot Security and Voter Suppression: What It Is And What the Law Says*, Brennan Center for Justice, 2012, at https://www.brennancenter.org/sites/default/files/legacy/Democracy/Ballot_Security_Voter_Suppression.pdf.

[19] H.R. 4617, §§ 311-314.

[20] *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *United States v. Alvarez*, 567 U.S. 709 (2012).

[21] *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (internal quotation marks omitted) (quoting *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 351–52 (1995)).