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October 17, 2019

The Honorable Nancy Pelosi
The Speaker of the House of Representatives
The Capitol
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader of the United States House of Representatives
The Capitol
Washington, DC 20515

Re: Opposition to H.R. 4617, Stopping Harmful Interference in Elections for a Lasting Democracy Act (SHIELD Act)

Dear Speaker Pelosi and Leader McCarthy:

We write in opposition to the SHIELD Act (H.R. 4617) because of the detrimental effects it will have on the rights of American citizens and organizations to speak on political issues and participate in the political process while doing little to combat the foreign interference it is designed to prevent.

The Republican National Lawyers Association (RNLA) is the national organization of Republican attorneys. We seek to promote open, fair, and honest elections at all levels of American society in a non-discriminatory manner.

As Chairperson Zoe Lofgren noted at the beginning of the markup for H.R. 4617 in the Committee on House Administration, public trust and confidence in our elections is of utmost importance. Unfortunately, the SHIELD Act will increase the regulatory burdens on Americans without increasing public confidence in elections through preventing foreign interference.

The Committee on House Administration majority prevented the most harmful and overreaching provisions in the bill during yesterday's markup from being considered. One provision (§313) would allow the U.S. Attorney General to intercede in elections to correct misinformation "by any means" when he or she believes that state and local election officials have not taken "adequate steps" to address the misinformation. Since the Committee was not allowed to markup this provision of H.R. 4617, it will continue to the House Floor unimpeded.

Our federalist system allows the states to be incubators for democracy: individual states can try a particular system or reform to evaluate how it works in practice, allowing other states and the national government to learn from their mistakes and successes before implementing a similar policy. In the Honest Ads Act portion of the SHIELD Act, instead of learning from the experience of the states, Congress is attempting to replicate their mistakes on a national level.

While on the surface, the political record requirements of section 116 may seem like an online version of the political file requirements currently applicable to broadcast advertisements, an expansive political record requirement such as this is unworkable for online advertising platforms due to the massive number of digital ads and has the effect of suppressing speech and the liability imposed upon the website or advertising platform would understandably make them reluctant to accept political ads.

When Maryland and Washington passed similar laws, Google stopped selling political ads related to Maryland and Washington state and local elections, thereby reducing the ability of Americans who wished to speak about those elections to reach an audience with their message. When a group of newspapers led by *The Washington Post* sued to enjoin Maryland's law, the U.S. District Court found that the law failed to meet either strict scrutiny or exacting scrutiny to justify its burdens on important First Amendment rights.

In addition, the Honest Ads Act requirements would not prohibit most of the disruptive activities engaged in by foreign nationals leading up to the 2016 election. Those activities, such as the efforts by the Russian Internet Research Agency, were largely accomplished through free social media posts, not the paid advertisements that would be regulated by the Honest Ads Act, and many did not reference a candidate. Those foreign posts that were paid advertisements that referenced a candidate are already subject to reporting and disclaimer requirements that the foreigners violated.

As Ranking Member Rodney Davis pointed out during yesterday's markup, foreign actors' intent on interfering with our elections did not comply with the existing requirements in 2016, and they would similarly not comply with the requirements of the SHIELD Act if it were passed. Instead, the regulatory burdens would fall on law-abiding American candidates, citizens, and organizations and the liability for foreign advertisements would be placed on American media and advertisement platforms.

Ranking Member Davis also pointed out that by applying the disclaimer requirements applicable to broadcast advertisements to internet advertisements, the SHIELD Act is living in the past and not creating a workable system that can adapt to rapidly changing technological advances.

Indeed, its application to some of the common current forms of digital advertisement would create absurd results. A character-limited, one-line text add would be required to take a substantial portion of its advertising space to include a "Paid for by" disclaimer. To qualify for the safe harbor provision for video advertisements, a five-second YouTube ad would be required to have four seconds of video disclaimer and three seconds of audio disclaimer, leaving the add with only one second to convey its message. Many longer YouTube ads offer the viewer the option to skip the ad after five seconds. Under the SHIELD Act, the three seconds of audio disclaimer and four seconds of video disclaimer would need to be at the beginning of the video so that the viewer saw it prior to skipping the rest of the ad, thereby limiting the ability to convey the speaker's message. Tiny mobile phone ads would be required to have a "Paid for by" disclaimer that was at least as large as the text conveying the speaker's message. As Ranking Member Davis pointed out, the process for the SHIELD Act was rushed so that the Committee

did not take the time to receive testimony from technology companies on what is feasible with the latest online advertisement technology.

Other provisions of the SHIELD Act deserve greater deliberation than the rushed process currently being implemented for the bill. As Rep. Jamie Raskin and Ranking Member Davis discussed during yesterday's markup, the exception for legitimate journalistic activities will be subject to judicial construction and could remove foreign state news agencies—some of which are propaganda arms of unfriendly foreign governments—from being subject to the bill's requirements.

The bill quietly extends the Federal Election Commission's jurisdiction to include genuine lobbying activity by requiring ads concerning any "national legislative issue of public importance" to be part of the public political records for online ads.

The requirement for campaigns to report certain foreign contacts could open a new avenue for foreigners to influence and interfere with our elections, because campaigns would have a reporting obligation for interactions that are outside the campaign's control. Through making unsolicited contacts that would fall under the Act's reporting requirements, a foreign agent could burden a campaign's time, personnel, and compliance resources, could create an appearance of impropriety surrounding a campaign, or could muddy the waters to cover actually nefarious conduct.

These are simply some of the issues with the SHIELD Act in its current form. As Ranking Member Davis noted at the outset of yesterday's markup, the SHIELD Act, and the Honest Ads Act contained in it, is not a serious effort to prevent foreign interference in our elections. It is part of the larger effort to resist President Trump, respond to his alleged activities in 2016, and move toward impeachment proceedings. Instead of impacting President Trump or foreign bad actors, the SHIELD Act would have the greatest effect on Americans engaging in political speech.

Sincerely,

Manuel Iglesias
Chair

David Warrington
President