No. 19-1132

United States Court of Appeals for the Fourth Circuit

THE WASHINGTON POST, *et al.*,
Plaintiffs-Appellees,

v.

DAVID J. MCMANUS, JR., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland (Paul W. Grimm, District Judge)

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF BROADCASTERS AND NCTA – THE INTERNET & TELEVISION ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, amici curiae make the following disclosures regarding their corporate status:

Both the National Association of Broadcasters and NCTA – The Internet & Television Association are nonprofit, nonpartisan corporations organized under Section 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation nor issues stock, and no publicly held corporation has any form of ownership interest in either corporation.

Dated: June 7, 2019

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amicus Curiae National Association of Broadcasters ("NAB") is a non-profit incorporated trade association representing radio and television broadcasters across the United States. NAB advocates for its membership before Congress, the courts, the Federal Communications Commission, and other governmental entities.

Amicus Curiae NCTA – The Internet & Television Association ("NCTA") is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation's cable television customers, as well as more than 200 cable program networks.

In addition to their traditional roles as broadcasters and providers of cable television services, many NAB and NCTA members, both national and local, provide online content and sell online advertising on both their own and third-party websites, and are thus potentially subject to Maryland's Online Electioneering Transparency and Accountability Act ("the Act"). Both NAB and NCTA therefore have substantial interests in this Court's resolution of this appeal. Accordingly, NAB and NCTA urge this Court not only to affirm the district court's preliminary

[1] All parties have consented to the filing of this brief. No party's counsel or other person except amicus and its counsel authored this brief or contributed money to fund its preparation or submission.

injunction, but also to direct the district court on remand to consider the Act's broader application to other online publishers, including their members.

SUMMARY OF ARGUMENT

Because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," election-related speech is "an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Its regulation is thus scrutinized against the background principle that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

The Act abridges the First Amendment rights of online publishers in two distinct ways: by compelling them to speak by publishing and continually updating information dictated by the State about each political advertisement they accept, and by imposing onerous recordkeeping requirements based on the content of the speech they publish. Thus, the Act is subject to strict scrutiny.

Appellants Donald J. McManus *et al.* (collectively "Maryland" or "the State") and its *amici* urge this Court to exempt the Act from strict scrutiny, and instead evaluate its constitutionality with the lesser "exacting scrutiny" applicable to disclosure laws for electoral participants. But the Act is not such a disclosure

law. The exception to strict scrutiny that courts have applied to political-actor disclosure laws does not apply to compulsion of third-party speech, and the Act's requirements do not serve the governmental interests that courts have found to justify this lesser scrutiny.

As the district court correctly found, the Act cannot survive strict scrutiny. Maryland must demonstrate that the Act is "narrowly tailored to promote" its interest and that no "less restrictive alternative would serve the Government's purpose." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). The State cannot meet that burden with regard to the Act's conscription of online media, not least because the State itself could collect and publish the same information without burdening the speech of online platforms.

The district court also correctly found that even accepting, *arguendo*, Maryland's plea for a lesser level of "exacting" scrutiny, the Act still violates the First Amendment. The Act is not narrowly tailored to serve Maryland's interest in interference with *state* elections by foreign powers, a speculative harm that has never been known to occur in Maryland. The Act is both underinclusive and overinclusive, and is ill-fitted to combat foreign manipulation of elections, as it fails to address the primary means by which such manipulation has occurred and is easily evaded. Because the Act does not significantly advance the government's claimed interest in preventing foreign interference in Maryland elections, the State

cannot justify the Act's substantial abridgements of the First Amendment rights of online platforms.

The Act also cannot be defended as substantially related to any state interest in promoting an informed electorate. If anything, the Act will produce the opposite effect because online media may stop accepting political advertising in Maryland to avoid the onerous burdens of (and uncertainty associated with) compliance, as members of NAB and NCTA have already done. Because the same First Amendment analysis applies to all online platforms, the Court should direct the district court on remand to consider broadening the scope of any permanent relief to cover other online platforms, including those of NAB and NCTA members.

ARGUMENT

I. THE ACT'S REQUIREMENT THAT ONLINE PLATFORMS COLLECT AND PUBLISH INFORMATION IS COMPULSORY SPEECH SUBJECT TO STRICT SCRUTINY.

It is well-established that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Our free speech regime "mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790-91 (1988). Indeed, the Supreme Court recently reiterated that "measures compelling

speech are at least as threatening" as those proscribing it. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

The Act goes well beyond disclosure laws heretofore adjudicated in the electioneering context under a more restrained "exacting scrutiny" standard. As the district court explained, those laws all mandated disclosures by the electoral actors themselves—candidates, referendum petitioners, political committees, donors, or independent advocates of a candidate's election—about their own identities, control, electioneering activities, or sources of financial support. *See* JA442-45. That lower standard of review reflects that the government may obligate those who participate in electioneering activity to be transparent about such matters so long as the disclosures serve important government interests. Here, the Act does not regulate the political actor or serve the identified interests that warrant lesser scrutiny; instead, Maryland compels third-party online platforms to collect and disseminate to the public information about *every paid online campaign advertisement* merely because the State theorizes that access to such information would somehow benefit the public. The State's interest in augmenting public access to information does not entitle it to abridge the rights of independent media. A state may not treat NAB and NCTA members' "private property as a [] billboard" for spreading the information it considers important. *Wooley*, 430 U.S. at 715.

A. No Exception Justifies Departure from the Rule That Content-Based Regulation and Compulsion of Speech Warrant Strict Scrutiny.

The Act's requirements compelling online media to collect and publish political advertising information trigger strict scrutiny. First, the Act's applicability turns on the content of the speech. 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." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (holding that an "anti-robocall statute [that] applies to calls with a consumer or political message but does not reach calls made for any other purpose" "makes content distinctions on its face" and is subject to strict scrutiny even if viewpoint-neutral). As the district court properly held, the Act is content-based: it "singles out campaign-related content for regulation—as patent a case of content discrimination as there could be." JA425.

Second, compelling online publishers to speak words mandated by the State likewise subjects the Act to strict scrutiny. The Supreme Court has consistently held that a "[g]overnment-enforced right of access" compelling particular speech by publishers "operates as a command in the same sense as a statute or regulation forbidding [publication of] specified matter" and cannot be reconciled with the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57

(1974); s*ee also Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 193 (4th Cir. 2013) (en banc) (applying strict scrutiny to compelled speech). As the district court held, the Act "compels online publishers to retain records, make information available upon request, and publish content on their websites." JA425.

Contrary to Maryland's claim, the Act is not within the *Buckley* exception to strict scrutiny. That exception extends only to disclosure requirements imposed upon electoral actors attempting to influence the electoral process; it does not justify giving less rigorous scrutiny to abridgements of the rights of third-party online publishers. Furthermore, the Act does not serve any of the governmental interests that the *Buckley* Court identified as sufficiently important to justify the exception. The Court held that disclosure laws (1) identify the source and disposition of campaign funds "in order to aid the voters in evaluating those who seek federal office," including "alert[ing] the voter to the interests to which a candidate is most likely to be responsive"; (2) deter actual corruption and avoid the appearance of corruption "by exposing large contributions and expenditures to the light of publicity"; and (3) enable governmental enforcement of other legal restrictions. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 202-203 (1999) ("*ACLF*"). Disclosures may also be required for independent expenditures to provide "the maximum deterrence to corruption and undue influence possible" by eliminating end-runs around

contribution limits, *Buckley*, 424 U.S. at 76; *McConnell v. FEC*, 540 U.S. 93, 196 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010), and may be required in the advertisement itself to allow the citizen to evaluate the arguments and to "mak[e] clear that the ads are not funded by a candidate or political party." *Citizens United*, 558 U.S. at 368. Because such disclosures are critical to informed voting or to the government's interest in ensuring fair elections, and generally impose minimal burdens on the actor, the Court applies the more forgiving form of review denominated "exacting scrutiny." *Id.* at 366-67.

The disclosures mandated by the Act, which relate to individual ads on individual online platforms, do not serve any of the aforementioned governmental interests. They do not aid voters in evaluating candidates for Maryland office; deter actual corruption or the appearance thereof by exposing large supporters to whom a candidate may be beholden; or aid in the enforcement of other electoral laws like contribution limits. *See Buckley*, 424 U.S. at 66-67. Instead, those interests are already served by separate Maryland laws requiring individual political advertisers to register with the State Election Board if they expend over $5,000 in an election cycle, and file detailed reports disclosing each campaign advertising expenditure if they spend over $10,000 per cycle. *See* Md. Code Ann., Elec. Law ("Elec. Law") §§ 13-306(c)-(e), 13-307(c)-(e), (m).

Nor does the Act contemporaneously inform the viewer of the speaker's identity. *See Citizens United*, 558 U.S. at 368. That is the office of separate Maryland laws requiring campaign material to disclose the person responsible for the speech. *See* Elec. Law § 3-401(a)(1)(i)–(ii); *id.* § 13-404 (requiring "authority line" on "campaign material"). The Act instead requires online platforms to post on their private websites largely duplicative information about the source of (and amount paid for) the ad within 48 hours after purchase, with no requirement to link it to the particular ad. Elec. Law §§ 13-405(b)(3). Because the Act goes far beyond merely requiring disclosures by participants in the electoral process, and does not serve the specific governmental interests the Supreme Court held could justify lesser scrutiny, the district court properly applied strict scrutiny to the content-based provisions of the Act that compel speech by third-party online platforms.

Maryland and its *amici* wrongly invoke the Supreme Court's approval of certain recordkeeping and disclosure requirements imposed on broadcasters in *McConnell*. State Br. 34; *see also id.* at 35 n.18 (discussing disclosure requirements imposed on cable system operators). But these requirements apply only to NAB members in their traditional roles as broadcasters, and the *McConnell* Court upheld the constitutionality of those requirements because they paralleled longstanding recordkeeping and disclosure requirements imposed by the Federal

Communications Commission on licensees of the public airwaves. *See McConnell*, 540 U.S. at 237 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380, 386-400 (1969)).[2] *McConnell* has no bearing on whether strict scrutiny should apply to content-based abridgements of the First Amendment rights of NAB or NCTA members when they act as online publishers on the Internet.[3] Indeed, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court held that the cases upholding "extensive Government regulation of the broadcast medium" "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 868-70; *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.").

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[2] NAB disagrees with *Red Lion* and its diminution of broadcasters' First Amendment rights, but *Red Lion*'s viability is not at issue in this case. NCTA similarly does not concede that its members' First Amendment rights may be abridged even when they are acting in their traditional roles as cable system operators and programmers.

[3] A party's status as a regulated entity in one context does not affect regulatory treatment outside of that context or weaken constitutional protections for entities in their capacity as online publishers. *Cf. Kan. City S. Ry. Co. v. United States*, 282 U.S. 760, 764 (1931) (holding that Interstate Commerce Act did not reach "activities which lie outside the performance of [entities'] duties as common carriers).

B. Forcing Private Online Platforms To Collect and Publish Information on Electoral Advertising Is Not the Least Restrictive Means of Accomplishing the State's Purpose.

Maryland did not contend below, at least for purposes of the preliminary injunction motion, that the Act satisfies strict scrutiny, and for good reason. Strict scrutiny requires Maryland to demonstrate that the Act is "narrowly tailored to promote" its interest and that no "less restrictive alternative would serve the Government's purpose." *Playboy Entm't Grp.*, 529 U.S. at 813. As this Court has advised, "scrutiny of means [] helps identify the point on the spectrum where valid disclosures slip silently into the realm of impermissible compelled speech." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 112 (4th Cir. 2018), *cert. denied*, 138 S. Ct. 2710 (2018). When the Supreme Court rejected a requirement that crisis pregnancy centers post notices about alternative family-planning services, it noted that the State "could inform the women itself with a public-information campaign" instead of "co-opt[ing] the licensed facilities to deliver its message for it." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018); *see also Greater Baltimore Ctr.*, 879 F.3d at 112 (invalidating compelled disclosure where state could "inform[] citizens . . . through a public advertising campaign").

Thus, in addition to the reasons why the Act is unconstitutional even under intermediate "exacting scrutiny," *infra* at 13-25, there is an indisputable reason

why the Act fails strict scrutiny: namely, that the Act does not choose the least restrictive means of accomplishing its goals. The State could always collect, maintain, and publish the information supplied by advertisers rather than compel online publishers to do its work and bear its costs. It is no answer that the State *currently* does not collect and publish that information, *see* State Br. 44-45; it is enough that it could do so.

The Act would force NAB and NCTA members "to alter the[ir] expressive content" to fulfill the State's purposes, and strict scrutiny for such an imposition "applies . . . equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995); *see also Stuart v. Camnitz*, 774 F.3d 238, 246, 253 (4th Cir. 2014) (state's attempt to "commandeer" private communication "is quintessential compelled speech" even when "the words . . . are factual"). Like Plaintiffs below, NAB and NCTA members "would rather avoid" the Act's compelled disclosures. The Act unconstitutionally "forces [them] to alter their speech to conform with an agenda they do not set." *Pac. Gas & Elec. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986).

II. EVEN UNDER "EXACTING SCRUTINY," THE ACT VIOLATES THE FIRST AMENDMENT

The district court's alternative finding that the Act would not survive "exacting scrutiny" is likewise sound. Exacting scrutiny is a "lesser but still

meaningful standard," *Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014), that demands more than "a mere showing of some legitimate governmental interest," *Buckley*, 424 U.S. at 64. It instead "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (quotation marks omitted).

Just as under strict scrutiny, courts applying intermediate scrutiny "must assess the fit between the stated governmental objective and the means selected to achieve that objective" and evaluate whether there is "unnecessary abridgement of First Amendment rights." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014) (scrutiny of limits on campaign contributions) (internal citations and quotation marks omitted). Thus, a court giving exacting scrutiny to a disclosure regulation must ensure that it "employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (internal quotation marks and ellipsis omitted); JA450-51. Narrow tailoring under intermediate scrutiny requires a showing that the law "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Ross v. Early*, 746 F.3d 546, 552-53 (4th Cir. 2014) (citations omitted). The Government must submit evidentiary proof of narrow tailoring. *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015) ("intermediate scrutiny does indeed require the government to

present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden").

When there is "substantial mismatch between the Government's stated objective and the means selected to achieve it," courts "need not parse the differences between" strict and more relaxed forms of scrutiny. *McCutcheon*, 572 U.S. at 199. Here that mismatch is palpable. For at least four reasons, the Act fails to achieve a substantial fit between its means and its ends.

A. The Act Is Not Narrowly Tailored to Address Foreign Interference in State Elections.

The Act responds chiefly to Russia's deployment of digital political communications during the 2016 Presidential election. *See* JA17-19 (detailing legislative history). But Maryland has no interest in regulating federal elections. Federal law "supersedes State law concerning . . . expenditures regarding Federal candidates," 11 C.F.R. § 108.7(b), and Maryland election law "does not apply to [] campaign activity . . . governed solely by federal law," Elec. Law § 13-101(b). Maryland trumpets that it was among the states targeted by Russia, State Br. 6, but there is zero evidence that Russia ever sought to interfere with a Maryland election (or even would have any interest in doing so). JA145-46 (noting that the identified online posts targeted at Maryland "largely concerned topics such as inflaming opinions, both for and against, the Black Lives Matter movement, in order to stoke

racial tensions," not state or local electoral campaigns); JA118. Even assuming *arguendo* that Maryland has a general prophylactic interest in preventing foreign interference with state elections, the Act is both underinclusive and overinclusive.

The Act is underinclusive because it reaches exceedingly few, and likely none, of the communications it was the Legislature's stated purpose to target. Russian interference during the 2016 election mainly involved (1) unpaid postings spread voluntarily, and (2) postings about broadly divisive issues like race, immigration and gun ownership. *See* JA449-50, 454-455; JA144-47. The few paid posts were generally not related to electoral campaigns, and often involved specific "sponsored" messages using the functionality of platforms like Facebook, principally to gather followers. JA146-47. In contrast, the Act only covers "qualifying paid digital communications," which are limited to "campaign material," Elec. Law § 1-101(*ll*-1), and do not appear to have been part of Russia's arsenal.

For the State to burden speech there must be, minimally, a "causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). The Act "neglect[s] to regulate the primary tools that foreign operatives exploited to pernicious effect in the 2016 election." JA446. The State questions whether it has the power to regulate unpaid Internet posts, State Br. 47-48, but that does not free it to impose ineffectual speech

restrictions that are not "narrowly tailored to achieve the desired objective." *Wis. Right To Life*, 751 F.3d at 840-41; *see Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 802 (2011) (that a "regulation is wildly underinclusive when judged against its asserted justification . . . is alone enough to defeat it").[4]

The Act is underinclusive in another respect. The Act does not impose its per-ad disclosure requirements upon other businesses, like print media, that accept campaign advertising. *See Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 285 (4th Cir. 2013) ("*CFIF*") (invalidating disclosure law statute because it "regulate[d] periodicals to the exclusion of other non-broadcast media"). Maryland musters no evidence that Russian operatives ever used any paid digital communication that qualifies for regulation under the Act, and thus cannot justify the discriminatory burdening of the First Amendment rights of online press vis-à-vis other paid advertising businesses.

Even apart from these mismatches, the Act's collection-and-publication requirements are likely to be ineffectual against any foreign meddling. The online

[4] As this Court held recently in an analogous context, the State cannot claim to advance a compelling interest through a law so full of gaps that it fails to address the problem at hand. *See Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, at 169 (4th Cir. 2019) (invalidating under strict scrutiny a Telephone Consumer Protection Act exemption permitting robocalls for debt collection that "actually authorizes a broad swath of intrusive calls . . . [and] therefore erodes the privacy protections that the automated call ban was intended to further").

platform's obligations are only triggered when the advertiser gives notice that it has placed a qualifying paid digital communication, Elec. Law § 13-405(a)(1), and the State maintains that the online platform can rely in good faith entirely on advertiser-provided information, *see id.* § 13-405(d)(1) and (d)(2); State Br. 51 ("*all* the information that online platforms must either disclose or retain is required to be provided by the purchaser placing the ad."). Common sense dictates that foreign operatives will simply withhold notice "as any self-respecting foreign operative surely would." JA455. Or the operative would provide false information. *Id.*; JA147 (noting Russian reliance on false identities). "In either case, the state is no closer to achieving its aim of rooting out foreign attempts to interfere in its elections." JA455. The well-established rationale that "disclosure requirements deter [] corruption . . . by exposing . . . expenditures to the light of publicity," *Buckley*, 424 U.S. at 67, loses its force when the ultimate actors are foreign agents likely to engage in deception or evasion. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352-353 (1995) (striking down prohibition in part because of the law's inability to reach "wrongdoers who might use false names and addresses in an attempt to avoid detection"); *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (disclosure law that could "not establish whether signatures . . . are forged" was not tailored to anti-fraud interest).

While the Act is underinclusive in these ways, it is overinclusive in its application to myriad online media that were not targeted by foreign operatives and have none of the characteristics that such operatives exploited. As the district court pointed out, "the Act imposes its obligations on any and all 'online platforms," Elec. Law § 1-101(dd-1), a term "broad enough to ensnare not only Facebook, Instagram, and other social media giants that foreign operators are known to have exploited, but many news sites as well, including smaller regional sites." JA449. But "the State has not been able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time." *Id.* The State has thus failed to carry its burden of proving narrow tailoring with evidence, and it cannot justify its blanket regulation of all online platforms (including the sites of newspapers, broadcasters, and cable operators and programmers) when foreign operators principally manipulated national social media platforms. *Reynolds*, 779 F.3d at 231 (where a leafletting problem was limited to "roadway solicitation at busy intersections in the west end of the county, … the county-wide sweep of the Amended Ordinance burdens more speech than necessary").

Maryland's only evidence linking Plaintiffs to Russian interference is circuitous and circumstantial at best: some sold advertising space via Google's DoubleClick ad network, which also distributed Russian-bought communications.

See State Br. 6-7; JA297. Not only is there no evidence that qualifying paid digital communications were placed through the DoubleClick network, but this further cuts against a "substantial relation" between the Act's means and ends; the Act's limited disclosure requirements concerning ad networks would not address these claimed incidents of interference. *See* Elec. Law § 13-405(b)(6)(iii) (online platforms selling space through ad networks must post only "the contact information for the ad network" or "a hyperlink to the ad network's website where the contact information is located").

B. The Act's Requirements Are Not Substantially Related to Any Interests in Improving Voter Choices or Preventing Actual or Apparent Corruption in Elections.

The State's brief spends many pages attempting to align the Act with interests that the courts have found to justify electoral disclosure requirements. State Br. 39-46. This attempt is unavailing.

The Act bears no substantial relationship to any such interest. The Act requires publication of the identity and related information of the purchaser on a *per-ad per-platform basis*. *See* Elec. Law § 13-405(b)(6). That ad-and-platform-specific disclosure does not reveal the spender's total efforts to influence an election or support a candidate, and thus does not substantially advance any governmental interest in informed choices about candidates or preventing corruption (or the appearance thereof). *Supra* at 8-9. Although the State contends

that voters need to know who is behind a political advertisement, Maryland law already requires that disclosure in the ad itself. *Supra* at 9-10. Requiring an online platform to publish the state-mandated information on its website for at least a year after the general election (even when the ad is no longer run), Elec. Law § 13-405(b)(3)(ii), is not narrowly tailored to serve that interest.

The State also theorizes that disclosing identities of all paid online advertisers (and not just those with over $10,000 in expenditures) might assist the State in identifying illegal foreign spending and evasions of coordinated-expenditure laws. State Br. 42-43. But that justification, if credited, would apply across all advertising media; absent any evidence that paid online campaign advertising is any more likely to involve foreign or coordinated expenditures than other forms of paid campaign advertising, the Act is not narrowly tailored. *See Reynolds*, 779 F.3d at 231; *CFIF*, 706 F.3d at 285.

C. Requiring Online Publishers To Collect and Publish The Mandated Information Burdens More Speech Than Necessary.

Under intermediate scrutiny, a law is not narrowly tailored if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ross*, 746 F.3d at 552-53. Even if the state-mandated information substantially related to sufficiently important governmental interests, the Act burdens more speech than necessary by conscripting the online press to collect and

publish it. The State can collect and publish the information itself without compelling speech by the online publisher.

The State and its *amici* claim that campaign laws must be modernized to account for the growing use of online advertising. State Br. 7-8, 41; Campaign Legal Center Br. 21-24. If so, why should the onus of modernization fall on private online publishers?

The State asserts that the Act enhances public access "at the point of publication" as opposed to requiring the viewer to navigate to another website. State Br. 43-46. But as applied to ad networks—the only purchasers of Russian-origin online communications Maryland even attempted to link to Plaintiffs—the Act does no such thing. It instead requires online publishers to provide a link to the ad network's website, to which a viewer must navigate with no provision ensuring that the proper records will even be kept there. An ad network may not have any direct relationship with political advertisers and therefore have difficulty obtaining the required information.

Moreover, even as to individuals and political action committees, the Act does not ensure access at the point of publication. The Act requires an online platform to post the relevant information "within 48 hours" at a "clearly identifiable location on [its] website." Elec. Law § 13-405(b)(3). A viewer of a

suspicious ad might not get that information until days later, if she chooses to revisit the website (assuming she remembers where she saw the ad).

There is no logical reason citizens would be more effectively informed by online platforms than by a state-run database. Congress employs the latter strategy, directing the FEC to "maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information." 52 U.S.C. § 30112(a); *see also Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 758 (1996) ("[W]e can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential'"). It is also the strategy employed by many states, including Maryland.[5] Maryland protests that the Act requires things that the State Board of Election's website currently *does not* do—but the relevant question (never answered by the State) is why the Board *could not* perform equivalent functions. The State thus has not shown that the public could not be "sufficiently served by measures less destructive of First Amendment interests." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444

[5] *See, e.g.*, Ark. Code Ann. § 7-6-214; Del. Code Ann. tit. 15, § 8032; 10 Ill. Comp. Stat. Ann. 5/9-15(5)-(7); Mo. Ann. Stat. § 130.042; N.M. Stat. Ann. § 1-19-27; Ohio Rev. Code Ann. § 3517.11(B)(3)(b); Ohio Rev. Code Ann. § 3517.1011(D)(3); Or. Rev. Stat. Ann. § 260.255(2); S.C. Code Ann. § 8-13-320(4)-(6).

U.S. 620, 636 (1980); *see also Alvarez*, 567 U.S. at 726 ("The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.").

At the end of the day, Maryland decided that it would be more efficient (*i.e.*, less costly for the State) to conscript online platforms as its data-processors and publishers and as a known contact point for any investigations. Even if there were any evidence as to how enlisting online publishers would help combat foreign disruption or root out corruption, and there is none, the Constitution "does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795; *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Because the State could attain essentially the same result by collecting and publishing the information itself, without burdening the speech rights of private online platforms, the Act does not survive exacting scrutiny.

D. Imposing Vague and Costly Recordkeeping and Publication Requirements on Online Media Will Reduce Political Speech.

In conducting exacting scrutiny, this Court must also assess the negative effects of the Act on speech. See *ACLF*, 525 U.S. at 192 (rejecting compelled disclosure that "discourage[d] participation" in elections); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873-874 (8th Cir. 2012) (en banc) (invalidating election disclosure law under exacting scrutiny where "chill is more than a theoretical concern"); *(WIN)*, 213 F.3d at 1137 (striking down under

exacting scrutiny a disclosure requirement that "discouraged would-be petition circulators from engaging in that activity"). Here, both the vagueness of, and the costs of complying with, the Act (*see, e.g.*, JA41-42, JA46-47, JA51-53, JA57-59, 64-69) will discourage political speech, proving that the Act unduly burdens more speech than is necessary.

A speech restriction is unconstitutionally vague where it "force[s] individuals to guess at its contours." *In re Murphy-Brown, LLC*, 907 F.3d 788, 800 (4th Cir. 2018) (citation and quotation marks omitted). Under the Act, qualifying paid digital communications encompass paid online advertising that is "campaign material," defined as anything that "relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question." Elec. Law § 1-101(k)(1), (ll-1). Such communications are clearly not limited to "electioneering communications," a term which covers the subset of qualifying paid digital communications that are independent of any campaign, "refer[] to a clearly identified candidate or ballot issue," are made within 60 days of the relevant election day, and are "capable of being received by" 5,000 or more people within the constituency. Elec. Law § 13-307(a). It is unclear what genus of communication "relates to" a candidate or question so as to make it a qualifying paid digitial communication, or when someone becomes a "prospective candidate" or something becomes a "prospective question." If one places an advertisement

about gun control or drug decriminalization on a national broadcaster's or cable operator's or network's website, must one check to see whether any upcoming Maryland referenda involve those issues?

The Act thus leaves online platforms and their paid advertisers across the country guessing at which communications are covered and puzzling over how to comply. When faced with such vague or overbroad laws participants may "choose simply to abstain from protected speech ... harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see also Miami Herald*, 418 U.S. at 257 (editors "might well conclude that the safe course is to avoid controversy" leaving "political and electoral coverage . . . blunted or reduced"); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 280-84 (4th Cir. 2008) (holding campaign-finance regulations unconstitutionally vague and chilling of political speech).

Indeed, this chilling of speech is already occurring. Certain NAB and NCTA members report that the regulatory complexity and uncertainty created by the Act has forced them to suspend all of their qualifying online political advertising sales in Maryland. Other NAB members, especially small broadcast stations with online platforms, face a similar calculus. NCTA members also report that some of their ad network partners will cease accepting online political

advertising. This Court should not uphold a law more likely to diminish the free flow of ideas in elections than to enhance it.

III. THE COURT SHOULD DIRECT THE DISTRICT COURT TO CONSIDER BROADENING ITS INJUNCTION.

As the foregoing makes clear, the Act impermissibly burdens the speech of not just the Plaintiffs, but all private online platforms subject to these content-based requirements and compelled to publish government-mandated information. The constitutional analysis here is independent of Plaintiffs' status as members of the traditional institutional press or the status of NAB and NCTA members as regulated entities. See *supra* at 10-11. All are before this Court in their distinct capacities as online publishers and all will suffer the same constitutional harm from the Act.

In the digital advertising marketplace, NAB's and NCTA's members compete with Plaintiffs and other online platforms for revenue, including revenue from political advertising. As evidenced in disclosures filed with the Federal Election Commission for recent campaigns, there are numerous expenditures by candidates, political parties, and political action committees on a wide variety of digital advertising published by Plaintiffs, NAB, and NCTA members, as well as other online publishers. *See* 2016 FEC Political Spending Records, *available at* http://www.fec.gov.

The relevant question, therefore, is whether Maryland can lawfully compel *any* of these third-party online platforms to publish the required information on their private websites. As discussed above, the answer under well-established First Amendment principles is *no*. These principles apply with particular force on the Internet, which the Supreme Court has compared to a public square while urging "extreme caution" with regard to any government regulation of online speech. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.").

While the district court confined its preliminary injunction to Plaintiffs on an "as applied" basis, its analysis of the Act's fundamental First Amendment flaws applies to all covered third-party online publishers. Thus, when addressing the merits of the case, the district court on remand will be unable to resolve it "on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Citizens United*, 558 U.S. at 329-31 (further stating that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge"); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) ("[C]lassifying a lawsuit as facial or as-applied . . . does not speak at all to the substantive rule of law

necessary to establish a constitutional violation."); *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs.").

This Court may recognize the general applicability of these First Amendment principles in upholding the preliminary injunction, and should instruct the district court to consider these broader First Amendment implications as it proceeds to the merits of the case. As in *Citizens United*, "[i]t is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications," and "[o]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases." 558 U.S. at 329, 331 (internal quotation marks omitted). If the district court rules for Plaintiffs and enjoins the Act permanently, such relief should extend to other third-party online publishers, including NAB and NCTA members, under the same controlling legal principles.

CONCLUSION

This Court should affirm the district court's grant of the preliminary injunction and direct the district court on remand to consider the broader application of the Act to other third-party online publishers, including NAB and NCTA members.

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CERTIFICATE OF SERVICE

I, Stephen Kinnaird, hereby certify that on June 7, 2019, the foregoing brief was filed using the Court's CM/ECF system and a copy served on the parties' counsel of record via ECF.

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