No. 19-1132

IN THE
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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, NO. 1:18-CV-2527-PWG,
THE HONORABLE PAUL W. GRIMM, PRESIDING

BRIEF OF *AMICI CURIAE* NEWS MEDIA ALLIANCE AND 16 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION

The District Court correctly held that Maryland's Online Electioneering Transparency and Accountability Act, Md. Code, Elec. Law §§ 13-405, 13-405.1 and 13-405.2 (the "Act") violates traditional First Amendment principles and enjoined its enforcement. *Washington Post v. McManus*, 355 F. Supp. 3d 272, 305-06 (D. Md. 2019) ("Order") (J.A. 409-60). It found that Plaintiffs were likely to succeed on the merits of their First Amendment claim because the Act is a content-based regulation of speech subject to strict scrutiny, and it rejected the State's argument that the Court should apply lesser scrutiny because the Act involves disclosure requirements. J.A. 432-34, 442-43. The Court concluded the Act could not even satisfy intermediate scrutiny, as it is both over-inclusive and under-inclusive. J.A. 450-57.

In its effort to save the law, Maryland argues that online platforms should be regulated under more relaxed constitutional scrutiny, borrowing standards from cases involving broadcast and cable television regulation and from decisions on campaign finance and disclosure requirements imposed on political actors. Brief of Appellants at 25-34 ("App. Br."). In short, the State seeks to justify the Act by relying on First Amendment exceptions, not established rules for online news sites. This approach is profoundly misguided. It asks this Court to uphold the Act by

degrading constitutional protections for both the Internet as a medium of communication and for news organizations that operate online.

There is no support for the State's position. More than two decades ago the Supreme Court rejected an effort to regulate Internet platforms based on the constitutional standards historically applied to broadcasters, observing "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). More recently, the Court urged "extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017). Likewise, there is no basis for regulating news websites under standards that have been applied to finance and disclosure rules governing campaign participants. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). The Maryland law will not serve its asserted interests and will only undermine online news platforms. The District Court decision should be affirmed.

INTEREST OF *AMICI CURIAE*[1]

Amici News Media Alliance ("NMA") and 16 of the nation's leading news media companies and press advocacy groups either provide—or advocate on behalf of those who provide—news and information to the American public through various media, including online platforms.[2] *Amici* strive to maintain robust protections for the press under the First Amendment and seek to promote the economic conditions necessary to sustain a vibrant news industry.

This case concerns *amici* because Maryland is defending the Act's constitutionality by attempting to undermine established interpretations of the First Amendment applicable to the news media and to the Internet. *Amici* also are concerned because the Act would impose significant financial and structural burdens on the ability of media companies to accept online political advertisements. This is particularly concerning as the news industry is adapting to technological changes that have transformed historic methods of news delivery–both by embracing the opportunities created by these new platforms but also by struggling to monetize valuable content in an ecosystem that does not necessarily reward quality.

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

[2] A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

The health of news industry increasingly depends on the ability to build financially sustainable online platforms, and local and regional newspapers will likely be especially hard hit if forced to choose between forgoing accepting online political advertisements or taking on the financial burdens of compliance. *Amici* also are concerned because other states (including California and Washington State) have adopted similar laws and the federal government currently is considering such legislation. Accordingly, *amici* urge this Court to affirm the holding below.

BACKGROUND

A. Internet and the News Media

A generation ago, the Internet burst onto the scene as a unique and wholly new global medium of communication that gave individuals access to information as "diverse as human thought," on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." *Reno*, 521 U.S. at 849-52 (citation omitted). The first courts to consider the implications of this new medium quickly realized the Internet is "the most participatory form of mass speech yet developed," that makes possible for the first time in history "a never-ending worldwide conversation." *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzel, J.), *aff'd*, 521 U.S. 844 (1997). This global medium presented both challenges and opportunities for established news media, and has also raised issues affecting political campaigns.

While Americans once consumed the majority of their news via physical newspapers, radio, and eventually television, more and more Americans are now turning to the Internet as their primary source of news—whether browsing media outlets' websites on their laptops and tablets, receiving news notifications on their smartphones, or streaming news podcasts on their smart speakers. *See* Newspapers Fact Sheet, Pew Research Center: Journalism & Media, June 13, 2018 (https://www.journalism.org/fact-sheet/newspapers/) ("*Newspapers Fact Sheet*"). This explosion of communications technology has created great opportunities to reach more consumers in new and innovative ways, but this seismic shift in consumption patterns also has upended established business models for ad-supported media. News organizations have had to adapt by shifting their resources away from the more traditional forms of news dissemination and towards expanding their online platforms and search engine optimization through distribution platforms.[3] The very survival of media companies depends on their ability to successfully make this transition.

[3] In 2017 alone, the total U.S. daily newspaper print circulation dropped from the previous year—with an 11 percent decrease for weekday print circulation and a 10 percent decrease for Sunday circulation. At the same time, weekday digital newspaper circulation increased by 10 percent in 2017. The audience for newspapers' digital publications rose dramatically over the past few years, with an 18 percent rise from 2014 to 2015 and a 21 percent rise from 2015 to 2016. *Newspapers Fact Sheet*, *supra*.

B. Background of the Litigation

The Internet also has presented challenges to the electoral process, and after foreign interference in the U.S. political system came to light following the 2016 election, the Maryland legislature took action. It passed the Online Electioneering Transparency and Accountability Act in 2018 to combat foreign interference in elections in the State of Maryland. *See* Compl. ¶¶ 35-45. Although much of the concern about foreign influence arose from speech appearing on social media platforms, *id.* ¶¶ 36-37, the Act imposes recordkeeping and disclosure requirements broadly on any "online platform" that publishes political advertisements.[4]

Eight newspaper publishers and one press association challenged the Act as a violation of the First Amendment and sought a preliminary injunction. The District Court held that the plaintiffs were likely to succeed on the merits of their First Amendment claim and granted injunctive relief. J.A. 456-57. The State of Maryland appealed. J.A. 461-62.

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[4] The Act requires that, within 48 hours of publication, online platforms that have 100,000 or more monthly visitors disclose the purchaser's identity and amount paid for the ad. The platform must also compile specified records (subject to inspection) that include (1) the subject of the ad (candidate or ballot issue), (2) dates and times the ad was first disseminated and last disseminated, (3) geographic locations where the ad was disseminated, (4) description of the audience reached or targeted by the ad, and (5) the number of impressions generated. The law is backed by criminal penalties. *See* Md. Code, Elec. Law §§ 13-405, 13-405.1, and 13-405.2.

SUMMARY OF ARGUMENT

The District Court correctly held that Plaintiffs are likely to succeed in challenging the Act as a violation of the First Amendment and properly granted a preliminary injunction. The State primarily defends the law not on its merits, but by seeking to diminish constitutional protections for the Internet and for online news platforms. There is no basis for this, and Maryland has made no showing to support regulating the Internet under First Amendment standards that apply to broadcasting or cable television, or for imposing recordkeeping and disclosure requirements on news websites who are not direct participants in political campaigns. Nor may the government impose regulation in a bid to gather information in the hope it may justify the law.

The Act is a content-based regulation of political speech and is properly subject to strict scrutiny. The District Court correctly found that the State had failed to establish that the law actually serves a compelling state interest or that it is the least restrictive means of doing so. Cases on campaign finance regulation that have upheld disclosure requirements under "exacting scrutiny" have never been enforced against neutral third-parties as opposed to campaign participants. And the State makes no showing that would support conscripting news websites to further its regulatory goals. Its attempt to do so would undermine the viability of online news, and the District Court properly took this impact into account in its constitutional

analysis. The District Court correctly applied strict scrutiny, but the Act would fail First Amendment review even under less rigorous review. As the District Court found, it is poorly tailored to address the State's interest in electoral integrity, as it is both over- and under-inclusive.

ARGUMENT

I. MARYLAND IS DEFENDING THE ACT BY SEEKING ILLEGITIMATELY TO RATCHET DOWN FIRST AMENDMENT PROTECTIONS

The State is seeking to defend a defective law by weakening the First Amendment. The District Court found that "the primary weapons in the Russian disinformation campaign were *unpaid* social media posts, rather than paid advertisements," and, for that reason, the Act fails "to remedy the harms that inspired its enactment." J.A. 412-15, 454-55. The State frankly acknowledges the Act does not address what is widely understood to be the principal problem—unpaid use of social media—but claims that paid advertisements were also used (although it has no idea to what extent). It chose to regulate advertising because it understood that legislation aimed at curbing social media would face almost insurmountable constitutional hurdles. App. Br. 46-47.[5] So the Act targets advertising not because

[5] Maryland admits "it is not clear that regulating the content of unpaid, anonymous posts on social networks (or perhaps newspaper article comment forums) was even available to the State." App. Br. 47-48 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354-55 (1995)). *See also id.* at 56 ("[T]here are

the State believes doing so would actually solve the problem, but because it thinks it can achieve a lower level of First Amendment scrutiny. This is illegitimate, and it is not how the First Amendment works.

A. The State Cannot Justify Speech Regulation Retroactively

The First Amendment does not permit the government to regulate first and justify its actions later. The government cannot restrict speech without knowing the magnitude of the problem it is seeking to address with the hope that–by regulating–it can discover the extent of its interest. Yet that is precisely what Maryland has done here. The State agrees that efforts to subvert American politics were conducted on social media sites including Facebook, Twitter, and Google but admits it is unknown "the extent to which that activity affected other platforms–including those of plaintiffs." App. Br. 47. *See also id*. at 6 ("[T]he extent of this activity on other sites that host political advertisements may never be known"). Finding out the scope of the problem was, in the State's words, "in large measure … *the very point* of the legislation," and it asserts it must be "free to address misconduct that it knew was taking place, even if it did not (and could not) understand the full extent of the misconduct." *Id*. (emphasis added).

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constitutional questions as to whether the State can regulate the unpaid speech of anonymous commenters on the Internet.").

Maryland's belief that administration of the Act will produce evidence to justify its existence is dubious at best,[6] and it gets First Amendment doctrine exactly backwards. It is hornbook law that, regardless of the level of scrutiny, the government bears the burden of proving the constitutionality of its actions when it seeks to regulate speech. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-17 (2000). A governmental body seeking to sustain a speech regulation "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield* v. *Fane*, 507 U. S. 761, 770-71 (1993). The First Amendment bars the government from imposing speech restrictions and then "simply go[ing] fishing for a justification by imposing obligations on the party seeking to defend its First Amendment rights." *IMDB.com, Inc. v. Becerra*, 257 F. Supp. 3d 1099, 1102 (N.D. Cal. 2017).

[6] One gaping problem with the Act is that it depends on foreign entities who seek to interfere in U.S. elections to self-report their activities and allows platforms to "'rely in good faith on the information provided by a purchaser of [an online ad] to comply with' those obligations." App. Br. at 10 (quoting Elec. Law § 13-405(d)(2)). The District Court was rightly skeptical. (J.A. 455) ("A buyer who wishes to avoid detection–as any self-respecting foreign operative surely would–can simply withhold the notice."). But the State asserts the "conspicuous *absence*" of the required disclosures will serve as "an easy trigger" to begin its investigation. App. Br. 49-50. It is a novel theory indeed that the government can establish a compelling state interest through the absence of evidence.

B. The State Cannot Justify Diminished First Amendment Scrutiny

After acknowledging that the Constitution generally bars regulating in this area under traditional First Amendment principles, the State bases its entire defense of the Act on its quest for ways to apply diminished protections to online news platforms. It proposes borrowing the constitutional standards applicable to broadcasting or cable television, citing, respectively, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and suggests disclosure regulations merit only "minimal scrutiny" under the First Amendment. App. Br. 34-35 & nn.17, 18. However, this superficial analysis neither explains how these technology-specific constitutional standards legitimately could be applied to online media or whether the Act's provisions would even survive scrutiny under broadcast or cable standards. Had the State attempted to pursue either line of reasoning, it would have fallen short.

First, none of the historic justifications for broadcast or cable regulation apply to online platforms. Broadcast regulation was based on the concept of spectrum scarcity and the need to avoid electromagnetic interference, *Red Lion*, 395 U.S. at 388-90, while cable regulation was premised on that medium's use of public rights-of-way under a dual system of federal and local regulation. *Turner Broad.*, 512 U.S. at 627-28. Maryland does not–and cannot–suggest that these same conditions apply to the Internet or online platforms, and the Supreme Court has held the "special

justifications for regulation of the broadcast media … are not applicable to other speakers." *Reno*, 521 U.S. at 868.

Specifically, the Court found "the Internet can hardly be considered a 'scarce' expressive commodity," and, as a consequence, "the vast democratic forums of the Internet have [not] been subject to the type of government supervision and regulation that has attended the broadcast industry." *Id*. at 868-70. Maryland gains nothing from trying to rope in cable regulation, as the cable medium historically has been less subject to regulation than broadcasting.[7] The Supreme Court in *Reno* expressly rejected the government's bid to dilute the level of First Amendment protection for online media, *id*. at 870, and the State makes no case for why this Court should do so. Nor does it address the District Court's analysis on this point.[8]

Second, Maryland offers no analysis for how the Act's provisions, which require online platforms to create and compile detailed information and make reports under tight time frames, would satisfy constitutional review even under broadcast

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[7] In *Turner Broadcasting*, the Supreme Court noted the FCC's "minimal" authority over broadcast content and added that "the 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 television." 512 U.S. at 637 (emphasis added).

[8] *See* J.A. 427 (citing *Red Lion* and *Turner Broadcasting* and observing that "[e]ach of these lines of cases marks a limited exception to the baseline principles controlling the constitutional review of content-based laws").

standards.[9] In *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983), for example, the D.C. Circuit held that broadcast licensees could not be required under the Communications Act to investigate the "true" sponsors of political advertisements, and that such requirements would present constitutional problems, even under the *Red Lion* standard. The court explained that "even in broadcasting, where the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantees of free speech makes at least problematic." *Id*. at 1459. Here, the State must do more than simply ask this Court to apply a lower level of constitutional scrutiny.

Maryland also fails to address constitutional principles governing journalistic enterprises. The First Amendment fully protects editorial decisions regarding treatment of public issues and public officials. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Maryland disputes that *Tornillo* applies in this case,

[9] Although *Red Lion* recognized greater latitude for government regulation of the broadcast medium, subsequent decisions increasingly imposed First Amendment limits on such authority. *See*, *e.g*., *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 378 (1984) (FCC cannot ban public broadcasting editorials); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) (FCC cannot compel carriage of editorial advertising); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000) (*per curiam*) (personal attack and political editorial rules are invalid because they "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media") (citation omitted).

asserting that accepting political ads does not constitute editorial judgment where websites act merely as "vessels for partisan political advertising." App. Br. 37-38. This is incorrect. The Supreme Court has made clear that decisions by news organizations regarding whether to accept political advertising is a matter of journalistic judgment. *CBS, Inc.*, 412 U.S. at 118.

When online news sites exercise their rights in this regard, the First Amendment clearly applies because the decision to accept political ads triggers significant regulatory burdens under the Act. The Supreme Court has held that the First Amendment applies fully to such conditional regulations, where burdens are imposed only when a speaker opts to exercise his or her rights. *See*, *e.g*., *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 743-48 (2011) (First Amendment bars a state from subsidizing political opponent when a candidate exercises his right to fund his own campaign above a specified level). In *Bennett*, for example, the Court found the regulatory burden was imposed as a "direct result of the speech of privately financed candidates." *Id*. at 742. Likewise here: a news platform in Maryland can avoid the Act's recordkeeping and disclosure requirements only by foregoing its right to carry political advertisements.

The State asserts that these burdens are slight because the Act merely requires the "'disclosure of' a line or two of 'factual information'" if the platform runs political ads, and therefore does not affect the choice of material to go into the

newspaper. App. Br. 38. This glib summary of the law ignores the Act's extensive recordkeeping requirements *and* that the Supreme Court has held that forcing a speaker to disclose "a line or two" of factual information can violate the First Amendment. In *Riley v. National Federation of the Blind*, 487 U.S. 781 (1987), the Supreme Court reaffirmed that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and that a compelled disclosure of "facts" "would clearly and substantially burden the protected speech." *Id*. at 795-98 (citing *Tornillo*). In *Riley*, the Court invalidated a North Carolina law that required the disclosure of a single "fact" – the gross percentage of revenues retained by charitable solicitations. Here, the burdens imposed by the Maryland Act are far more significant.[10]

A final argument urging this Court to apply diminished First Amendment scrutiny is made not by the State, but by *amici* Campaign Legal Center and Common Cause of Maryland. They argue the Act promotes the First Amendment rights of the "people of Maryland" by providing them with more information for making decisions in the political marketplace. Campaign Legal Center Br. at 29-31. This

[10] Not only does the Act require disclosure of the purchasers of ads and amounts paid, it requires online platforms to compile and retain significant data, including the subject matter of the ads, dates and times first and last disseminated, geographic locations covered, audience reached or targeted, and the number of impressions made.

argument misperceives the very purpose of the First Amendment. If requiring "more speech" necessarily promotes First Amendment values, there would never be a constitutional impediment to forced disclosures. This turns the First Amendment upside down. By *amici's* logic, there could be no compelled speech doctrine, for all forced disclosures ultimately contribute to the marketplace of ideas.

The Supreme Court rejected this notion in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), when it noted "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Amici's* "collective speech" concept is equally foreign to the First Amendment, as Chief Justice Roberts explained in *McCutcheon v. FEC*, 572 U.S. 185, 205-06 (2014). "The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting 'collective speech.'" *Id*. at 206. Consequently, Maryland cannot promote the First Amendment by conscripting online news platforms to disseminate government-mandated speech.

II. THE ACT VIOLATES THE FIRST AMENDMENT UNDER ANY LEVEL OF SCRUTINY.

The State's essential defense of the Act is its attempt to manipulate the level of First Amendment scrutiny, but the law's problems are far more fundamental. It

is inadequately justified, poorly tailored, and unable to serve its asserted interests. The Act thus fails constitutional review regardless of the level of scrutiny.

A. The District Court Appropriately Applied Strict Scrutiny.

The State does not dispute that the Act is a content-based regulation of speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws [are] those that target speech based on its communicative content."). Such laws are presumptively unconstitutional and are subject to strict scrutiny. *Id*. Few speech regulations can survive this daunting level of review. *Playboy Entm't*, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."). The government must prove "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quoting *Bennett*, 131 S. Ct. at 2817). It must show that "no 'less restrictive alternative' would serve" its purposes. *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016).[11]

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[11] Such a law must eliminate "no more than the exact source of the 'evil' it seeks to remedy." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 111 (4th Cir. 2018) (citation omitted), *cert. denied*, 138 S. Ct. 2710 (2018). It must be neither "overinclusive by unnecessarily circumscribing protected expression . . . or underinclusive by leaving appreciable damage to the government's interest unprohibited." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (citation, brackets omitted).

Although Maryland takes a stab at suggesting the Act survives strict scrutiny, App. Br. 54-56, it is not really a serious argument; even the State's supporting *amici* were loath to make such a claim. It mainly suggests that the Act is the least restrictive means of policing political advertising because more intrusive regulations (*e.g*., regulating social media) are constitutionally foreclosed. App. Br. 56. This position is utterly baseless. The State can cite no authority for the outlandish proposition that a law purporting to tackle only part of a problem satisfies strict scrutiny where a law that attempts to address the actual problem would be unconstitutional. The opposite is true–the government is prohibited from imposing content-based speech regulations where it cannot show it will solve the problem at issue. *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Playboy Entm't*, 529 U.S. at 816; *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011). Under this demanding test, the State's inability to say how much online advertising contributes to the problem of election interference is alone sufficient to doom the Act.[12]

[12] Even where there is no dispute about election interference being a compelling interest, it is incumbent on the State to establish the strength of its interest in regulating *advertising*, rather than the Internet in general. *See Playboy Entm't Grp.*, 529 U.S. at 819-21 (although there is no dispute protecting children is a compelling interest, law fails strict scrutiny when government cannot establish the number of affected households); *Entm't Merchs. Ass'n*, 564 U.S. at 800 ("ambiguous proof will not suffice"). *See also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (government cannot impose "content-based restrictions on speech without 'persuasive evidence . . . of a long (if heretofore unrecognized) tradition' to that effect") (citation omitted).

Evidently recognizing the futility of trying to surmount strict scrutiny, the State devotes most of its energy arguing that disclosure requirements in any context must satisfy only "exacting scrutiny." App. Br. 25-39. Applying the analytic framework for campaign regulation articulated in *Buckley v. Valeo* that employs differing levels of scrutiny to campaign regulations depending on "the degree to which each encroaches upon protected First Amendment interests," *McCutcheon*, 572 U.S. at 196-97 (discussing *Buckley*), Maryland argues that disclosure and recordkeeping requirements warrant a lesser degree of scrutiny, even though the Act's requirements are imposed on neutral third parties and not campaign participants. App. Br. 25-39.

1. The Act Imposes Disclosure Obligations on Neutral Third-Parties.

The District Court properly distinguished this case from those involving campaign regulation, observing that *Buckley* and its progeny "addressed the constitutionality of laws or regulations . . . requiring candidates, campaigns, political committees, or donors to make certain disclosures in connection with election activities." J.A. 433-34. The court surveyed a dozen federal appellate court decisions applying the *Buckley* exacting scrutiny standard and found that, unlike the Act, the laws at issue in those cases imposed disclosure obligations on "individuals or groups seeking to influence an election or ballot question." J.A. 433-34 & n.16.

None involved statutes that imposed disclosure obligations on neutral third parties, such as media outlets or other publishers of election-related advertisements. *Id.*

As the District Court observed, requiring disclosures from campaign participants may make sense, because they "are the ones seeking to influence public discourse." But placing the burden on news platforms "enlists the press in the government's regulatory scheme" and is thus "fundamentally at odds with the essential role a free and independent press has historically played in holding government to account." J.A. 448. Appellants and their *amici* try to minimize this distinction, arguing that this Court should apply intermediate scrutiny to any disclosure requirement, regardless of the entity covered. However, they fail to cite any case where a court has applied intermediate scrutiny and upheld a law compelling the press or any other neutral third-party to make election-related disclosures.

The cases on which the State and its *amici* rely are inapposite. Maryland claims that *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (hereinafter, "*ACLF*") is a case where disclosure requirements were applied to third parties who "were not themselves candidates or political committees," App. Br. 29, but the case undermines its argument. The disclosure requirement at issue in *ACLF* fell on petition sponsors—direct participants in the electoral process—and not on neutral third parties, such as members of the press. *ACLF*, 525 U.S. at 187-

89. Even more strikingly, the Court *invalidated* the disclosure requirement regarding the identity of paid circulators. It concluded that because Colorado law already mandated "[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives," the "added benefit of revealing the names of paid circulators and amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." *Id.* at 202-03.

The State and supporting *amici* rely on *McConnell v. FEC*, 540 U.S. 93 (2003), App. Br. 27-28, but that case does not apply the *Buckley* exacting scrutiny test, as the District Court explained. J.A. 435-37. Instead, the disclosure requirements at issue applied to broadcasting, and the Court relied entirely on the authority of *Red Lion*. *Id.* That approach does not work here, for two reasons: First, the Act applies to online platforms, not broadcasting, and regulation of this medium is subject to strict scrutiny. *See supra* 11-15. Second, the Act's compelled recordkeeping and disclosure requirements are far more intrusive than those required in keeping a broadcaster's political file. As the District Court pointed out, the Act forces online publishers "to reveal details about the number, demographic makeup, and geographical dispersion of visitors to their site" and "obligates them to cough up proprietary information about their customer base." J.A. 454. *McConnell* thus does not support the Act's constitutional validity.

John Doe No. 1 v. Reed, 561 U.S. 186 (2010), on which the State and *amici* Campaign Legal Center and Common Cause rely, is even further afield. App. Br. 22; Amicus Curiae Br. by Campaign Legal Center and Common Cause Maryland, D.E. 42 at 6, 12. The disclosure obligations in that case related to participants in the referendum process–petition signatories–and the regulatory burden was imposed on the state, not private parties. The statute did not impose disclosure obligations on these third-party signatories; rather, the signatories objected to the law because the law required the State to disclose the signatories' personal identifying information. *Reed*, 561 U.S. 200. *Reed* simply has no bearing on what level of scrutiny should be applied to regulations that impose disclosure obligations on neutral third parties.

2. The District Court Properly Considered the Act's Impact on Freedom of the Press.

Because the Act imposes obligations on neutral third parties who are not participants in in political campaigns, the District Court quite correctly considered the extent to which the law burdens the First Amendment rights of those affected. *McCutcheon*, 572 U.S. at 196-97 (level of scrutiny depends upon degree to which the regulation "encroaches upon protected First Amendment interests"). While the regulatory burdens in this instance affect all online platforms that accept political advertising, the District Court found there would be a pronounced impact on news websites. J.A. 439 ("All compelled disclosure laws implicate the Free Speech

Clause, but laws imposing those burdens on the media implicate a separate First Amendment right as well: the freedom of the press.").

The District Court was right to be concerned, and the record below showed that the Act's adverse effects would extend to companies both large and small. It is particularly notable that Google discontinued accepting political ads in Maryland in response to the Act. This response is chilling enough, but it is a harbinger of even more pronounced effects for online platforms that lack the same resources of one of the nation's largest companies. In this regard, declarations filed in the proceedings below showed how the Act would be especially devastating to local and regional newspapers.[13]

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[13] *See*, *e.g.*, Declaration of Rebecca Snyder, Executive Director of the Maryland-Delaware-D.C. Press Association, D.E. 9-8 ¶¶ 5-6 (The Act "forces our members to choose between diverting scarce resources away from editorial and news reporting and towards legislatively-mandated administrative reporting, or refusing all online political advertising and sacrificing an important revenue stream."); Declaration of Timothy J. Thomas, Senior Vice President of Business Development of the Baltimore Sun Company, LLC, D.E. 9-3 ¶ 12 ("Compliance … would require us to … divert resources to collating and publishing data, [and] develop new technological accommodations…. These requirements will have a significant negative effect on our business."); Declaration of Robin Quillon, publisher of the *Cumberland Times-News*, D.E. 9-5 ¶¶ 9, 13 ("To obtain [data required by the Act,] the paper would have to purchase advanced software, at a cost of hundreds of thousands of dollars. . . . Because of the burdens and potential liability imposed by the Act, the *Cumberland Times-News* is seriously considering refusing all digital political advertisements . . . [, which would] have a major financial impact on our paper . . . ."); Declaration of Geordie Wilson, publisher of the *Frederick News-Post*, D.E. 9-6 ¶¶ 13-14 ("Because of the burdens and potential liability imposed by the Act, the *Frederick News-Post* is considering refusing all digital political

Amicus Brennan Center for Justice contends that the District Court erred by considering the impact of the Act on the press because media entities should not be given special treatment with regard to generally applicable laws. *See* Br. of the Brennan Center for Justice, Doc. 43-1 ("Brennan Br.") at 12-14. This mischaracterizes the issue. Where a government regulation imposes widespread burdens on both journalistic and non-journalistic organizations alike, it is hardly "special treatment" for a court to take into account the adverse effects on the press. *See*, *e.g*., *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838-46 (1978) (courts properly considered impacts on both speech and press of generally applicable statute that prohibited divulging or publishing information regarding confidential proceedings of the Judicial Inquiry and Review Commission).

It is especially appropriate for this Court to consider the impact of regulation on the press where regulation of a particular medium threatens the future viability of the news business. The rise of the Internet has been disruptive and has forced the news industry to both react to the challenges this new medium presents as well as to embrace the opportunities it offers. *See supra* 4-5. It would be myopic for courts to ignore the fact that a regulation like the Act, premised on diminished constitutional

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advertisements."); Declaration of Andrew Bruns, publisher of *The Herald-Mail*, D.E. 9-7 ¶¶ 14-15 (same).

protections for this new medium, will have widespread adverse effects on the press. The District Court was correct to consider this impact, and it should be affirmed.[14]

B. The Act Fails Even Exacting Scrutiny.

As the District Court observed, the State made almost no attempt to show that the Act could satisfy strict scrutiny and "plac[ed] all its bets on the applicability of the exacting scrutiny standard." J.A. 443. Although it was under no obligation to do so, the District Court also analyzed the Act under exacting scrutiny and found it fell short because it is "duplicative of other campaign finance disclosure requirements" and fails to "target the deceptive practices the Act ostensibly seeks to deter." J.A. 450-56. This determination is correct as well.

The State's claim that the Act's requirements are not duplicative of existing campaign finance laws because they compel news sites to provide more information than currently required is hardly persuasive and undermines its defense of the law. App. Br. 55. The fact it requires "instantaneous" disclosures at the point of publication rather than periodic filings, requires cost disclosures on a per-ad basis, compels identification of the publications in which ads were placed, and requires

[14] The Brennan Center's further claim that the record does not show whether media companies exercise any editorial discretion with respect to online political advertisements misses the point. Brennan Br. at 15-17. The choice of accepting political advertising–or not–is itself an editorial decision. *CBS, Inc.*, 412 U.S. at 118. Moreover, separate First Amendment issues are raised by the Act's compelled recordkeeping and speech requirements and burdens imposed on news websites.

disclosure of persons making independent expenditures of less than $10,000 only shows how the Act is more burdensome than existing law. Maryland never explains how requiring "instantaneous" disclosures as opposed to approximately monthly disclosures under current campaign finance laws would assist the State in cracking down on foreign interference in elections. Nor does it provide evidence that any of the marginal non-duplicative requirements are substantially related to an important state interest.

The District Court acknowledged the Act's features "go farther than other Maryland campaign finance disclosure requirements" but found it "difficult to see how these disclosures might possibly contribute to the Act's chief aim of deterring foreign meddling in federal and state elections." J.A. 453-54. The Supreme Court struck down a similarly duplicative disclosure requirement in *ACLF*, 525 U.S. at 202-03, finding the "added benefit of revealing the names of paid circulators and amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." The same conclusion is warranted here.

The State's response to the problem of under-inclusiveness is even less persuasive. Maryland has no real answer to the fact that the most significant problem of foreign interference is linked to unpaid social media posts. It claims "evidence shows that foreign operators infiltrated ad networks that served ads to plaintiffs' sites," App. Br. at 56, but this does not address the fact that foreign operatives

primarily operated via unpaid postings. J.A. 414, 449-50, 454-55. Maryland's acknowledgement that the First Amendment precludes it from regulating unpaid posts on social media so it is regulating what (it believes) it can is no answer. Such logic is akin to that of the drunk who searches for his lost car keys under the street lamp because the light is better there–it may not provide a solution, but it is easier to do. Even under exacting scrutiny, the State must show the regulation at issue is sufficiently effective in furthering the governmental interest without doing unwarranted collateral damage to First Amendment rights. *ACLF*, 525 U.S. at 203-04. This, Maryland has failed to do.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order.

RESPECTFULLY SUBMITTED this 7th day of June, 2019.

By /s/ Robert Corn-Revere

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Civil Procedure 32(a)(7)(B) and Circuit Rule 32(b). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, Microsoft Word, the word count of the brief is 6,431, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 7th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 7, 2019.

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APPENDIX A

STATEMENTS OF INTEREST

The **News Media Alliance** represents news media content creators, including nearly 2,000 diverse news organizations in the United States—from the largest news groups and international outlets to hyperlocal news sources, from digital-only and digital-first to print news.

The **American Society of News Editors** is an organization of some 500 members that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The **Associated Press** is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

The **Associated Press Media Editors** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

The **Association of Alternative Newsmedia** is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Dow Jones & Company, Inc. is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's;

MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

The **E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 52 television stations in 36 markets, including WMAR-TV, the ABC affiliate in Baltimore. Scripps owns a collection of national journalism businesses such as Newsy, the next-generation national news network; Stitcher, a podcast industry leader; and several national broadcast networks including Court TV. Scripps also owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

The **Investigative Reporting Program** at UC Berkeley's Graduate School of Journalism is dedicated to promoting and protecting the practice of investigative reporting. Evolving from a single seminar, the IRP now encompasses a nonprofit newsroom, a seminar for undergraduate reporters and a post-graduate fellowship program, among other initiatives. Through its various projects, students have opportunities to gain mentorship and practical experience in breaking major stories for some of the nation's foremost print and broadcast outlets. The IRP also works closely with students to develop and publish their own investigative pieces. The IRP's work has appeared on PBS Frontline, Univision, Frontline/WORLD, NPR and PBS NewsHour and in publications such as Mother Jones, The New York Times, Los Angeles Times, Time magazine and the San Francisco Chronicle, among others.

The **Investigative Reporting Workshop**, a project of the School of Communication at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The **Media Institute** is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MPA – The Association of Magazine Media, is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce

titles on topics that cover news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The **National Press Photographers Association** is dedicated to advancement of visual journalism in its creation, editing and distribution. The NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The **New York Times Company** is the publisher of *The New York Times* and operates the news website nytimes.com.

The **Online News Association** is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

The **Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The **Society of Professional Journalists** is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The **Virginia Press Association** supports member newspapers through responsive services and resources. It champions the common interests of Virginia newspapers and the ideals of a free press in a democratic society. Since 1881, the Virginia Press Association has been an unwavering advocate for newspapers in the Commonwealth.