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.

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

REPLY BRIEF OF APPELLANTS

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"Like all campaign finance-related disclosure requirements," Maryland's Online Electioneering Transparency and Accountability Act, 2018 Md. Laws ch. 834 (the "Act"), "is subject to exacting scrutiny." *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 291 (4th Cir. 2013). Plaintiffs would have this Court ignore its prior precedents, and those of the Supreme Court, and subject the Act's obligations to strict constitutional scrutiny. But the distinction they draw between laws that burden the *publishers* of political advertisements and those that apply to

the advertisers themselves has no basis in precedent and is inconsistent with the rationale underlying the "exacting scrutiny" doctrine. The district court erred in concluding otherwise, and its decision should be reversed.

The district court also erred in concluding that the Act would fail exacting scrutiny even if the court had found that standard to apply. That standard requires disclosure requirements to be substantially related to an important government interest. In concluding that the Act failed this test, the district court misapplied this standard by ignoring (1) that the Act targeted *some* of the means by which foreign actors meddled in our elections in 2016 and (2) other state interests in informing the electorate and deterring corruption altogether. Plaintiffs and their *amici* repeat these errors on appeal: they attempt to insulate the district court's legal conclusions from plenary review by characterizing them as factual findings and apply a cramped version of the Supreme Court's exacting-scrutiny test that more closely resembles strict scrutiny.

The plaintiffs' contentions that the Act fails strict scrutiny are also wrong. There is no less restrictive means available that would effectively further the State's interests in deterring foreign meddling, informing the electorate, and deterring corruption, because there is no effective substitute for requiring the relevant disclosures at or near the point of publication. And the Act is neither over- nor

underinclusive regarding the range of compelling government interests it furthers. The preliminary injunction entered by the district court should be reversed.

REPLY ARGUMENT

I. CAMPAIGN FINANCE DISCLOSURE AND RECORDKEEPING OBLIGATIONS ARE SUBJECT TO EXACTING SCRUTINY.

Plaintiffs do not dispute that courts review "campaign finance and disclosure regulations" under "exacting scrutiny." Appellees' Br. 25; *see* Br. of Nat'l Ass'n of Broadcasters & NCTA ("NAB/NCTA Br.") 7; Br. of News Media Alliance & 16 Media Orgs. ("NMA Br.") 19. Instead, plaintiffs assert that exacting scrutiny does not apply where such regulations are imposed on so-called "neutral third-parties," who are not themselves "participants in the electoral process," Appellees' Br. 29, 29-32; *see* NAB/NCTA Br. 7-10; NMA Br. 19-22. In so doing, plaintiffs misconstrue Supreme Court precedent and misapply the underlying rationale for subjecting such regulations to exacting scrutiny.

A. The Supreme Court's Exacting Scrutiny Cases Support Applying the Doctrine Here.

The imposition of campaign finance disclosure and recordkeeping obligations on third parties is not a novel concept. In both *McConnell v. FEC*, 540 U.S. 93, 233-46 (2003), and *John Doe No. 1 v. Reed*, 561 U.S. 186, 197-201 (2010), the Supreme Court evaluated the third-party disclosure obligations at issue in both cases within the framework of (or resembling) exacting scrutiny.

Plaintiffs urge this Court to ignore *McConnell* because it involved regulation of broadcasters, *see* Appellees' Br. 34-35 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)); NAB/NCTA Br. 9-10, but *McConnell* is not so easily dismissed. For one, it is not clear that the "minimal scrutiny" applicable to broadcaster regulations provided the framework for the Court's analysis. The district court in *McConnell* had concluded that the regulations failed exacting scrutiny, *see McConnell v. FEC*, 251 F. Supp. 2d 176, 378-79, 718, 811-13 (D.D.C. 2003) (holding that § 504 of the BCRA failed exacting scrutiny), and the cross-appellees (including current *amicus* NAB) urged affirmance under that same *Buckley* standard, *see* Br. for Appellants/Cross-Appellees Senator Mitch McConnell *et al.*, *McConnell*, 540 U.S. 93 (No. 02-1674), 2003 WL 21999283, at *74. And in language evoking that same test, the Supreme Court reversed, rejecting the argument that the burdens imposed by the broadcaster disclosure provisions were "intolerably burdensome and invasive" and "fail[ed] significantly to further any important government interest," *McConnell*, 540 U.S. at 235, 236-37.[1] True, the Court cited *Red Lion* in observing that the FCC had constitutionally imposed similar obligations on broadcasters for years, but this buttressed its conclusion that the burden imposed

[1] As even the dissent acknowledged, "[r]equired disclosure provisions that deter constitutionally protected association and speech rights"—even when imposed on third parties—"are subject to heightened scrutiny" under *Buckley*. *McConnell*, 540 U.S. at 359 (Rehnquist, C.J., dissenting).

by the regulations was minimal, not that *Red Lion* provided the constitutional framework for review. *See id.* And to confirm the point, the Court concluded that the BCRA's broadcaster disclosure and recordkeeping provisions were constitutional "under any potentially applicable First Amendment standard, *including that of heightened scrutiny*." *Id.* at 245 (emphasis added). Not once did the Court consider that the imposition of disclosure obligations on *third parties* in the electoral context somehow nullified the applicability of *Buckley*'s exacting scrutiny test. Thus, *McConnell* supports applying exacting scrutiny here.[2]

So, too, does *John Doe No. 1*. There the Court applied exacting scrutiny to require a third party (Washington) to disclose petition forms containing information provided by "direct participants in the political process" (the petition signers). Appellees' Br. 34; *see John Doe No.* 1, 561 U.S. at 191, 197. Plaintiffs dismiss the significance of this case because it compelled disclosure by the government, as opposed to a private entity. Appellees' Br. 34. But nothing in the *John Doe* opinion suggests that the identity of the disclosing party had any bearing on the scrutiny applied to the obligation. *See John Doe No. 1*, 561 U.S. at 196 ("First Amendment challenges to disclosure requirements in the electoral context" are reviewed "under

[2] NMA contends that Maryland "proposes borrowing the constitutional standards applicable to broadcasting or cable television," NMA Br. 11, but this has it backwards. *Buckley*'s exacting scrutiny test should apply to the Act's disclosure and record-keeping obligations.

what has been termed 'exacting scrutiny.'"). *McConnell* and *John Doe No. 1* make clear that this includes disclosure requirements imposed on third parties.

Finally, plaintiffs suggest that, in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) ("*ACLF*"), the Court applied strict scrutiny to a regulation "arguably imposed on a third party" that required "paid circulators to wear identification badges." Appellees' Br. 33. It is true that the Court in *ACLF* applied strict scrutiny to the identification badge requirement at issue in that case, deeming its ruling in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), "instructive" to its determination. *ACLF*, 525 U.S. at 199.[3] The Court reasoned that the prohibition against the "distribution of anonymous campaign literature" in *McIntyre* was similar to the prohibition against the circulation of petition forms by "anonymous" circulators presented in *ACLF*, and thus required a similar strict scrutiny analysis. *See id.* But, noting that *Buckley* required the application of that

[3] Although the Court in *McIntyre* purported to apply "exacting scrutiny," 514 U.S. at 347, "[t]he Supreme Court has used the term 'exacting scrutiny' in many contexts, [only] some of which indicate the application of a less-than-strict scrutiny approach." *281 Care Comm. v. Arneson*, 766 F.3d 774, 783 n.7 (8th Cir. 2014). In *McIntyre*, the Court held that it was applying "the strictest standard of review," and thus requiring the law to be "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 348; *see also Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013) ("The *McIntyre* Court equated 'exacting scrutiny' with 'strict scrutiny.'").

test "when compelled disclosure of campaign-related payments is at issue," the Court applied *exacting scrutiny* to disclosure provisions regarding the filing of circulator information with the Secretary of State. *Id.* at 202, 204. As in *ACLF*, the disclosure obligations here relate to "campaign-related payments," and thus exacting scrutiny should apply.

B. Applying Exacting Scrutiny Here Is Consistent with its Rationale.

Plaintiffs contend that the rationale for applying exacting scrutiny to required campaign finance disclosures "does not translate to third party platforms." Appellees' Br. 31; *see* NAB/NCTA Br. 7. Here, too, they are wrong.

As the Supreme Court explained in *Citizens United v. FEC*, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." 558 U.S. 310, 367 (2010) (internal quotation marks and citations omitted). Implicit in this formulation is that some "burden" on the "ability to speak" is both inevitable and constitutionally permissible when disclosure obligations are imposed in the electoral context. *Cf. Buckley*, 424 U.S. 1, 71 (1976) ("There could well be a case . . . where the threat to the exercise of First Amendment rights is *so serious* and the state interest furthered by disclosure *so insubstantial* that the Act's [disclosure] requirements cannot be constitutionally applied." (emphases added)). That is why the exacting-scrutiny test requires that "the strength of the governmental interest must reflect the

seriousness of the actual burden on First Amendment rights." *John Doe No. 1*, 561 U.S. at 197. Plaintiffs argue that the doctrine makes sense only if it applies to laws targeting "highly motivated" participants in the political process, Appellees' Br. 31, but this ignores that the doctrine already weighs the burdens imposed against the interests served by the regulations. The mere fact that campaign finance disclosure obligations "compel speech by third parties or target an entire topic," *id.*, does not make them subject to strict scrutiny, as *Buckley* and its progeny make clear.[4]

C. Conventional Strict Scrutiny Doctrines Have No Application to this Case.

Because the Act's disclosure obligations are subject to *Buckley*'s exacting scrutiny test, plaintiffs' reliance on general doctrines requiring that regulations compelling speech or imposing content-based restrictions satisfy strict scrutiny is misplaced. *See* Appellees' Br. 35-39 (citing, among others, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*")). At their core, "disclosure requirements in the electoral context," *John Doe No. 1*, 561 U.S. at 196, are regulations that compel speech. They also impose

[4] NAB/NCTA contend that strict scrutiny should apply because "the Act does not serve any of the governmental interests" identified in Buckley. NAB/NCTA Br. 7. But the exacting scrutiny framework can sort out whether particular obligations are substantially related to the "sufficiently important" interests identified in *Buckley*.

obligations only on a certain category of speech. And yet, neither *Tornillo* nor *Reed* nor any of the compelled speech or content-based restriction cases cited by plaintiffs, *see* Appellees' Br. 27-29, 36-39, has been construed to abrogate *Buckley*'s exacting scrutiny test for campaign finance disclosure obligations.[5] Accordingly, these cases do not stand as a bar to the review of the Act's obligations under *Buckley*'s exacting scrutiny framework.

Plaintiffs concede that *Buckley*'s exacting scrutiny framework remains good law; they assert, however, that it should "should be narrow in scope" in light of the content-based speech principles articulated in *Reed* and *NIFLA*. Appellees' Br. 38. But these cases acknowledge that the normal practice of reviewing content-based restrictions under strict scrutiny bends where, as here, there is a "long . . . tradition" of imposing such restrictions. *NIFLA*, 138 S. Ct. at 2372; *see Buckley*, 424 U.S. at 60 (noting that the first electoral "federal disclosure law was enacted in 1910"). This Court should refrain from narrowing *Buckley*'s exacting-scrutiny framework and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions." *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

[5] *McIntyre* is not to the contrary, as it involved a prohibition on anonymous ballot issue campaign literature, 514 U.S. at 348-49, where the Court specifically distinguished laws requiring the disclosure of campaign-related expenditures and contributions as in *Buckley*. *See id.* at 355.

In any event, both lines of cases involve circumstances that are distinguishable from the disclosure obligations at issue here. The cases involving content-based speech regulations largely dealt with *bans* on speech, not disclosure obligations.[6] Plaintiffs assert that this is irrelevant, because the "distinction between laws burdening and laws banning speech is but a matter of degree." Appellees' Br. 39 (quoting *Playboy Entm't Grp.*, 529 U.S. at 812 (2000)). But that distinction is what gave birth to the lower, exacting-scrutiny framework in the first place. *See Citizens United*, 558 U.S. at 366 (holding that campaign finance disclosure requirements are subject to lesser scrutiny because while they "may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." (internal quotation marks and citations omitted); *compare id.* at 337-65 (subjecting ban on corporate political expenditures to strict scrutiny). Courts "view disclosure rules [in the campaign finance context] far less skeptically than

[6] *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470 (6th Cir. 2016) (law prohibiting dissemination of false information in campaign materials); *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015) (law banning certain categories of robo-calls); *American Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 165-66 (4th Cir. 2019) (law banning automated calls to cell phones); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (law prohibiting panhandling in certain parts of the city); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 806 (2000) (law prohibiting the broadcast of sexually explicit content during certain times of day).

[they] review bans on speech." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 510-11 (D.C. Cir. 2016).

Plaintiffs' reliance on the Supreme Court's compelled-speech cases fares no better. Plaintiffs protest that this doctrine "applies to both editorial opinions [such as in *Tornilllo*] and more mundane facts, including facts about spending," Appellees' Br. 36, but then concede that disclosure obligations[7] that "mirror the 'authority line'" required for campaign ads are not subject to it, *id.* at 37 n.10 (citing *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F. 2d 365 (D.C. Cir. 1988)). And even if this distinction made doctrinal sense, the disclosure obligations here—which require disclosure of the identities and amounts paid for specific online ads, *see* Md. Code Ann., Elec. Law ("Elec. Law") §§ 13-405(b)(1), 13-405(b)(6) (LexisNexis Supp. 2018)—resemble the authority line requirements of Election Law § 13-401(a)(1) (generally requiring disclosure of the identity of the person responsible for the campaign material). Exacting scrutiny applies to the regulations at issue.

II. THE ACT SATISFIES EXACTING SCRUTINY.

The Act's obligations bear a "substantial relation" to at least three "sufficiently important" government interests, and the "seriousness of the burden" they impose on speech are commensurate with the importance of the government

[7] The Act's recordkeeping obligations, contrary to the assertions of the NMA *amici* (*see* NMA Br. 14-15 & n.10), do not implicate First Amendment concerns regarding compelled disclosure.

interests involved. *See* Appellants' Br. 39-54. The efforts by plaintiffs to rehabilitate the district court's contrary ruling fall short.

A. The Standard of Review Applicable to Factual Findings Does Not Insulate the District Court's Legal Determinations from de Novo Review.

At the outset, plaintiffs assert that the district court's ruling should be affirmed because its findings of fact have not "been meaningfully contested on appeal." Appellees' Br. 24. But the State does contest some of the district court's factual findings in this appeal, and plaintiffs' discussion of the standard of review confuses an important distinction between the standards applicable to factual findings and mixed questions of law and fact.

It is well settled that this Court reviews the lower court's applications of law to facts de novo. *See United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 334 (4th Cir. 1996). Plaintiffs assert that Maryland's failure to dispute findings such as the absence in the record of any "foreign-sourced paid political ad that ran on a news site" during the relevant period is dispositive to this appeal. Appellees' Br. 22 (quoting J.A. 449). But the question of whether that particular fact (which the State does not dispute) is pertinent to the *legal* determination that that the Act's obligations are substantially related to sufficiently important government interests—particularly in light of other undisputed facts in the record—is reviewed de novo. When an appellate court is called on "to consider

legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then . . . the question should be classified as one of law and reviewed de novo." *United States v. Hinkson*, 585 F.3d 1247, 1259-60 (9th Cir. 2009) (internal quotation marks and citation omitted); *see also United States v. Brown*, 631 F.3d 638, 643-44 (3d Cir. 2011) (determination requiring the court "to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests" is a "process that necessarily involves us in an inquiry that goes beyond the historical facts," and therefore is subject to de novo review). Accordingly, the district court's applications of law to the facts it found (and the ones that it ignored) to conclude that the Act's obligations were not "narrowly tailored" to further the State's interests via the "least restrictive means," or that they did not bear a "substantial relation" to those interests, are subject to de novo review by this Court. *See, e.g.*, *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether [a] regulation meets the "narrowly tailored" requirement [for overcoming strict scrutiny] is of course a question of law, to be reviewed by an appellate court *de novo*.").

B. Exacting Scrutiny Does Not Require a Perfect Fit.

Plaintiffs compound their error regarding the standard of review by confusing *Buckley*'s exacting-scrutiny test with a test that more closely resembles strict scrutiny. *See* Appellees' Br. 43-47. Their confusion is understandable, because

"[t]he Supreme Court has used the term 'exacting scrutiny' in many contexts, [only] some of which indicate the application of a less-than-strict scrutiny approach." *281 Care Comm.*, 766 F.3d at 783 n.7. But in purporting to explain why the Act's obligations fail exacting scrutiny, plaintiffs cite almost exclusively to strict-scrutiny cases that reside outside the context of campaign-finance-disclosure requirements.

For example, plaintiffs cite *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality opinion), for the principle that where "at least one less speech-restrictive means" to achieve a state interest of sufficient importance is available, a regulation will fail "exacting scrutiny." Appellees' Br. 44. This formulation tracks strict scrutiny's "least-restrictive-means test," which makes sense because that is exactly what the plurality opinion was applying. *See Alvarez*, 567 U.S. at 730-31 (Breyer, J., concurring). Similarly, plaintiffs cite *McIntyre* to argue that disclosure obligations must be "narrowly tailored to serve an overriding state interest," Appellants' Br. 44 (citing *McIntyre*, 514 U.S. at 347), and later that restrictions promulgated only "as an aid to enforcement" of other campaign finance or anti-fraud requirements do not meet that test, *id.* at 44. But *McIntyre* is a strict-scrutiny case (as noted in note 3 above); its pronouncements on the required "fit" between burdens imposed and interests pursued do not bear on *Buckley*'s exacting scrutiny analysis.[8]

[8] The other cases cited by plaintiffs (*see* Appellees' Br. 43, 44, 46) assessed laws imposing contribution limits, not disclosure obligations, and were evaluated

As the Court's precedents makes clear, exacting scrutiny requires a "fit," but not necessarily a perfect one. While the "strength of the governmental interest" must "reflect the seriousness of the actual burden on First Amendment rights," *John Doe No.* 1, 561 U.S. at 199, exacting scrutiny does not require the government to select "the least restrictive means of advancing [its] interests." *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008). The question is whether the obligations "are sufficiently tailored to justify the compelled disclosures," even if the obligations "undoubtedly chill" some First Amendment-protected activity. *Independence Inst. v. Williams*, 812 F.3d 787, 798 (10th Cir. 2016). It is only where obligations are "no more than tenuously related to the substantial interests disclosure serves" that they "fai[l] exacting scrutiny." *ACLF*, 525 U.S. at 204. The Act's disclosure and recordkeeping obligations satisfy this test.

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under distinct constitutional tests tailored to regulations—like contribution limits—that directly prohibit speech or impede associational rights. *See McCutcheon v. FEC*, 572 U.S. 185, 218 (2014); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295-98 (1981); *Free & Fair Election Fund v. Missouri Ethics Comm'n*, 903 F.3d 759, 763 (8th Cir. 2018); *see also Buckley*, 424 U.S. at 25 (holding that contribution limits are permissible as long as they are "closely drawn" to match a "sufficiently important interest").

C. The Act's Obligations Are Substantially Related to Important State Interests.

There is no dispute that Maryland's interests in curtailing foreign influence, providing the electorate with information, and deterring corruption are "sufficiently important" interests; indeed, they are "compelling." J.A. 36, 37. Instead, plaintiffs claim that the Act "does not meaningfully" further these interests. Appellees' Br. 48-54; NAB/NCTA Br. 14-20. Plaintiffs are wrong.

Foreign election-meddling.[9] First, Plaintiffs are wrong about the Act's potential effect on election meddling by foreigners. Plaintiffs complain that the record does not reflect that any foreign-sourced political ads were *directly* placed onto their sites in 2016 (as opposed to being placed through ad networks), and that therefore the imposition of disclosure obligations on the plaintiffs was without constitutional foundation. *See* Appellees' Br. 48-49; NAB/NCTA Br. 18-19. But this makes no sense. The Act regulates ads placed through ad networks, requiring disclosures by both the ad networks and publishers in such circumstances. *See* Elec.

[9] The Institute for Free Speech ("IFS") questions whether this is a proper interest of Maryland's at all, given that "foreign policy" is not "an area of 'traditional competence'" of the states. Br. of the IFS (the "IFS Br.") 8, 9. Maryland also prohibits non-U.S. citizens from voting in state elections and from standing as candidates for state office. *See* Elec. Law §§ 3-102(a)(1)(i), 5-202 (LexisNexis 2017). The disclosure obligations imposed by the Act—even if imposed, *in part*, to curtail foreign meddling in Maryland elections—lie well within Maryland's police powers.

Law § 13-405(b)(6)(i) – (iii).[10] Thus, it expressly reaches conduct found to have occurred in 2016. Maryland was not required to wait for foreign-sourced ads to appear *via a particular method* on plaintiffs' websites before acting prophylactically to prevent such misconduct. *See Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011) ("There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures."). The district court's conclusion to the contrary was wrong as a matter of law.

Plaintiffs also repeat the district court's error in disregarding the enforcement benefits of requiring disclosures at the point of an ad's publication. *See* Appellees' Br. 49-50; NAB/NCTA Br. 16-17. It is true that a purchaser who wishes to avoid compliance may withhold the required notice from the publisher; but if it does, the disclosures required by the Act will be conspicuously absent from the ad, making enforcement easier. *See* Appellants' Br. 49-50. Plaintiffs assert that this same benefit would entail with reporting and disclosure "obligations imposed directly on . . . purchasers," Appellees' Br. 50, but it is difficult to see how. If purchasers were

[10] NMA suggests that ad networks are not regulated by the Act. *See* NMA Br. 21. This is plainly wrong. *See* Elec. Law §§ 1-101(dd-1) (defining "online platform" to include "ad network[s]"); 13-405(b)(1) (imposing disclosure obligations on "online platforms"). For the same reason, plaintiffs are incorrect in asserting that the Act regulates activity that is only "adjacent to the problem it targets," because it focuses only on "paid ads" and not "unpaid anonymous posts on social networks." Appellees' Br. 49; *see also* NMA Br. 27.

instead required to make the relevant disclosures to the State Board, those that wished to avoid compliance would continue to do so, but the publications themselves would no longer indicate which purchasers are compliant and which ones are not. It was legal error for the district court to ignore this particular way that the disclosure obligations further the State's interests.

Informing the public. Likewise, the Act's obligations are substantially related to the State's interest in informing the public about the sources of election-related spending. Plaintiffs and their *amici* question the benefit of the "granular[ity]" of the additional information that the Act requires to be disclosed, the promptness with which it requires such disclosures, and the location for the required disclosures on the publishers' websites. Appellees' Br. 55-56; *see also* NAB/NCTA Br. 19-20; NMA Br. 25-26. But informing the public on a per-ad basis of the persons responsible for the ad and the amounts paid for the ad harmonizes the requirements for online political advertising with those applicable to television and radio advertising. *See* Elec. Law §§ 13-405(b)(1), 13-405(b)(6); *compare* 47 C.F.R. §§ 25.701(d), 73.1943, 76.1701.[11] Moreover, the benefits of requiring such

[11] NAB/NCTA criticize the Act's failure to impose per-ad disclosure requirements "upon other businesses, like print media, that accept campaign advertising." NAB/NCTA Br. 16. But with the overwhelming migration of political advertising to the Internet, *see* J.A. 117, 118, 129, not to mention the fact that Russian meddling was alleged to have occurred exclusively online, Maryland was

disclosures to be made within 48 hours (*i.e.* when the ad is still running), as opposed to as long as a month or two later (*i.e.*, under the campaign finance reporting schedule), are self-evident. *See Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015) (rejecting "the argument that the possibility of disclosure at another time undermines the need for disclosure at the moment when disclosure is most useful"); *Tooker*, 717 F.3d at 595 (holding that a "48-hour deadline makes disclosure more effective because it is rapid and informative, more quickly providing the electorate with information about the sources of election-related spending"). And requiring disclosures to be made on the publisher's webpage—as opposed to that of the State Board—brings those disclosures in closer proximity to the ad itself, which makes it easier for the electorate to access information about a specific ad. *See* Appellants' Br. 45-46 (describing benefits of Hogan Facebook ad disclosures at J.A. 211-214). For these reasons, a "less restrictive" disclosure regime would not further the interest in informing the public.[12] The district court's failure to consider the State's interest in

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well within its rights to "proceed one step at a time" by focusing regulatory efforts on online publishers. *Tennant*, 706 F.3d at 285.

[12] NAB/NCTA contends that even if it were more efficient for the State to proceed as it has, the Constitution "does not permit the State to sacrifice speech for efficiency." NAB/NCTA Br. 23 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). But exacting scrutiny allows the State to choose the "more effective" disclosure method, even if a less restrictive means of doing so is available. *Tooker*, 717 F. 3d at 595 ("narrow tailoring is not required").

informing the electorate in concluding that the Act was underinclusive and lacked efficacy (*see* J.A. 454-455) was legal error.

Deterring corruption and enforcing campaign finance laws. The Act also furthers Maryland's interests in deterring corruption and enforcing campaign finance laws. *See* Appellants' Br. 41-43. Plaintiffs complain that whatever benefit the Act provides does not justify the "substantial burden" imposed by the Act's recordkeeping obligations. Appellees' Br. 53. But it is difficult to take this complaint seriously, given that all the information required to be collected and/or published must be provided by the *purchasers* in the first instance. *See* Elec. Law § 13-405(d). The Act furthers the State's interests in deterring corruption and enforcing campaign finance laws.

D. The Strength of the Governmental Interests Reflects the Seriousness of any Burdens on Speech.

The burdens on speech imposed by the Act are also commensurate with the importance of the governmental interests involved.

The obligations imposed by the Act are modest: publishers must disclose some, and retain other, information provided entirely by purchasers. Plaintiffs assert that this ignores "uncontroverted [publisher] declarations" that doing so "would require them to devote substantial resources to purchasing expensive software and

training staff members," Appellees' Br. 22, 10, but this strains credulity.[13] What additional software could possibly be necessary to collect and post information provided by ad purchasers? Plaintiffs do not say.

The alleged burden of being forced to publish "proprietary information," Appellees' Br. 23 n.5, also crumbles under the light of scrutiny. The district court found this "grievance" to be "legitimate," because the Act requires publishers to "cough up proprietary information about their customer base and the reach of their websites," to the State, a potential customer. J.A. 454. But there is nothing "proprietary" about the total amount paid and the identity of the purchaser—the only information required to be *disclosed* under the Act. *See* Elec. Law §§ 13-405(b)(1), 13-405(b)(6).[14] And plaintiffs do not dispute that nothing in the record supports the district court's finding that the *recordkeeping* obligations imposed by the Act subject plaintiffs to potential competitive harm. *See* J.A. 41, 52, 58, 68-69 (publisher declarations stating that the required *disclosure* of information on their websites subjects them to competitive harm). Nor is there any support in the record for the

[13] The district court made no findings of fact regarding these alleged burdens of "purchasing expensive software and training staff members."

[14] Plaintiffs counter that "the Act effectively requires Publishers to disclose their ad rates by also requiring disclosure of the number of impressions purchased," Appellees' Br. 23 n.5, but that is a *recordkeeping* requirement, not a disclosure requirement. *See* Elec. Law § 13-405(c)(3)(vi).

district court's finding that the State "may well count itself as a participant in the market for online ads," J.A. 454, which formed the basis for its conclusion that the burden on publishers was significant. This finding was clearly erroneous, and its conclusion wrong as a matter of law.[15]

In any event, all the information subject to disclosure *or* recordkeeping under the Act comes from *purchasers*, not publishers, and plaintiffs profess no competition-related concern whatsoever with purchasers disclosing this information themselves. *See, e.g.*, Appellees' Br. 23, 41. The record does not support the district court's conclusion that the Act imposes burdensome obligations on plaintiffs that could cause them to withdraw from the marketplace.

Next, plaintiffs point to "Google's decision . . . to stop accepting political advertising in Maryland" as evidence that Act's burdens risk chilling more speech than is warranted. Appellees' Br. 22, 55.[16] But plaintiffs ignore the circumstances of Google's non-participation in the last election cycle, which related to whether its "dynamic" pricing scheme could conform to the disclosure requirements of the Act.

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[15] Even if there were a legitimate concern about the confidentiality of sensitive information shared solely with the State, Maryland's Public Information Act protects from public disclosure records that contain "trade secrets," "confidential commercial information," or "confidential financial information." Md. Code Ann., Gen. Prov. § 4-335(1) – (3) (LexisNexis 2014).

[16] The district court made no finding regarding Google's decision not to accept political advertising in Maryland.

See Appellants' Br. 20. Google already publishes information regarding the identities of purchasers and the amounts paid for political ads.[17] In the meantime, the State Board has attempted to address Google's concerns via proposed regulation. *See* Appellants' Br. 20. The example of Google does not support the district court's ruling.

Plaintiffs also invoke the burden on their "editorial independence" by likening this case to *Tornillo*, 418 U.S. at 259-61. Appellees Br. 56. But courts have not shied away from imposing disclosure requirements on the press when the circumstances warrant, *see Wall St. Publ'g Inst.*, 851 F. 2d at 376 (upholding requirement that consideration received by publisher from company whose stock was covered in an article be disclosed), and plaintiffs themselves concede that the press stands on no firmer footing than any other private entity with regard to their First Amendment compelled speech claims, *see* Appellees' Br. 37. Regardless, the contrast between the modest disclosures required by the Act and the required publication of the editorial in *Tornillo* could not be starker. Justice White's concurrence in *Tornillo* observed that "we have never thought that the First Amendment permitted public officials to dictate to the press *the contents of its news*

[17] *See generally* Political Advertising in the United States, https://transparencyreport.google.com/political-ads/region/US?hl=en (last visited July 3, 2019).

columns or the slant of its editorials," 418 U.S. at 261 (White J., concurring; emphasis added). The Act's disclosure obligations cannot fairly be described to do so. *Tornillo* is not a bar to the obligations imposed by the Act.

Finally, NAB/NCTA cites the alleged "vagueness" of the Act's definition of "campaign material" as further evidence that the Act discourages more speech than is necessary, pointing to the alleged withdrawal of some of its own (unidentified) members from political advertising in Maryland. NAB/NCTA Br. 23-26. The district court did not reach this issue, and this Court should decline to address it for the first time on appeal, given the factual issues from outside of the record that NAB/NCTA raise. *See Q Int'l Courier Inc. v. Smoak*, 441 F.3d 214, 220 (4th Cir. 2006) (declining to affirm on alternative grounds because it was "more appropriate to allow the district court to consider them, if necessary, in the first instance on remand"); *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 727 (4th Cir. 2000) (remanding issue not reached by district court because "factual questions are properly considered by the district court in the first instance").[18] So, too, should this

[18] Even on the merits, the Act does not require online platforms like plaintiffs and NAB/NCTA's members to "guess[] at which communications" constitute "campaign material" (and thus "are covered" by the Act), *see* NAB/NCTA Br. 24-25, because it is ad *purchasers* who are responsible for doing so. *See* Elec. Law § 13-405(a)(1) (requiring the purchaser of an ad to provide notice to the publisher that it is subject to the Act's requirements). For decades, political advertisers in Maryland have been operating without problem under the allegedly ambiguous definition for "campaign material". *See* Elec. Law § 1-101(k); 2002 Md. Laws ch.

Court decline NAB/NCTA's invitation on this basis to direct the district court to expand the ordered relief to encompass entities who were not party to the proceedings below. *See* NAB/NCTA Br. 26-28.

In sum, while disclosure requirements will inevitably chill "some amount of speech," *National Ass'n for Gun Rights, Inc. v. Murry*, 969 F. Supp. 2d 1262, 1270 (D. Mont. 2013); *see also Buckley*, 424 U.S. at 68, there is "sufficient cause" for the modest disclosure and recordkeeping obligations imposed by the Act. *ACLF*, 525 U.S. at 200. The Act satisfies exacting scrutiny.

III. THE ACT ALSO SATISFIES STRICT SCRUTINY.

Although the Act's obligations are subject to *Buckley*'s exacting scrutiny test, they satisfy strict scrutiny as well.[19] *See* Appellants' Br. 54-57.

First, there is no less restrictive means that would effectively further the State's interests. Plaintiffs assert that "Maryland could easily require ad purchaser

291, § 3 (adding definition of "campaign material" as "new language derived without substantive change" from former definition located elsewhere in the Article).

[19] Plaintiffs contend that the State's failure to brief the Act's constitutionality under strict scrutiny in the district court somehow disqualifies it from challenging the court's ruling on that issue on appeal. *See* Appellees' Br. 40. Not so. There is no dispute that the State defended the constitutionality of the statute against plaintiffs' First Amendment challenge below, and "appellate courts are broadly tolerant of argumentative shifts so long as the underlying constitutional provision remains the same and no new facts need be found." *Maine Green Party v. Maine, Sec'y of State*, 173 F.3d 1, 7 (1st Cir. 1999).

themselves to make the disclosures directly," Appellees' Br. 41, but this ignores the benefit of requiring disclosures to appear where the ad is published. "Satisfying the least restrictive means test does not require the government to consider . . . unwieldy or ineffective" options. *United States v. Hardman*, 622 F. Supp. 2d 1129, 1131 (D. Utah 2009); *accord Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (regulation fails strict scrutiny unless "less restrictive alternatives" are shown to be "less effective").

Similarly, that the scope of the Act includes political ads placed on plaintiffs' websites (and not just "social media giants") does not render it overbroad. Here, even setting aside that foreign meddling occurred via ad networks utilized by the plaintiffs, the State's other interests in informing the electorate and deterring fraud support the scope of the obligations imposed by the Act. In focusing solely on the State's interest in deterring foreign influence and not on the State's other interests in informing the electorate and deterring fraud, plaintiffs commit the same error that the district court committed. *See* Appellees' Br. 42. Those interests support the scope of the obligations imposed by the Act.

Finally, the Act's focus on paid advertisements (*see* Appellees' Br. 42) does not render it underinclusive. "[A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995). Rather, "a rule is struck for underinclusiveness only if it cannot 'fairly be

said to advance any genuinely substantial governmental interest,'" *Id.* (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984)). Plainly that is not the case here. Not only were paid advertisements a component of the foreign meddling to which the Act was "primarily" directed, but the Act furthered substantial governmental interests in informing the electorate and deterring fraud as well. The district court's conclusion that the Act failed strict scrutiny was erroneous.

CONCLUSION

The order of the United States District Court for the District of Maryland preliminarily enjoining the enforcement of the Act against the plaintiffs should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE WASHINGTON POST, *et al.*,	*	
Plaintiffs-Appellees,	*	
v.	*	No. 19-1132
DAVID J. MCMANUS, JR., *et al.*,	*	
Defendants-Appellants.	*	

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of July 2019, the Reply Brief of Appellants was filed electronically and served on counsel of record for the appellees, who are registered CM/ECF users.

s/ Andrea W. Trento

Andrea W. Trento