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)

BRIEF OF APPELLANTS

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April 12, 2019

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JURISDICTIONAL STATEMENT

This action involves the constitutionality of Maryland's Online Electioneering Transparency and Accountability Act (the "Act"), which imposed certain campaign finance-related disclosure and record-keeping requirements on online publishers that host political advertisements in Maryland. The district court had subject matter jurisdiction under 42 U.S.C. § 1983, and on January 3, 2019, entered an order granting in part plaintiffs' motion for preliminary injunction and enjoining the

defendants from enforcing significant portions of the Act against the plaintiffs. (J.A. 459.) The defendants timely appealed on February 1, 2019. (J.A. 461.) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's entry of a preliminary injunction.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in concluding that the campaign finance-related disclosure and record-keeping obligations imposed by the Act are subject to strict scrutiny, given that the Supreme Court and this Court have consistently applied intermediate, "exacting scrutiny" to such disclosure and record-keeping obligations?

2. Did the district court err in concluding that, under "exacting scrutiny," the Act's disclosure and record-keeping obligations were not substantially related to the State's concededly important interests in providing the electorate with information regarding the sources of election-related spending, deterring corruption and avoiding the appearance of corruption, enforcing existing election-related regulations, and ensuring that foreign nationals or foreign governments do not seek to influence Maryland elections?

3. Did the district court err in concluding that the Act's disclosure and record-keeping obligations were not narrowly tailored to further the State's concededly compelling election-related interests?

STATEMENT OF THE CASE

Maryland's Pre-Existing Record-Keeping and Disclosure Obligations

Maryland has long required people and entities engaged in certain campaign-related speech to comply with disclosure, reporting, and record-keeping requirements. Those requirements fall into three broad categories.

First, the State's election law imposes disclosure obligations with regard to "campaign material." *See* Md. Code Ann., Elec. Law § 3-401(a)(1)(i)–(ii)[1]; *id.* § 13-404 (requiring "authority line" on "campaign material"); Code Md. Regs. ("COMAR") 33.13.07.02 (2018) ("electronic media").[2]

Second, Maryland law imposes reporting obligations on "political committees," *see* Elec. Law § 13-304, and on individuals or other entities that are not "political committees," but make independent expenditures of $10,000 or more for campaign-related "public communications" or "electioneering communications," *see* Elec. Law §§ 13-306, 13-307.[3] Political committees must file

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[1] Unless otherwise noted, all citations to Election Law Article are to the Lexis Nexis 2017 edition of the Annotated Code of Maryland and the 2018 Supplement.

[2] "Campaign material" is any published or distributed material containing text or graphics that "relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question." Elec. Law § 1-101(k)(1).

[3] A "Political committee" is a "combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate, political party, question, or prospective question submitted to a vote at any election." Elec. Law § 1-101(gg); *see also id.* § 1-101(h) (defining "campaign finance entities" as "political committees").

with the State Board periodic reports detailing contributions received and expenditures made during the reporting period. COMAR 33.13.02.02C(6); *see* Elec. Law § 13-304(b). Covered persons who are not "political committees" must file a detailed report with the State Board within 48 hours of making aggregate independent expenditures of $10,000 for campaign-related "public communications" or "electioneering communications" ("Independent Spenders"). Elec. Law §§ 13-306(c)-(e), 13-307(c)-(e). Independent Spenders must also include the same information in any periodic report to donors, members or shareholders, and on their websites, within 24 hours. *Id.* §§ 13-306(*l*), 13-307(*l*).

Finally, the law imposes record-keeping obligations on both political committees and Independent Spenders. *See id.* §§ 13-221(a)(1), (b); COMAR 33.13.06.06A-B (political committees); *see also* Elec. Law §§ 13-306(m), 13-307(m) (Independent Spenders). The law authorizes the State Board to audit the records retained under §§ 13-221, 13-306, and 13-307. *See id.* § 2-102(b)(5); COMAR 33.13.06.06C(1).[4]

[4] The Election Law Article imposes criminal and civil penalties for violations of these provisions. *See* Elec. Law §§ 13-603, 13-604(a)(1)-(2). The Secretary of State may also seek an "injunction against any violation of this title." *Id.* § 13-605(a).

The 2016 Election

The 2016 Presidential Election saw a precipitous rise in online ads as compared to the prior election cycle. Nationwide, approximately $1.4 billion was spent on online political advertising—an eightfold increase over the amounts spent in 2012. (J.A. 117.) During that same period, "TV political ad spending fell 20% and radio political ad spending dropped 23%." (J.A. 129.) Moreover, the internet allows for the sophisticated targeting of advertising in a way that had not been seen before with regard to traditional advertising media. Technological advances make it possible to direct ads to increasingly stratified sets of readers or viewers, at a fraction of the cost of traditional broadcast or print advertising. (J.A. 118.)

These developments have had the effect of undermining the effectiveness of the tools traditionally available to enforce campaign-finance regulations. In Maryland, campaign finance enforcement is driven by public complaints, which are typically lodged by an opposing campaign or by private citizens who support an opposing candidate or question. (J.A. 131.) The targeted delivery of ads over the Internet, however, has allowed advertisers to select their audience with increasing precision, such that those who might have complained about an ad in the past no longer even see the ad now. (*Id.*) Moreover, while federal law requires television and radio broadcasters to make public their records relating to requests for broadcast

time by candidates or their agents,[5] there is no analogous requirement for online advertising. Thus, as political advertising moved online and away from traditional platforms, regulators' ability to enforce campaign finance and disclosure laws diminished.

Meanwhile, as the 2016 election unfolded, the shift toward online advertising revealed another vulnerability in regulatory enforcement: the susceptibility of online advertising to untraceable foreign influence. Maryland was one of several states targeted by Russian operatives who bought online ads and promoted content through fake accounts, pretending to be Americans. They crafted different messages for different audiences and used sophisticated tools to target their propaganda to the most receptive audiences. (J.A. 118.)

Russian meddling was pervasive. Investigations by Facebook, Twitter, and Google have found Russian activity on each of these platforms (J.A. 118-19; *see generally* J.A. 139-49), but the extent of this activity on other sites that host political advertisements may never be known. Although Russian influence was achieved "primarily through unpaid posts" (J.A. 144), Google's "DoubleClick" ad network—

[5] Specifically, broadcasters and cable and satellite operators are required to keep records "of all requests for broadcast time made by or on behalf of a candidate for public office," and, for all granted requests, the "charges made," the "schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased. *See* 47 C.F.R. §§ 73.1943 (broadcaster), 76.1701 (cable); 25.701(d) (satellite).

which plaintiff MDDC Press Association concedes places advertisements on many of the plaintiffs' websites (J.A. 133)—was also affected. *See* Elizabeth Dwoskin *et al.*, *Google Uncovers Russian-Bought Ads on YouTube, Gmail and Other Platforms*, The Wash. Post (Oct. 9, 2017) (hereinafter "Dwoskin").[6] According to some reports, Maryland was one of the three most-targeted states in the 2016 election. (J.A. 118-19.)

The Legislative History of the Act

It was against this backdrop that Maryland enacted the Online Electioneering Transparency and Accountability Act. 2018 Md. Laws ch. 834 (J.A. 83-109). Although the Act's sponsors cited revelations about Russian involvement in the 2016 election, that was not the sole focus of the legislation. In legislative hearings, witnesses testified about the need to modernize the regulatory environment to address the degree to which political advertising now occurs online, beyond the reach of regulatory oversight.

For example, Bradley Shear, an attorney who specializes in social media law, testified that he had worked with the State Board since 2010 to regulate online political advertising and that, "while television, radio and print mediums must follow

[6] Available at https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/?utm_term=.3380beb3a8e5 (last visited April 12, 2019) (cited in District Court ECF No. 24 at 7 n.10).

strict guidelines . . . to ensure the public knows who is responsible for the political ads they see, social media companies and the digital advertising industry do not have to follow the same rules." (J.A. 129.) The League of Women voters echoed Mr. Shear's testimony, noting that the "legislation is aimed at updating our current laws, many of which were written when campaign material was primarily in print form," and urging "more transparency in on-line campaigning such as Facebook ads, Twitter Posts or websites is in order." (J.A. 136.) Get Money Out, an organization dedicated to "the goal that all citizens should have equal access to the ballot and an equal say in governance," testified that the bill "would close important gaps in the existing disclosure requirements," including a "critical loophole" pursuant to which the definitions of "electioneering communication" and "public communication" did not expressly include digital advertisements. (J.A. 137.)

Other witnesses testified about the extent of the interference with the 2016 election in Maryland. For example, Common Cause Maryland noted that, while the "complete effect[] of unregulated social media electioneering in the 2016 election is still unknown," what *was* known was that "unethical domestic campaigns and hostile foreign campaigns" alike used social media to spread "news stories designed to dupe Americans and depress participation in our elections." (J.A. 131.) And the legislative record also made clear, as noted above, that plaintiffs' own properties may have been impacted by Russian involvement in the 2016 elections. (J.A. 133.)

The Requirements of the Act

The Act extends to "online platforms" disclosure and record-keeping requirements applicable to campaign-related paid advertisements—defined in the Act as "qualifying paid digital communications."[7] "Online platforms, in turn, are defined as any "public-facing website, web application, or digital application, including a social network, ad network or search engine" that generally has 100,000 or more unique monthly United States visitors or users and accepts online ads. Elec. Law § 1-101(dd-1).

An online platform that accepts online ads must post on its website, in machine-readable format: (1) the name and contact information of the purchaser; (2) the identity of the treasurer of the political committee (if applicable) or the individuals exercising direction or control over the activities of the purchaser (if applicable); and (3) the total amount paid by the purchaser for the placement of the ad. Elec. Law §§ 13-405(b)(1), 13-405(b)(6)(i)-(ii). For online ads placed by an ad network, the online platform must provide contact information for the ad network or a hyperlink to the ad network's website where the contact information is located.

[7] Specifically, a "qualifying paid digital communication" is "any electronic communication that: (1) is campaign material; (2) is placed or promoted for a fee on an online platform; (3) is disseminated to 500 or more individuals; and (4) does not propose a commercial transaction." Elec. Law § 1-101(*ll*-1). We will refer to these types of communications as "online ads."

Elec. Law § 13-405(b)(6)(iii). The records must be posted "within 48 hours after [the ad] is purchased" and must remain available for at least one year following the next general election. *Id.* § 13-405(b)(3).

Online platforms' obligations under the Act are triggered by notice that the ad qualifies as an online ad. *Id.* § 13-405(a)(1). The purchaser (or ad network) placing the ad must provide that notice together with the information necessary for the online platforms to comply with the disclosure obligations set forth above. *Id.* § 13-405(d)(1)). In turn, online platforms are entitled to "rely in good faith on the information provided by a purchaser of [an online ad] to comply with" those obligations. *Id.* § 13-405(d)(2).

Online platforms are also required to retain certain information provided by the purchaser or ad network. *See id.* §§ 13-405(c), 13-405(d)(1). This information includes: (1) the candidate or ballot issue to which the ad relates and whether the ad is in support or opposition; (2) the dates and times the online ad was first and last disseminated; (3) an "approximate description of the geographic locations" where the ad was disseminated; (4) an "approximate description of the audience that received or was targeted to receive" the online ad; and (5) the total number of time the ad was viewed. *Id.* § 13-405(c)(3). These records must be retained for at least one year following the next general election and "shall be made available on the request of the State Board" within 48 hours after the online ad is first disseminated.

Elec. Law § 13-405(c)(2).[8] Together, these provisions align the disclosure and record-keeping obligations applicable to "online platforms" with those already applicable to radio and television broadcasters. *Compare* 47 C.F.R. §§ 25.701(d), 76.1701, 73.1943 (obligations for radio and television, cable, and satellite broadcasters).

The Act also authorizes the State Administrator to investigate potential violations of these provisions by a purchaser of an online ad. Elec. Law § 13-405.1(a). Following an investigation, the State Administrator may request that the Attorney General institute an action for injunctive relief to require a purchaser to comply with these provisions, or to "require an online platform to remove [an online ad] that does not" comply with § 13-401 or § 13-405. Elec. Law §§ 13-405.1(b)(1), (b)(3) (injunction may be entered only if violation shown "by clear and convincing evidence").[9]

Finally, the Act forbids the purchase or sale of campaign material or an electioneering communication using any currency other than United States currency. Elec. Law § 13-405.2(b)-(c).

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[8] Online platforms must also make "reasonable efforts to allow the State Board" to obtain this information. Elec. Law § 13-405(e).

[9] Before making a request that the Attorney General institute an action, the State Board must provide the purchaser with a reasonable opportunity to be heard at a public meeting of the State Board. Elec. Law § 13-405.1(b)(2).

The Act became law on May 26, 2018 without the Governor's signature and took effect on July 1, 2018. 2018 Md. Laws ch. 834, § 2 (J.A. 109).

Procedural History of this Lawsuit

On August 17, 2018, the plaintiff newspaper publishers[10] filed a complaint for declaratory judgment and preliminary and permanent injunctive relief against the five members of the Maryland State Board of Elections (the "State Board"),[11] the State Administrator of Elections Linda H. Lamone, and Maryland Attorney General Brian E. Frosh, all in their official capacities. (J.A.15-16.) As relevant here, the complaint asserts that the Act, on its face, violates the First and Fourteenth Amendments of the U.S. Constitution by requiring online publishers to make certain disclosures regarding the political advertisements that they host on their websites, and to retain certain other information regarding those advertisements. (J.A. 11-12.)[12] The plaintiffs sought a declaration that the Act was unconstitutional under the

[10] The plaintiffs in this action are newspaper publishers that publish in and around Maryland and online, as well as one organization that represents the daily and most of the non-daily newspapers in Maryland, Delaware, and the District of Columbia. (J.A. 14-15, 79.)

[11] The members of the State Board are Chairman David J. McManus, Jr., Vice Chairman Patrick J. Hogan, Michael R. Cogan, Kelley A. Howells, and Malcolm L. Funn. (J.A. 16.)

[12] The complaint also alleged that certain provisions of the Act were vague and/or overbroad, that the injunctive remedies prescribed by the Act constituted unlawful prior restraints in violation of the First Amendment, that the records inspection provisions prescribed by the Act authorized unlawful searches in

First and Fourteenth Amendments and preliminary and permanent injunctions enjoining the defendants from enforcing the Act. (J.A. 34-35.)

Simultaneous with their complaint, the plaintiffs filed a motion for preliminary injunction. (J.A. 36.) Included with the motion were seven declarations from representatives of the plaintiffs attesting what they believed to be the burdens of complying with the Act (J.A. 40-79):

- that plaintiffs' "current systems and processes do not collect some of the required information and where [they] do, it is maintained in different software and locations," requiring the development of new collection processes and/or acquisition of new software (e.g., J.A. 41);
- that the publication requirements would "require both the creation and publication of a new webpage on our website, and the disclosure of proprietary information about our advertising practices and pricing" (e.g., J.A. 41); and
- "[m]ore importantly," the publication requirements would intrude on plaintiffs' "independent editorial judgment regarding the news, opinion and advertising content [they] choose to publish" (e.g., J.A. 41).

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violation of the Fourth Amendment, and that the Act's imposition of liability on online publishers was pre-empted by the federal Communications Decency Act of 1996, 47 U.S.C. § 230. (J.A. 13-14.) The district court did not reach any of those issues in its ruling. (J.A. 410.)

Plaintiffs also submitted the declaration of a candidate for Maryland's House of Delegates in the 2018 election, who testified that he had attempted (unsuccessfully) to place political ads on Google, and would be harmed if Maryland newspapers were to "cease accepting digital political advertisements" as a result of the Act. (J.A. 153.)

On November 16, 2018, the district court held a hearing on plaintiffs' motion (J.A. 215), and on January 3, 2019, entered an order granting it in part and denying it in part. (J.A. 459.) The district court explained its decision in an accompanying memorandum opinion. (J.A. 409.)

The District Court's Memorandum Opinion

The district court concluded that the plaintiffs were likely to succeed on the merits of their First Amendment claim. (J.A. 456.) The court first found that the Act "singles out campaign-related content for regulation . . . and compels online publishers to retain records, make information available upon request, and publish content on their websites." (J.A. 425.) As a result, the Act imposed content-based restrictions on speech and thus was subject to strict scrutiny, pursuant to which the State bore the burden of establishing that the Act "furthers a compelling interest and is narrowly tailored to achieve that interest," unless it qualified for one of several exceptions to that doctrine. (J.A. 443, 425.)

One such exception, the district court found, was articulated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). (J.A. 428.) In *Buckley*, the Supreme Court evaluated a series of requirements related to campaign spending, campaign contributions, and disclosures. (J.A. 428-31.) As the district court noted, the disclosure requirements were the least troubling to the Court; although they had "the potential to deter some people from making contributions and could, under some circumstances, 'expose contributors to harassment or retaliation,'" the government's interest in "providing the electorate with information about campaign funding and expenditures; deterring corruption and the appearance of corruption; and helping the state gather data necessary to detect violations of campaign finance laws" was "'sufficiently important to outweigh the possibility of infringement.'" (J.A. 431) (quoting *Buckley*, 424 U.S. at 68).) As a result, the record-keeping, reporting, and disclosure provisions of campaign finance laws are subject to a less rigorous form of scrutiny known as "exacting scrutiny," which requires the government to show that these provisions are "substantially related" to an "important" government interest. (J.A. 431).)

Despite the fact that the Act imposes record-keeping, reporting, and disclosure obligations relating to campaign finance, the district court declined to apply "exacting scrutiny." (J.A. 430-39.) The court concluded that, unlike the statute at issue in *Buckley* and other "exacting scrutiny" cases, the Act here "burden[ed]

ostensibly neutral third parties such as publishers of political advertisements," as opposed to the "individuals or groups seeking to influence an election or ballot question—the direct participants in the electoral process." (J.A. 434-35.) This distinction, according to the district court, resulted in an "encroach[ment] on First Amendment rights" that was "more profound[]" than the burdens imposed by the laws in *Buckley* and its progeny, in part because of the special place occupied by the Press in the First Amendment landscape. (J.A. 441.) The district court also understood "[r]ecent Supreme Court precedents" to "strongly suggest" that courts should narrowly construe exceptions to the "general rule" that compelled disclosure laws must overcome strict scrutiny. (J.A. 441-42 (citing *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)). Based on its understanding of the governing law, the district court declined to extend "the *Buckley* 'exacting scrutiny' standard" to third party publishers of political advertisements. (J.A. 443.)

The district court then evaluated the Act's obligations under strict scrutiny, concluding that the Act did not survive this "demanding" test. (J.A. 450.) The district court acknowledged that the State's interests in "preventing foreign governments and their nationals from interfering in [its] elections" and "informing voters about the source of online ads and deterring corruptions" were "compelling governmental interests" (J.A. 444, 445), but concluded that the Act was not

"narrowly tailored" to promote those interests, because it was both over- and underinclusive with regard to the interests it purported to further. (J.A. 446.)

The district court found that the Act was overinclusive because it imposed on third-party publishers disclosure obligations that were duplicative of those already imposed on political committees (i.e., many of the ad purchasers) under Maryland law. (J.A. 447-48.) In addition, the district court concluded that there was no reason why the state could not require the ad purchasers themselves to retain the records that publishers were required to retain under the Act. (J.A. 448.) Finally, the district court concluded that the Act was overinclusive because it "imposes its obligations on any and all 'online platforms,'" instead of limiting its reach to "Facebook, Instagram, and other social media giants that foreign operators are known to have exploited." (J.A. 449.)

The district court found that the Act was underinclusive because it targeted only paid advertisements, when the evidentiary record suggested that "the primary evil the Act was intended to redress was *unpaid* Internet postings (many of which mentioned no election or candidate at all) on social media sites that are not news publishers." (J.A. 449-50.) As a result, it concluded that "there is simply no way the State can show its law is the least restrictive means of achieving its compelling interest in deterring or exposing foreign attempts to meddle in its elections." (J.A. 450.)

Although the Court concluded that strict scrutiny was the appropriate framework for evaluating the constitutionality of the Act's obligations, it found that even under *Buckley*'s "exacting scrutiny" test "the Act would not pass muster." (J.A. 450.) The district court concluded that, because the State's interests "in shielding its elections from foreign influence" and "promoting electoral transparency" were "compelling," it "necessarily follows, then, that these interests are 'sufficiently important' to conceivably justify a campaign finance disclosure requirement under *Buckley*." (J.A. 451.) However, it concluded that the Act's obligations did not bear a "substantial relation" to these interests for the same reasons that it concluded they were not "narrowly tailored" to those interests under strict scrutiny: they were duplicative of other campaign finance disclosure requirements; they did not target the deceptive practices the Act ostensibly sought to deter; and they were poorly calibrated to prevent foreign operatives from evading detection. (J.A. 453-55.) With regard to the latter concern, the district court noted that, because the Act's reporting and record-keeping obligations were triggered by notice to the publisher from the purchaser that the ad was subject to the requirements of the Act, a person seeking to avoid disclosure could "simply withhold the notice, in which case the publisher never incurs an obligation to disclose any information about the ad." (J.A. 455.) The district court concluded that "these infirmities separate Maryland's statute from

the more traditional campaign-finance disclosure requirements that have withstood exacting scrutiny." (J.A. 455.)

Having found that plaintiffs were likely to succeed on the merits of their First Amendment challenge to the disclosure and record-keeping requirements of the Act, the district court concluded that the remaining preliminary injunction factors of irreparable harm, the balance of equities, and the public interest all tipped in plaintiffs' favor. (J.A. 456-57.) Accordingly, it found that "preliminary injunctive relief was warranted," (J.A. 457) and enjoined the State Board from enforcing the disclosure and record-keeping requirements of § 13-405 or investigating violations of the same under § 13-405.1 against plaintiffs during the pendency of the action (J.A. 459).[13]

Subsequent Developments and Plaintiffs' Motion

On June 29, 2018, Google announced that it would no longer accept political ads in Maryland due to the passage of the Act. *See* Michael Dresser, *Google no longer accepting state, local election ads in Maryland as result of new law*, The Balt.

[13] The district court concluded that plaintiffs failed to show that their challenge to the Act's prohibition on the use of foreign currency to purchase online ads, *see* Elec. Law § 13-405.2, was likely to succeed. (J.A. 417, 459.)

Sun (June 29, 2018).[14] While it supported the intent of the law—indeed, Google has developed and published its own political ad transparency resources that track many of the requirements of the Act[15]—it was concerned that its systems were not "currently built to collect and provide the information in the time frame required by" the Act. Dresser, *supra*. Specifically, its "'dynamic' pricing scheme can make it difficult to determine what the final price is until the end of a campaign that may last a week or longer," potentially inhibiting compliance with the requirement that the price paid per ad be disclosed within 48 hours of purchase. *Id.* Google indicated that it was working with the Board to ensure that the regulations implementing the law that would be compatible with its systems. *See id.* The Board has since published proposed regulations that address the concerns raised by Google.[16]

SUMMARY OF ARGUMENT

The district court erred as a matter of law in concluding that the plaintiffs were likely to succeed on the merits of their claims.

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[14] Available at https://www.baltimoresun.com/news/maryland/politics/bs-md-google-political-ads-20180629-story.html (last visited April 12, 2019) (cited at ECF No. 9-1 at 13 n.10).

[15] *See Political advertising on Google*, https://transparencyreport.google.com/?hl=en (last visited April 12, 2019).

[16] *See* 46 Md. Reg. 326, 327 (Mar. 1, 2019) (proposing regulation 33.13.21.02B(6), which would require a political advertising purchaser to provide "a reasonable approximation" of the total amount to be paid "[i]f the amount will be calculated at a later date").

First, the district court erred by applying strict scrutiny, as opposed to the less stringent "exacting scrutiny," which requires the burden on speech to be substantially related to an important government interest. The Supreme Court has extended the application of "exacting scrutiny" beyond the context of political committee or independent expenditures where it first developed the standard and now applies exacting scrutiny to "all campaign finance-related disclosure requirements." *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 291 (4th Cir. 2013); *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-67 (2010). Nothing in the Supreme Court's recent decisions applying strict scrutiny to content-based speech-restrictions purports to pull back the applicability of exacting scrutiny to campaign-disclosure cases.

The district court also erred by declining to apply exacting scrutiny due to concerns about the Act's burden on "neutral third parties," when the exacting scrutiny test is designed to weigh the government's important interests against *any* burden on speech that the disclosure regulation might impose. The district court compounded its error by invoking the Press's "right to exercise editorial judgment and control" to justify its decision to apply strict scrutiny, when the Act requires online providers to disclose only a line or two of factual information related to paid advertisements that publishers have already chosen to accept.

The district court also erred as a matter of law in concluding that the Act would fail exacting scrutiny. Exacting scrutiny requires a "'relevant correlation' or 'substantial relation'" between the disclosure and recordkeeping obligations and a "sufficiently important" government interest, as well as a harmony between "the strength of [that] governmental interest" and "the seriousness of the actual burden on First Amendment rights." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196, 197 (2010).

The district court acknowledged that the State's interest in electoral transparency, deterring corruption and avoiding the appearance thereof, enforcing substantive campaign finance laws, and preventing the involvement of foreign actors in Maryland's electoral process were compelling, but erred in concluding that they were not "substantially related" to the disclosure and recordkeeping obligations imposed by the Act. The district court erred in finding that the Act's obligations were "duplicative of other campaign finance laws," when those laws do not require the information and instantaneity that the Act's disclosure provisions require. And the court wrongly decided that the obligations were "poorly calibrated to prevent foreign operatives from evading detection," where the record indicates that foreign operatives had in fact infiltrated ad networks that served plaintiffs' websites, and where the district court failed to even consider the other State interests furthered by the Act in assessing its efficacy.

The burden on the newspapers' editorial judgment and control is insignificant compared to the important State interests advanced by the Act. The Act requires the disclosure of only minimal factual information—provided in all cases by the purchaser—associated with ads that publishers have already decided to run. It does not require publishers to disclose proprietary information or to publish speech with which they disagree, or forbid the publication of information that publishers might otherwise wish to publish.

Finally, although strict scrutiny should not apply to the disclosure requirements at issue in this case, the district court erred in concluding that the Act's obligations fail that test. The district court acknowledged that the State's interests were compelling, but erred as a matter of law in concluding that the Act was not narrowly tailored to further those interests, committing the same errors it committed in concluding that the Act failed exacting scrutiny.

ARGUMENT

I. THIS COURT REVIEWS THE JUDGMENT OF THE DISTRICT COURT FOR ABUSE OF DISCRETION, CLEAR ERROR, AND LEGAL CORRECTNESS.

On appeal of an order granting a preliminary injunction, this Court employs an abuse of discretion standard of review. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). Pursuant to this standard, the district court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Id.* A

district court abuses its discretion when it "has acted arbitrarily or irrationally[,] has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises.'" *L.J. v. Wilbon*, 633 F.3d 297, 304 (4th Cir. 2011) (citation omitted). A district court also abuses its discretion when it "misapprehends or misapplies the applicable law." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). Clear error is found "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. (citation omitted).

"Because preliminary injunctions are 'extraordinary remed[ies] involving the exercise of very far-reaching power,'" this Court should be "particularly 'exacting' in its use of the abuse of discretion standard when it reviews an order granting a preliminary injunction," *id.* (citation omitted). A plaintiff seeking a preliminary injunction must demonstrate "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Courts must consider each factor separately, *Pashby*, 709 F.3d at 321, and the preliminary injunction should be granted "only if the moving party clearly establishes entitlement to the relief sought." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS WERE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

The district court abused its discretion in granting the plaintiffs' Motion, because it made two principal legal errors in reaching the conclusion that the plaintiffs were likely to succeed on the merits of their claims. It erred in concluding that strict scrutiny applies to campaign-related disclosure and recordkeeping requirements, rather than the intermediate "exacting scrutiny" that the Supreme Court has applied, and then it erred in concluding the requirements would fail exacting scrutiny if it applied. Both require reversal.

A. The Campaign-Finance Disclosure and Recordkeeping Requirements of the Act Are Subject to Intermediate "Exacting Scrutiny," Not Strict Scrutiny.

The district court erred in concluding that the Act was subject to strict constitutional scrutiny as a content-based restriction of speech, rather than the intermediate-level "exacting scrutiny" that this Court had stated applies to "all campaign finance-related disclosure requirements." *Tennant*, 706 F.3d at 291.

1. The Supreme Court Applies Exacting Scrutiny to Campaign-Finance Disclosure and Recordkeeping Requirements.

The "exacting scrutiny" test has its roots in the Supreme Court's decision in *Buckley v. Valeo*, which evaluated limits placed on contributions to political campaigns and on expenditures for political communications under the Federal Election Campaign Act. 424 U.S at 1. Although the Court found that both types of

limits "impinge on protected associational freedoms," *id.* at 22, it concluded that contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20, whereas expenditure limits were more troublesome because they "necessarily reduce[] the quantity of expression," *id.* at 19. As a result, the Court held that expenditure limitations must satisfy strict scrutiny, *id.* at 44-45, whereas contribution limitations are permissible if they are "closely drawn" to match a sufficiently important interest," *id.* at 25.

Buckley also addressed the act's compelled disclosure of donors who make political contributions to "political committees" and the expenditures made by those committees. Although the Court found that these types of compelled disclosures also threaten associational freedom by subjecting contributors to potential harassment, it identified three "governmental interests" that were "sufficiently important to outweigh the possibility of infringement," *id.* at 66:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [imposed by federal law].

Id. at 66-68.

The Court recognized that "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," *id.* at 68, but because disclosure obligations—unlike contribution and expenditure limitations—"impose no ceiling on campaign related activities," *id*. at 64, the important governmental interests at stake justified the application of "exacting scrutiny." Under this intermediate level of scrutiny, there must be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. *Id.* The threat to First Amendment rights must be "so serious and the state interest furthered by disclosure so insubstantial" before a disclosure requirement must give way under this test. *Id*. at 71.

Since *Buckley*, the Supreme Court has applied "exacting scrutiny" to campaign-related disclosure requirements in five cases, three of which addressed disclosure requirements applicable to political committees or independent expenditures. In *McConnell v. Federal Election Commission*, the Court upheld disclosure requirements applicable to party committees that used state and local contributions to advocate for federal candidates in close proximity to an election. 540 U.S. 93, 190 (2003). The Court concluded that the same "important state interests" it recognized in *Buckley*—"providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the

data necessary to enforce more substantive electioneering restrictions"—supported the requirements. *Id.* at 196.

The Court applied exacting scrutiny to invalidate disclosure requirements in *Davis v. Federal Election Commission*, but only because they "were designed to implement" the so-called "millionaire's amendment," which imposed more stringent contribution limits on candidates who self-financed their campaigns over a threshold dollar amount. 554 U.S. 724, 729, 744 (2008). Because the Court concluded that the asymmetrical requirements imposed by the millionaire's amendment violated the First Amendment, the associated disclosure requirements fell as well.

Finally, in *Citizens United* the Court, applying strict scrutiny, invalidated a prohibition against corporations and unions using their general treasury funds to make independent expenditures for "electioneering communications" or other speech that expressly advocates the election or defeat of a candidates. 558 U.S. at 365-66. At the same time, however, it applied exacting scrutiny to uphold disclosure requirements applicable to people who make broadcast electioneering communications. *Id.* at 366-67. The Court emphasized that disclosure was a "less restrictive alternative to more comprehensive regulations of speech," and that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369. Importantly for this case, the Court also observed that, "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide

shareholders and citizens with the information needed to hold corporations and elected officials accountable." *Id.* at 370. The transparency created by these disclosure provisions "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

The Court has also twice applied "exacting scrutiny" to disclosure requirements applicable to third parties that—like the media outlets here—were not themselves candidates or political committees. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) ("*ACLF*"), the Court applied exacting scrutiny to a Colorado requirement that petition sponsors not only disclose "the source and amount of money spent . . . to get a measure on the ballot," 525 U.S. at 203, but also "the name and addresses (residential and business) of each paid circulator, and the amount of money paid and owed to each circulator," *id.* at 201. The Court upheld the first of these disclosure requirements, explaining that such disclosures ensure that "voters are informed of the source and amount of money spent by proponents to get a measure on the ballot." *Id.* at 203. But it rejected the second set of requirements, concluding that the "benefit of revealing the names of paid circulators and amounts paid to each circulator . . . [was] hardly apparent and ha[d] not been demonstrated." *Id.* at 203.

In *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Court extended the "exacting scrutiny" framework beyond the campaign committee or independent

expenditure framework altogether. The case involved a challenge to the application of Washington's Public Records Act to require disclosure of unredacted petition forms revealing the signatures, names, and addresses of supporters of a recent referendum petition. *Id.* at 191. Although the case did not involve an election law, the Court characterized the petitioners' challenge as a "First Amendment challenge[] to disclosure requirements in the electoral context" and applied exacting scrutiny to determine whether the petition forms should be released. *Id.* at 197. The Court concluded that the application of the state public records law to require the release of petition forms survived exacting scrutiny in light of the state's interests in "ferret[ing] out invalid signatures" and "promoting transparency and accountability in the electoral process" more generally. *Id.* at 198. Those interests, the Court found, outweighed the "'burden on First Amendment rights'" that potential harassment of petition signers might cause. *Id.* at 199-200 (quoting *Davis*, 554 U.S. at 744).

2. This Court Also Applies Exacting Scrutiny to Campaign-Finance Disclosure and Recordkeeping Requirements.

This Court has consistently applied *Buckley*'s "exacting scrutiny" test to campaign-related disclosure requirements. In *The Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544 (4th Cir. 2012), this Court addressed whether an organization's statements about then-Senator Barrack Obama "expressly advocated" for the defeat of a candidate such that it would be an "independent

expenditure" subject to certain disclosure obligations under federal law. *See id.* at 548. Because the challenged laws imposed "disclosure and organizational requirements," the Court applied "exacting scrutiny" and upheld the constitutionality of the law under that "intermediate scrutiny level." *Id.* at 549; *see also North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439-40 (4th Cir. 2008).

In *Center for Individual Freedom, Inc. v. Tennant*, this Court applied exacting scrutiny to a West Virginia statute that imposed certain reporting and disclaimer obligations on entities that made independent expenditures and engaged in electioneering communications. 706 F.3d 270 (4th Cir. 2013). It also confirmed that "all campaign-finance related disclosure requirements" were subject to this standard. *Id.* at 291.

Even in the one case where this Court rejected the application of exacting scrutiny, *see Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 548, 555 (4th Cir. 2012), *vacated on reh'g en banc on other grounds*, 721 F.3d 264 (4th Cir. 2013), it did so in a way that confirmed the standard's continuing applicability to campaign-finance disclosure measures. At issue was an ordinance requiring "limited-service pregnancy centers" to post signs stating that they "do[ ] not provide or make referral for abortion or birth control services." The Court rejected the application of exacting scrutiny because

that standard "applied to finance disclosure laws in the campaign finance cases" and had no application to abortion-related speech outside of that context. *Id*. at 555. The Court observed, that in the election context, the Supreme Court "drew a distinction between regulations that limit campaign contributions and restrict campaign activities and regulations that merely require the disclosure of objective financial information." *Id.* The abortion-related ordinance at issue was "significantly more analogous to the restrictions on campaign speech that the Court held were subject to strict scrutiny." *Id.* By contrast, "campaign finance disclosure laws are less likely to be impermissibly content- or viewpoint-based and pose a lower risk of altering the speaker's message." *Id*.

3. Exacting Scrutiny Applies to the Campaign Finance Disclosure and Recordkeeping Requirements Issue Here.

The obligations imposed by the Act fall squarely within the field of "campaign-finance related disclosure requirements" that are subject to exacting scrutiny. They require online platforms to make disclosures regarding the source and amount paid for any online ad that they publish, and to retain records regarding the distribution of the online ad and the candidate or ballot question to which it relates. The disclosure provisions do not compel online platforms to publish views related to the ad, do not require them to gather the information disclosed or retained

themselves, and do not meaningfully take up column space that could be "devote[d] to other content." (J.A. 447.)

At the same time, the disclosure obligations challenged here advance the "important state interest," *McConnell*, 540 U.S. at 196, "in knowing who is speaking about a candidate," which "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 369, 371. And by requiring disclosure of the individuals exercising direction or control over the purchaser of the ad, the Act addresses the concern that election-related speech is often made through organizations that "conceal the true identity of the source" of their funding, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981); *see Center for Individual Freedom v. Madigan*, 697 F.3d 464, 481 (7th Cir. 2012) ("[O]nly disclosure of the sources of [such organizations'] funding may enable the electorate to ascertain the identities of the real speakers."). The Act thus informs the public by requiring those "attempting to influence . . . elections to 'disclose their identity and efforts in a manner that allows voters to evaluate and measure the statements made by and interests of those third parties[.]'" *McConnell*, 540 U.S. at 198.

By contrast, the reason the district court gave for *not* applying exacting scrutiny—that the State's interest in "providing the electorate with information" must yield when the First Amendment rights of "neutral third parties" (especially,

the Press) are burdened (J.A. 438-39)—cannot be squared with this Court's precedents or those of the Supreme Court.

First, no court has recognized the exception for "neutral third parties" that the district court adopted. The district court found this point "hardly persuasive," because "[a] court cannot be expected to answer a legal question that no party in the case before it has squarely presented." (J.A. 435.) But the Supreme Court *has* extended the application of exacting scrutiny to disclosure provisions that apply to "third parties" beyond the context of political committees or independent expenditures described in *Buckley*. In *John Doe No. 1*, for example, the Court applied exacting scrutiny to Washington's generic Public Records Act and its disclosure of petition forms in the possession of the State. 561 U.S. at 191. And in *ACLF*, the Court applied exacting scrutiny in examining whether petition sponsors can be required to disclose the names of and amounts paid to petition circulators. 525 U.S. at 201.

Moreover, in *McConnell*, the Supreme Court upheld disclosure obligations imposed on third party broadcasters under a *more relaxed* constitutional standard than exacting scrutiny. *See McConnell*, 540 U.S. at 237 (noting the FCC's "broad" regulatory authority "to assure broadcasters operate in [the] public interest" (citing

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969)).[17] Chief Justice Rehnquist's dissent chided the majority for subjecting the disclosure obligations to "mere rational-basis review," and would have applied exacting scrutiny, as required by *Buckley*, to the "[r]equired disclosure provisions" instead. *Id.* at 782, 783 (Rehnquist, C.J., dissenting) (citing *Buckley*, 424 U.S. at 64). But precisely for this reason, the district court's reliance on *McConnell* to support the application of *strict scrutiny* to the disclosure obligations imposed by the Act (*see* J.A. (Mem. Op. 27-29)) was misplaced: *eight* of the nine justices in *McConnell* would have applied a standard no more stringent than exacting scrutiny to the broadcast media disclosure provisions in that case. *See McConnell*, 540 U.S. at 233, 350; *cf. Adventure Commc'ns, Inc. v. Kentucky Registry of Elections*, 191 F.3d 429, 443 (4th Cir. 1999) (citing *Buckley* in upholding a Kentucky statute requiring broadcasters to file their FCC political reports with state regulators).[18]

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[17] This Court has characterized the constitutional test required by *Red Lion* for regulations of broadcast media as one of "minimal scrutiny." *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 190 (4th Cir. 1994) (citing *Red Lion*, 365 U.S. at 397-400), *vacated on other grounds*, 516 U.S. 415 (1996).

[18] In addition, third party political disclosure requirements imposed by the FCC extend not only to broadcasters, where the FCC wields substantial regulatory authority under *Red Lion*, but also to cable and satellite operators, where "the more relaxed standard of scrutiny adopted in *Red Lion* . . . is inapt," *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994); *see* 47 C.F.R. §§ 73.1943 (broadcaster), 76.1701 (cable); 25.701(d) (satellite). The district court's effort to distinguish *McConnell* on the ground that it involved regulations of broadcast media that are

As this Court noted in *Tennant*, "*all* campaign-finance related disclosure requirements" are subject to the "exacting scrutiny" standard, 706 F.3d at 291 (emphasis added), not just those that are levied on the so-called "direct participants in the electoral process." (J.A. 434-35.) By contrast, courts (including this Court) reject the application of exacting scrutiny to disclosure requirements only when the context is divorced from the campaign finance context altogether. *See Greater Baltimore*, 683 F.3d at 555 (compelled disclosure regarding alternative medical services). These cases speak with one voice on the subject: "[A] campaign finance disclosure requirement is constitutional if it survives exacting scrutiny[.]" *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).[19]

Second, the district court's refusal to apply exacting scrutiny because of the "possibility that" the Act "might encroach on First Amendment rights more profoundly than ordinary campaign finance disclosure requirements" ignores the fact that these concerns are addressed by the exacting scrutiny framework. The

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inapposite to the circumstances presented here (J.A. 436-37) was incorrect for this reason as well.

[19] As the district court acknowledged, none of the Supreme Court's recent precedents assessing content-based regulation under strict scrutiny purported to overturn the Court's prior precedents according "less rigorous scrutiny" to certain categories of speech-burdening regulation. (J.A. 440 (acknowledging that "[t]he prevailing consensus appears to be that those exceptions to the *Reed* content-neutrality framework survive"), 442 (noting that the Court itself acknowledged in *National Institute of Family and Life*, 138 S. Ct. at 2372, that it "applied a lower level of scrutiny to laws that compel disclosures in certain contexts").)

Supreme Court acknowledged that disclosure obligations will "undoubtedly . . . deter some individuals who otherwise" might speak, but under exacting scrutiny, that burden on speech is "weighed carefully against the interests which [the legislature] has sought to promote by th[e] legislation." *Buckley*, 424 U.S. at 68. Thus, to withstand exacting scrutiny, "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 (quoting *Davis*, 554 U.S. at 744).[20] The district court's decision to remove the Act altogether from the ambit of the exacting scrutiny test, because of its concerns about the degree to which the Act burdens First Amendment rights, erroneously presumes that the test is incapable of addressing those concerns on its own.

Third, even if strict scrutiny applied to disclosure obligations imposed on "neutral third parties" in the electoral process, the publisher-plaintiffs do not qualify as such when they act essentially as vessels for partisan political advertising. The district court's concerns about the government acting "'as a censor to check critical comment by the press,'" (J.A. 439 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983)), or restricting the Press's

[20] As set forth below, the Act's disclosure and record-keeping obligations are substantially related to important government interests in promoting electoral transparency, deterring fraud, and enforcing existing campaign finance regulations. *See* § II.B.

"right to exercise 'editorial judgment and control,'" (J.A. 447 (quoting *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)), are not justified by the circumstances of this case. The Act requires little more than the "disclosure of" a line or two of "factual information" related to advertisements that publishers have already chosen to accept, *Greater Baltimore*, 683 F.3d at 555; it does not affect the "choice of material to go into [the] newspaper[s], and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials." *Tornillo*, 418 U.S. at 258. The plaintiffs' "editorial judgment and . . . free expression of views on these and other issues, however controversial," are untouched by the Act. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *cf. S.E.C. v. Wall St. Pub. Inst., Inc.*, 851 F.2d 365 (D.C. Cir. 1988) (holding that the SEC could require publication by a stock market-focused news magazine of any consideration it received in exchange for publishing an article, on the ground that "[r]equiring disclosure of such payments would not interfere with either editorial judgments concerning the content of the feature articles or newsgathering practices").

At the same time, to the extent that the decision to accept political advertising involves an exercise of "editorial judgment" on the part of a publisher,[21] the

[21] *Cf. Bryant v. Gates*, 532 F.3d 888, 898-99 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("[M]ilitary-run newspapers and the advertising space in them are not

imposition of disclosure obligations corresponding to that advertising is not repugnant to the Constitution. The Supreme Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United*, 558 U.S. at 352 (quoting *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)). And since the disclosure and record-keeping laws here—like those in *Buckley* and its progeny—"impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366, they are subject to exacting scrutiny rather than strict scrutiny.

B. The Act's Disclosure and Record-Keeping Obligations Satisfy Exacting Scrutiny.

Disclosure laws are constitutional so long as there is a "'relevant correlation' or 'substantial relation'" between the requirement and a "sufficiently important" government interest. *John Doe No. 1*, 561 U.S. at 196. In addition, to withstand exacting scrutiny, "'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id*. at 197 (quoting *Davis*, 554 U.S. at 744). The Act's disclosure and record-keeping obligations satisfy both of these prongs, and thus the district court erred in concluding that plaintiffs were likely to succeed on the merits of their claims.

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forums for First Amendment purposes but instead are the Government's own speech.").

1. The Act's Disclosure and Record-Keeping Provisions Bear a "Substantial Relation" to "Important" Government Interests.

The Supreme Court has identified several "important state interests" sufficient to support disclosure laws: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," *McConnell*, 540 U.S. at 196, and "ensur[ing] that foreign nationals or foreign governments do not seek to influence United States' elections," *Independence Inst. v. Federal Election Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *aff'd.*, 137 S. Ct. 1204 (2017); *see also SpeechNow.org v. Federal Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010) ("[R]equiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.").[22]

The disclosure and record-keeping obligations imposed by the Act are substantially related to these interests. First, the disclosure obligations of the Act are substantially related to the State's interest in providing the electorate with information regarding "the sources of election-related spending." *McCutcheon v. Federal Election Comm'n*, 573 U.S. 185, 223 (2014). The Act requires disclosure

[22] As the court observed in *Independence Institute*, "[t]he vital importance of determining if foreign nationals are supporting candidates has been underscored in th[e] election [of 2016]." 216 F. Supp. 3d at 191 n.11.

of the identity of the purchaser, the name of the treasurer of the committee or the persons exercising control over the entity, and the amount paid for the online ad. This information is substantially similar to the information that the Supreme Court found "sufficient to justify" the disclosure requirement. *See Citizens United*, 558 U.S. at 366 (evaluating disclosure requirement to "identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors"). Such disclosure fulfills the public's interest "in knowing who is speaking about a candidate," which "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 369, 371. And disclosure is particularly important "[i]n an age characterized by the rapid multiplication of media outlets and the rise of internet reporting," where "the 'marketplace of ideas' has become flooded with a profusion of information and political messages." *National Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011). "Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin." *Id.*

Second, the disclosure obligations are substantially related to the State's interest in deterring corruption. Disclosure can "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. "Arming voters with information about 'a candidate's most generous supporters,' whether direct or indirect, makes it easier

'to detect any post-election special favors that may be given in return.'" *Independence Inst.*, 216 F. Supp. 3d at 192. The disclosure of information regarding the source and amount of funding for online ads furthers these interests of deterring corruption.

Third, the Act's disclosure obligations are substantially related to the State's interest in enforcing more substantive electioneering restrictions, particularly restrictions on expenditures by foreign nationals. Disclosures regarding the identities of purchasers of and amounts paid for online ads help "to enforce existing regulations and to ensure that foreign nationals or foreign governments do not seek to influence United States' elections." *Independence Inst.*, 216 F. Supp. 3d at 191. Indeed, the Supreme Court has held that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 67-68. Here, the legislative history makes clear that the Act was intended in part to provide additional tools to regulators to deter unlawful foreign expenditures on political ads on online forums in Maryland.

The record-keeping obligations are also substantially related to the State's interest in enforcing other campaign finance laws. The Act requires online platforms to retain information—all of which must be provided by purchasers—regarding the candidate or ballot issue to which the ad relates, the dates and times when the ad was

first and last published, the approximate geographical region and audience to which the ad was targeted, and the total number of impressions generated by the ad. Information regarding the candidate or ballot issue allows the Board to investigate and enforce requirements governing coordinated spending and authority lines. *See* Elec. Law § 13-401; COMAR 33.13.18. Information regarding the timing of publication assists the Board in determining whether the Act's disclosure obligations were properly met. *See* Elec. Law § 13-405(b)(3)(i) (requiring disclosure within 48 hours of the purchase of the online ad). Information about the scope of the online ad's distribution, in this era of sophisticated micro-targeting tools, assists the State Board in determining if certain demographic groups were improperly targeted with misinformation or harassment. (E.g., J.A. 118.)

The reasons the district court gave for why the Act's disclosure provisions would not withstand exacting scrutiny—that they are "duplicative of other campaign finance disclosure requirements," "do not target the deceptive practices the Act ostensibly seeks to deter," and are "poorly calibrated to prevent foreign operatives from evading detection" (J.A. 453)—are not supported by the law or the factual record here.

The Act's obligations are not duplicative. The Act requires disclosure of the required information at the point of publication each time a qualifying ad is published. *See* Elec. Law § 13-405(b). By contrast, the ostensibly "duplicative"

reporting obligations cited by the district court (*see* J.A. 453) require, for political committees, omnibus reports detailing all contributions and expenditures on eight separate occasions during an election year—less than one a month. *See* Elec. Law §§ 13-309(a)-(b), 13-304(a)(1). A reader who sees an advertisement on one of plaintiffs' websites is thus unlikely to obtain information about that advertisement by consulting a month-old campaign finance report through the State Board's website. By contrast, the near-instantaneous disclosure required by the Act facilitates the "prompt disclosure of expenditures" necessary to "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable." *Citizens United*, 558 U.S. at 370.

Also, purchasers who make "independent expenditures" or "electioneering communications" are only required to report expenditures of at least $10,000, *see* Elec. Law §§ 13-306(c), 13-307(c), which many online ad buys may not reach (*see* J.A. 152 ("digital advertising is far less expensive than the alternatives of television, radio, or print advertising"); J.A. 213, 286 (indicating "money spent" on Larry Hogan for Governor Facebook ad of approximately $1,000 to $5,000)).

Moreover, the information available through campaign finance reports does not link to or otherwise identify specific advertisements. (*See generally* J.A. 178-210).) It is impossible to tell from the reports alone which payments to media entities for "online advertising" were made in support of which particular advertisements.

(*See* J.A. 192 (listing 15 payments to Facebook by Larry Hogan for Governor over approximately four-month period in 2015, without reference to specific ads)). And if payments are made to ad networks or (especially) media consulting companies (*see* J.A. 197 ("Media Strategies LLC")), the information is even more removed from the ad itself, with the reader unable to discern even the publication in which the unspecified ad(s) at issue were placed. The Court's conclusion that the Act's disclosure obligations are "duplicative" of pre-existing disclosure requirements was wrong as a matter of law.

But even setting whether the disclosures imposed by the Act are "duplicative," the district court's assessment ignored the benefit of requiring disclosures at the point of publication. For example, in the Larry Hogan for Governor ad used as a demonstrative at the hearing on plaintiffs' Motion, there is a clickable, small letter "*i*" in the corner, that when clicked opens a pop-up window titled "About this Ad" which identifies the ad's purchaser. (J.A. 211.) A link on this pop-up window allows the viewer to "[s]ee information about this ad" (*id.*), which takes the viewer to a page that shows that the ad is "active," shows that the viewer has now "viewed" the ad, and provides a link to "See Ad Performance." (J.A. 212.) The "Ad Performance" page provides the approximate number of impressions, the approximate "money spent" on the ad, the geographical distribution of persons viewing the ad, and the age and gender breakdown of persons viewing the ad. (J.A. 213-14.) Although this

format exceeds what is required by the Act, *see* Elec. Law §§ 13-405(b)(1), (b)(3), (b)(6) (requiring disclosure "on the Internet" of the purchaser of the ad, individuals with decision-making control over the purchaser, and the cost of the ad), it illustrates the benefit of having accessible information about a specific online ad available to persons viewing that ad at the point of publication, as opposed to requiring viewers to navigate to the State Board's web-searchable campaign finance database, and search through payment records that do not reference specific ads, and may not even identify the websites on which the ads are hosted.[23] The district court's failure to recognize these *qualitative* aspects of the Act that distinguished it from the existing reporting scheme was also wrong as a matter of law.

The Act is not underinclusive. The district court concluded that the Act "fail[s] to remedy the harms that inspired its enactment," because "foreign operatives largely confined their activities to . . . social media platforms" using "fake websites and free social media posts." (J.A. 454-55.) But in limiting its characterization of the record to how foreign actors "largely" behaved in the 2016 election, the district court ignored the undisputed evidence that this behavior *also* involved the use of paid

[23] The district court agreed that the record-keeping requirements were "not entirely duplicative," but concluded that these obligations did not further the State's interests in transparency, deterring deterrence, or "deterring foreign meddling in federal and state elections." (J.A. 153-54.) But this ignores the State's interests in enforcing the other substantive campaign finance restrictions that the record-keeping provisions facilitate. *See* pages 42-43 above.

online ads distributed through ad networks, including networks that served some of the plaintiffs' websites. (*See* J.A. 133; Dwoskin.) The district court chided defendants for failing to "identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time" (J.A. 449), but in large measure that was the very point of the legislation. While "internal investigations by Facebook, Twitter, and Google have found Russian activity on each of these popular platforms" (J.A. 119-20), the extent to which that activity affected other platforms—including those of plaintiffs—is unknown. In light of the evidence that Russian operatives infiltrated ad networks that served plaintiffs' websites,[24] the State was 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. *See Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) ("[T]here is no mandate that a state must address its problems wholesale. Indeed, states are free to regulate by degree, one step at a time, 'addressing . . . the phase of the problem which seems most acute to the legislative mind.'" (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

Moreover, it is not clear that regulating the content of unpaid, anonymous posts on social networks (or perhaps newspaper article comment forums) was even

[24] Moreover, Google's DoubleClick program is not the only ad network in operation. *See* https://en.wikipedia.org/wiki/Advertising_network (last visited Apr. 12, 2019). Other ad networks used by the plaintiffs may not have investigated whether their networks had been infiltrated by Russian-bought political ads in 2016.

available to the State. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354-55 (1995) (holding law that forbade anonymous political leafletting unconstitutional). The underinclusiveness of a regulation is constitutionally problematic because it "belies a governmental assertion that it has genuinely pursued an interest of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (applying strict scrutiny). Here, there is no dispute that the State's interests are compelling. It would be a perverse interpretation of the First Amendment to deny the State the authority to regulate conduct it can constitutionally reach because it has chosen *not* to regulate conduct for which it lacks constitutional authority. While this Court has cautioned that "a state legislature must provide some rationale for electing to proceed one step at a time," *Tennant*, 706 F.3d at 285, that requirement is met where subsequent steps are constitutionally unavailable.

In addition, the district court's underinclusiveness analysis *ignored altogether* the other important—indeed, compelling (J.A. 445-46)—state interests motivating the Act. "[W]ith regard to First Amendment under inclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required." *National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 17 (D.C. Cir. 2009) (applying exacting scrutiny); *see also Leake*, 524 F.3d at 439 ("Because narrow tailoring is not required [under exacting scrutiny], the state need not show that the Act achieves its purposes

in the least restrictive means possible."). Instead, "[t]he primary purpose of underinclusiveness analysis is simply to ensure that the proffered state interest actually underlies the law." *Taylor*, 582 F.3d at 17. Thus, "a rule is struck for *under* inclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest, because it provides only ineffective or remote support for the asserted goals, or limited incremental support." *Id.* Here, as the district court itself recognized, the Act had other aims than just deterring foreign meddling in Maryland elections, including promoting transparency and deterring corruption. (J.A. 445-46.) The court's failure to acknowledge these other interests in assessing whether the Act was "underinclusive" (*see* J.A. 446, 454) constitutes reversible error.

The Act's efficacy. The district court's conclusion that the Act's supposed lack of "efficacy" underscores the mismatch between "the Act's requirements and its aims" (J.A. 455) suffers from similar defects. For one, it focuses on the hypothetical conduct of a "buyer who wishes to avoid detection—as any self-respecting foreign operative surely would" (*id.*), ignoring that the thousands of ad purchasers that *complied* with the Act would serve as testaments to the Act's efficacy in promoting the State's interests in electoral transparency and deterring corruption.

But on the merits of its hypothetical, the district court is wrong. Even if a buyer "who wishes to avoid detection" simply "withholds the notice" so that "the publisher never incurs an obligation to disclose any information about the ad" (J.A.

455), the conspicuous *absence* of the required disclosure information for a non-complaint ad would serve as an easy trigger for subsequent investigation. The district court erred in concluding that the Act is "poorly calibrated" to achieve the State's important interests.

2. The Strength of the State's Interests Reflect the Seriousness of the First Amendment Burdens Imposed by the Act.

Because "[i]t is undoubtedly true" that disclosure requirements will deter some speech, *Buckley*, 424 U.S. at 68, "the strength of the governmental interest" advanced by disclosure "'must reflect the seriousness of the actual burden on First Amendment rights.'" *John Doe No. 1*, 561 U.S. at 197 (quoting *Davis*, 554 U.S. at 744). The court should intervene only 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 requirements cannot constitutionally be applied." *Buckley*, 424 U.S. at 71. Here, the Act's obligations do not burden speech to a greater extent than the importance of the interests involved would allow.

At the outset, the State has a strong interest in electoral transparency, deterring corruption, enforcing substantive campaign finance requirements, and preventing foreign meddling in its elections. The district court agreed that the State's interests were "compelling" for purposes of the strict scrutiny analysis (J.A. 444-45), and as

set forth above, these interests are substantially related to the burdens imposed by the Act. *See* § II.B.1 above.

These interests are also commensurate with the modest First Amendment burdens imposed by the Act. Nothing in the record plausibly indicates that the Act's disclosure obligations are likely to chill speech. "Disclaimer 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." *Citizens United*, 558 U.S. at 366 (internal quotation marks and citations omitted). Although plaintiffs testified that they might decline political ads in Maryland rather than develop new data collection processes and software to collect the information required by the Act (e.g., J.A. 41),[25] this alleged burden ignores the fact that *all* the information that online platforms must either disclose or retain is required to be provided by the purchaser placing the ad. *See* Elec. Law §§ 13-405(d)(1) (An ad-purchaser "shall provide the online platform . . . with the information necessary . . . to comply with subsections (b) and (c) of this title."). It also ignores the fact that they, like Google, have the opportunity to work with the State Board to develop

[25] The district court did not make findings as to whether the burden imposed by the Act's collection and record-keeping requirements had the potential to chill speech.

regulations that could address their concerns. Plaintiffs' concerns have no basis in the requirements of the Act themselves.

Nor is there a burden of "expos[ing]" plaintiffs' "proprietary data," as the district court found. (J.A. 454.) This is a curious finding, given the district court's simultaneous conclusion that the disclosures required under the Act were "duplicative" of information (including, presumably, plaintiffs' proprietary information) that was already required to be disclosed on campaign finance reports. (*See* J.A. 447-48, 453.) But even setting that incongruity aside, the only conceivable "proprietary" information subject to disclosure under the Act is the total amount paid for a given ad. This information, standing alone, does not reveal "proprietary" information such as "pricing"[26] or the plaintiffs' "customer base and the reach of their websites" (J.A. 454), particularly given that it is the *purchasers* under the Act who are required to provide the information subject to disclosure.[27] And to the extent the district court found that the *recordkeeping* obligations burdened plaintiffs by potentially requiring them to disclose proprietary information to the State (*see* J.A. 454), that finding is clearly erroneous because it is entirely without support in the

[26] Plaintiffs' representatives explained that "[p]aid digital content is primarily purchased in units of one thousand . . . impressions." (J.A. 40.) Thus, total amount paid by itself does not reveal the unit costs of advertising.

[27] There is no evidence in the record that the plaintiffs require purchasers to keep confidential the total amount paid for each ad.

record. (*See* J.A. 41 (explaining that the disclosure requirement, but not the recordkeeping requirement, would give rise to "disclosure of proprietary information about our advertising practice and pricing").)

Finally, the disclosure obligations do not impinge on plaintiffs' "right to exercise 'editorial control and judgment.'" (J.A. 447.) They do not compel plaintiffs "to associate with speech with which [they] may disagree," *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 15 (1986) (information from ratepayer advocacy group), or "publish that which 'reason' tells them should not be published," *Tornillo*, 418 U.S. at 256 ("right of reply" to any candidate whose character or record is "assailed" by newspaper). The regulations do not "forbid [plaintiffs] to publish and distribute advertisements commenting" on any candidate or ballot question; nor do they impose "any restriction whatever, whether of content or layout, on stories or commentary originated by [plaintiffs], [their] columnists, or [their] contributors." *Pittsburgh Press*, 413 U.S. at 391. The advertisements are, by definition, ones that plaintiffs would otherwise accept.

Instead, what the Act imposes is the requirement that plaintiffs publish a line or two of factual information, provided by the ad purchaser, regarding the purchaser's identity and the amount paid for the ad. These modest burdens do not outweigh the State's important interests in electoral transparency, deterring corruption, enforcing the substantive requirements of the campaign finance laws,

and protecting against foreign meddling in the State's elections.[28] The Act does not violate Plaintiffs' rights under the First and Fourteenth Amendments under *Buckley*'s exacting scrutiny framework.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ACT WOULD FAIL STRICT SCRUTINY.

As set forth above, *Buckley*'s exacting scrutiny test is the proper constitutional framework for assessing the constitutionality of the Act. But even if the district court were correct in concluding that strict scrutiny should apply (though it is not), its conclusion that the Act would probably fail this constitutional test is also wrong as a matter of law.

"Under strict scrutiny, the government bears the burden of showing the challenged regulation 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (J.A. 443 (quoting *Reed*, 135 S. Ct. at 2231).) The district court acknowledged that the State's interests in this case are compelling and that the plaintiffs did not appear to dispute that fact. (*See* J.A. 444-45.) The only question, then, was whether the Act's disclosure provisions are narrowly tailored to the State compelling interests.

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[28] The district court cited *ACLF* as a "vivid example of a mismatch between a disclosure requirement's means and its ends." (J.A. 452.) That may be, with respect to the requirement to reveal the names of petition-circulators, which the Supreme Court struck down. But the Court *upheld* the disclosure requirements as to "the source and amount of money spent by proponents to get a measure on the ballot," 525 U.S. at 203, which are much more like those at issue here.

Narrow tailoring requires a showing that "no less restrictive alternative would serve" the State's purposes. *Central Radio v. City of Norfolk, Va.*, 811 F.3d 625, 633 (4th Cir. 2016). The district court found that the Act failed this test because it was both "overinclusive" and "underinclusive": "It regulates substantially more speech than it needs to while, at the same time, neglecting to regulate the primary tools that foreign operatives exploited to pernicious effect in the 2016 election." (J.A. 446.) As discussed in substance above, the court was wrong on both counts.

The district court concluded that the Act's disclosure obligations were overinclusive in two ways, neither of which bears close scrutiny. First, Maryland campaign finance laws do not "prescribe other means of obtaining the same information" that the Act requires. (J.A. 447.) As set forth above, Maryland's other laws require only periodic, not instantaneous, filings that (a) do not require cost disclosures on a per-ad basis; (b) do not identify the publications in which ads were placed; (c) do not require disclosure of persons making the independent expenditures or electioneering communications where the amounts spent are less than $10,000; and (d) do not benefit from being made at or near the point of publication of the ad. *See* pages 43-46 above. Simply put, Maryland's preexisting disclosure requirements simply do not cover the same ground that the Act does.

Nor is the Act "overinclusive" by reaching "not only . . . social media giants that foreign operators are known to have exploited," but also sites like those

maintained by the plaintiffs. (J.A. 449.) As set forth above, the evidence shows that foreign operators infiltrated ad networks that served ads to plaintiffs' sites. And in any event the court's narrow focus on foreign meddling ignores the State's interests in electoral transparency, deterring fraud, and enforcing substantive campaign finance requirements, all of which are also furthered by extending the scope of the Act to plaintiffs' publications.

The district court also erred in concluding that the Act was "underinclusive" because "it solely targets" paid advertisements. (J.A. 449.) As noted above, however, there are constitutional questions as to whether the State can regulate the unpaid speech of anonymous commenters on the Internet. At any rate, targeting paid advertisements unquestionably serves the State's compelling interests in electoral transparency, deterring corruption, and enforcing the State's substantive campaign finance obligations, which the district court simply ignored in its analysis.

In sum, the State could not practically and effectively have furthered its compelling interest in electoral transparency, deterring corruption, enforcing the State's substantive campaign finance laws, and preventing foreign meddling in its elections via less restrictive means. The district court erred as a matter of law in concluding that the Act was likely to fail strict scrutiny.

CONCLUSION

The district court erred as a matter of law in concluding that the plaintiffs were likely to succeed on the merits of their claim under the First and Fourteenth Amendments. Accordingly, 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 12,915 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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.

PERTINENT STATUTES AND REGULATIONS

Annotated Code of Maryland, Election Law Article (LexisNexis Supp. 2018)
§ 1–101. Definitions.

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(h) *Campaign finance entity.* – "Campaign finance entity" means a political committee established under Title 13 of this article.

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(dd–1) *Online platform.* – "Online platform" means any public–facing website, web application, or digital application, including a social network, ad network, or search engine, that:

(1) has 100,000 or more unique monthly United States visitors or users for a majority of months during the immediately preceding 12 months; and
(2) receives payment for qualifying paid digital communications.

***

(gg) *Political committee.* – "Political committee" means a combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate, political party, question, or prospective question submitted to a vote at any election.

***

(ll–1) *Qualifying paid digital communication.* – "Qualifying paid digital communication" means any electronic communication that:

(1) is campaign material;
(2) is placed or promoted for a fee on an online platform;
(3) is disseminated to 500 or more individuals; and
(4) does not propose a commercial transaction.

Annotated Code of Maryland, Election Law Article (LexisNexis 2017)
§ 13-221. Books and records.

(a) (1) The treasurer of a campaign finance entity shall keep a detailed and accurate account book of all assets received, expenditures made, and obligations incurred by or on behalf of the entity.

(2) Except as provided in § 13–240 of this subtitle, as to each asset received or expenditure made, the account book shall state:

(i) its amount or value;

(ii) the date of the receipt or expenditure;

(iii) the name and address of the person from whom the asset was received or to whom the expenditure was made; and

(iv) a description of the asset received or the purpose for which the expenditure was made.

(3) (i) To the extent practicable, the treasurer of a campaign finance entity shall record the occupation and employer of an individual who makes contributions to the campaign finance entity in a cumulative amount of $500 or more during an election cycle.

(ii) The State Board shall:

1. promptly provide notice to the treasurer of a campaign finance entity if a contributor included on a campaign finance report submitted by the treasurer has made contributions to the campaign finance entity in a cumulative amount of $500 or more during the election cycle; and

2. require a standard response that a treasurer shall include in the campaign finance report if a contributor does not supply the information required concerning the contributor's occupation and employer.

(4) Each expenditure made from a campaign account shall be supported by a receipt.

(b) The account books and related records of a campaign finance entity shall

be preserved until the earlier of:

(1) 10 years after the creation of an account book entry or related record; or

(2) 2 years after the campaign finance entity files a final campaign finance report under Subtitle 3 of this title.

(c) A candidate for election to the central committee of a political party who is exempt under § 13–202(a) of this subtitle shall:

(1) keep a detailed and accurate account book of all expenditures made by the candidate; and

(2) preserve the account book required under item (1) of this subsection for auditing purposes until 2 years after the end of the election cycle.

Annotated Code of Maryland, Election Law Article (LexisNexis 2017)
§ 13-304. Reports to the State Board or a local board.

(a) (1) From the date of its organization until its termination under the provisions of this title, a campaign finance entity, except a political club, shall file a campaign finance report at the State Board at the times and for the periods required by §§ 13–309, 13–312, and 13–316 of this subtitle.

(2) A campaign finance report submitted using an electronic format shall:

(i) be made under oath or affirmation;

(ii) require an electronic signature from the treasurer at the time of the filing of the campaign finance report; and

(iii) be made subject to the penalties for perjury.

(b) A campaign finance report filed by a campaign finance entity under subsection (a) of this section shall include:

(1) the information required by the State Board with respect to all contributions received and all expenditures made by or on behalf of the campaign finance entity during the designated reporting period; and

(2) the information regarding the occupations and employers of contributors required to be recorded by the treasurer of a campaign finance entity under § 13–221 of this title.

(c) (1) In this subsection, "eligible contribution" means a contribution or series of contributions made by the same person for which a receipt is not required to be issued under § 13–222 of this title.

(2) The requirements of this subsection prevail to the extent of any conflict with § 13–240(b) of this title.

(3) Except as provided in paragraphs (4) and (5) of this subsection, a political committee shall report the following information on its campaign finance reports for each contribution the committee receives:

(i) the amount of each contribution; and

(ii) the name and residential address of each contributor, unless a contributor receives a confidentiality waiver from the State Board for a residential address, in which case a suitable alternative address approved by the State Board may be used.

(4) A campaign finance entity of a candidate may report a maximum of a cumulative amount of $25,000 in eligible contributions in an election cycle on its campaign finance reports without providing the information required under paragraph (3) of this subsection.

(5) A political committee may report eligible contributions collected in accordance with § 13–241 or § 13–242 of this title on its campaign finance reports in the manner specified in paragraph (4) of this subsection if the following is included on the political committee's campaign finance report:

(i) a lump sum contribution of the total amount received by the political committee in the form of eligible contributions;

(ii) the number of individuals making eligible contributions; and

(iii) the average amount of the eligible contributions received by the political committee.

(d) A campaign finance report prescribed by this subtitle for the campaign finance entity of a candidate is required whether or not:

(1) the candidate files a certificate of candidacy;

(2) the candidate withdraws, declines a nomination, or otherwise ceases to be a candidate;

(3) the candidate's name appears on the primary ballot; or

(4) the candidate is successful in the election.

Md. Code Ann., Election Law Article (LexisNexis Supp. 2018)
§ 13–306. Independent expenditure report.

(a) (1) In this section the following words have the meanings indicated.

(2)(i) "Donation" means the gift or transfer, or promise of gift or transfer, of money or other thing of value to a person who makes independent expenditures.

(ii) "Donation" does not include any amount of money or any other thing of value:

1. received by a person in the ordinary course of any trade or business conducted by the person, whether for profit or not for profit, or in the form of investments in the person's business; or

2. A. that the donor and the person receiving the money or thing of value expressly agree in writing may not be used for independent expenditures; and

B. in the case of a monetary donation, is deposited in a separate bank account that is never used for independent expenditures.

(3) "E–mail blast" means a transmission of electronic mail messages of an identical or substantially similar nature to 5,000 or more e–mail accounts simultaneously.

(4) "Mass mailing" means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30–day period.

(5) (i) "Person" includes an individual, a partnership, a committee, an association, a corporation, a labor organization, or any other organization or group of persons.

(ii) "Person" does not include a campaign finance entity organized under Subtitle 2, Part II of this title.

(6) (i) "Public communication" means a communication by means of any broadcast television or radio communication, cable television communication, satellite television or radio communication, newspaper, magazine, outdoor

advertising facility, mass mailing, e–mail blast, text blast, qualifying paid digital communication, or telephone bank to the general public, or any other form of general public political advertising.

(ii) "Public communication" does not include:

1. a news story, a commentary, or an editorial disseminated by a broadcasting station, including a cable television operator, programmer, or producer, satellite television or radio provider, website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, that is not controlled by a candidate or political party;

2. an internal membership communication by a business or other entity to its stockholders or members and executive and administrative personnel and their immediate families, or by a membership entity, as defined under § 13–243 of this title, to its members, executive and administrative personnel and their immediate families; or

3. a candidate debate or forum.

(7) "Telephone bank" means more than 500 telephone calls of an identical or substantially similar nature within any 30–day period.

(8) "Text blast" means a transmission of text messages of an identical or substantially similar nature to 5,000 or more telephone numbers simultaneously.

(b) Within 48 hours after a person makes aggregate independent expenditures of $5,000 or more in an election cycle for campaign material that is a public communication, the person shall file a registration form with the State Board.

(c) Within 48 hours after a day on which a person makes aggregate independent expenditures of $10,000 or more in an election cycle for campaign material that is a public communication, the person shall file an independent expenditure report with the State Board.

(d) A person who files an independent expenditure report under subsection (c) of this section shall file an additional independent expenditure report with the State Board within 48 hours after a day on which the person makes aggregate independent expenditures of $10,000 or more for campaign material that is a public communication following the closing date of the person's previous independent expenditure report.

(e) An independent expenditure report shall include the following information:

(1) the identity of the person making the independent expenditures and of the person exercising direction or control over the activities of the person making the independent expenditures;

(2) the business address of the person making the independent expenditures;

(3) the amount and date of each independent expenditure during the period covered by the report and the person to whom the expenditure was made;

(4) the candidate or ballot issue to which the independent expenditure relates and whether the independent expenditure supports or opposes that candidate or ballot issue; and

(5) the identity of each person who made cumulative donations of $6,000 or more to the person making the independent expenditures during the period covered by the report.

(f) For purposes of this section, a person shall be considered to have made an independent expenditure if the person has executed a contract to make an independent expenditure.

(g) The cost of creating and disseminating campaign material, including any design and production costs, shall be considered in determining the aggregate amount of independent expenditures made by a person for campaign material that is a public communication under this section.

(h) The treasurer or other individual designated by an entity required to file an independent expenditure report under this section:

(1) shall sign each independent expenditure report; and

(2) is responsible for filing independent expenditure reports in full and accurate detail.

(i)(1) Within 48 hours after a person makes aggregate independent expenditures of $50,000 or more in an election cycle for campaign material that is a public communication, the person shall identify a registered agent located in the State for service of process.

(2) A person making independent expenditures shall identify a registered agent on a form prescribed by the State Board.

(j)(1) A person who fails to provide on an independent expenditure report all of the information required by this section shall file an amended report as provided in § 13–327(b) of this subtitle.

(2)(i) Except as provided in subparagraph (ii) of this paragraph, in addition to any other sanction provided by law, the State Board may assess a civil penalty for failure to file properly an independent expenditure report or an amended independent expenditure report in an amount not exceeding the greater of:

1. $1,000 for each day or part of a day that an independent expenditure report or amended independent expenditure report is overdue; or

2. 10% of the amount of the donations or independent expenditures that were not reported in a timely manner.

(ii) If the failure to file properly an independent expenditure report or an amended independent expenditure report occurs more than 28 days before the day of a primary or general election, the State Board may assess a civil penalty in an amount not exceeding the greater of:

1. $100 for each day or part of a day that an independent expenditure report or amended independent expenditure report is overdue; or

2. 10% of the amount of the donations or disbursements for independent expenditures that were not reported in a timely manner.

(3) A civil penalty under paragraph (2) of this subsection shall be:

(i) assessed in the manner specified in § 13–604.1 of this title;

(ii) distributed to the Fair Campaign Financing Fund established under § 5–103 of this article; and

(iii) the joint and several liability of:

1. the person making independent expenditures;

2. the treasurer or other individual who signs and files the reports required by this section for the person making independent expenditures; and

3. the person exercising direction or control over the activities of the person making independent expenditures.

(4) A person who fails to file properly an independent expenditure report or amended independent expenditure report under this section may seek relief from a

penalty under paragraph (2) of this subsection for just cause as provided in § 13–337 of this subtitle.

k) If a treasurer of a person making independent expenditures or a person exercising direction or control over the activities of a person making independent expenditures has failed to pay any civil penalty or late fee under this title for which the individual is responsible, the individual may not:

(1) serve as the responsible officer of a political committee;

(2) serve in any position of responsibility in any other entity subject to regulation under this title; or

(3) assist in the formation of a political committee or any other entity subject to regulation under this title.

(l)(1) An entity required to file an independent expenditure report under this section shall do at least one of the following, unless neither are applicable to the entity:

(i) if the entity submits regular, periodic reports to its shareholders, members, or donors, include in each report, in a clear and conspicuous manner, the information specified in subsection (e)(3) through (5) of this section for each independent expenditure made during the period covered by the report that must be included in an independent expenditure report; or

(ii) if the entity maintains an Internet site, post on that Internet site a hyperlink from its homepage to the Internet site where the entity's independent expenditure report information is publicly available.

(2) An entity shall post the hyperlink required under paragraph (1)(ii) of this subsection within 24 hours of the entity's independent expenditure report information being made publicly available on the Internet, and the hyperlink shall remain posted on the entity's Internet site until the end of the election cycle during which the entity filed an independent expenditure report.

(m)(1) A person required to file an independent expenditure report under this section shall keep detailed and accurate records of:

(i) all independent expenditures made by the person for campaign material that is a public communication; and

(ii) all donations received by the person.

(2) Records required to be kept under this subsection shall be preserved for 2 years after the end of the election cycle in which the person filed the independent expenditure report to which the records relate

(n) The State Board may adopt regulations as necessary to implement the requirements of this section.

Md. Code Ann., Election Law Article (LexisNexis Supp. 2018)
§ 13–307. Electioneering communication report.

(a) (1) In this section the following words have the meanings indicated.

(2) (i) "Donation" means the gift or transfer, or promise of gift or transfer, of money or other thing of value to a person that makes disbursements for electioneering communications.

(ii) "Donation" does not include any amount of money or any other thing of value:

1. received by a person in the ordinary course of any trade or business conducted by the person, whether for profit or not for profit, or in the form of investments in the person's business; or

2. A. that the donor and the person receiving the money or thing of value expressly agree in writing may not be used for electioneering communications; and

B. in the case of a monetary donation, is deposited in a separate bank account that is never used for electioneering communications.

(3) (i) "Electioneering communication" means a broadcast television or radio communication, a cable television communication, a satellite television or radio communication, a mass mailing, an e–mail blast, a text blast, a telephone bank, a qualifying paid digital communication, or an advertisement in a print publication that:

1. refers to a clearly identified candidate or ballot issue;

2. is made within 60 days of an election day on which the candidate or ballot issue is on the ballot;

3. is capable of being received by:

A. 50,000 or more individuals in the constituency where the candidate or ballot issue is on the ballot, if the communication is transmitted by television or radio; or

B. 5,000 or more individuals in the constituency where the candidate or ballot issue is on the ballot, if the communication is a mass mailing, an e–mail blast, a text blast, a telephone bank, a qualifying paid digital communication, or an advertisement in a print publication; and

4. is not made in coordination with, or at the request or suggestion of, a candidate, a campaign finance entity of a candidate, an agent of a candidate, or a ballot issue committee.

(ii) "Electioneering communication" does not include:

1. an independent expenditure;

2. a news story, a commentary, or an editorial disseminated by a broadcasting station, including a cable television operator, programmer, or producer, or satellite television or radio provider, website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, that is not controlled by a candidate or political party;

3. a candidate debate or forum;

4. an internal membership communication by a business or other entity to its stockholders or members and executive and administrative personnel and their immediate families, or by a membership entity, as defined under § 13–243 of this title, to its members, executive and administrative personnel and their immediate families; or

5. a communication that proposes a commercial transaction.

(iii) For purposes of this paragraph, "clearly identified" means:

1. the name of a candidate appears;

2. a photograph or drawing of a candidate appears; or

3. the identity of a candidate or ballot issue is apparent by unambiguous reference.

(4) "E–mail blast" means a transmission of electronic mail messages of an identical or substantially similar nature to 5,000 or more e–mail accounts simultaneously.

(5) "Mass mailing" means a mailing by United States mail or facsimile of more than 5,000 pieces of mail matter of an identical or substantially similar nature within any 30–day period.

(6) (i) "Person" includes an individual, a partnership, a committee, an association, a corporation, a labor organization, or any other organization or group of persons.

(ii) "Person" does not include a campaign finance entity organized under Subtitle 2, Part II of this title.

(7) "Telephone bank" means more than 5,000 telephone calls of an identical or substantially similar nature within any 30–day period.

(8) "Text blast" means a transmission of text messages of an identical or substantially similar nature to 5,000 or more telephone numbers simultaneously.

(b) Within 48 hours after a person makes aggregate disbursements of $5,000 or more in an election cycle for electioneering communications, the person shall file a registration form with the State Board.

(c) Within 48 hours after a day on which a person makes aggregate disbursements of $10,000 or more in an election cycle for electioneering communications, the person shall file an electioneering communication report with the State Board.

(d) A person who files an electioneering communication report under subsection (c) of this section shall file an additional electioneering communication report with the State Board within 48 hours after a day on which the person makes aggregate disbursements of $10,000 or more for electioneering communications following the closing date of the person's previous electioneering communication report.

(e) An electioneering communication report shall include the following information:

(1) the identity of the person making disbursements for electioneering communications and of the person exercising direction or control over the activities of the person making the disbursements for electioneering communications;

(2) the business address of the person making the disbursements for electioneering communications;

(3) the amount and date of each disbursement for electioneering communications during the period covered by the report and the person to whom the disbursement was made;

(4) the candidate or ballot issue to which the electioneering communications relate; and

(5) the identity of each person who made cumulative donations of $6,000 or more to the person making the disbursements for electioneering communications during the period covered by the report.

(f) (1) For purposes of this section, a person shall be considered to have made a disbursement for an electioneering communication if the person has executed a contract to make a disbursement for an electioneering communication.

(2) A person who makes a contribution to a campaign finance entity may not be considered to have made a disbursement for electioneering communications under this section because of the contribution.

(g) The cost of creating and disseminating electioneering communications, including any design and production costs, shall be considered in determining the aggregate amount of disbursements for electioneering communications made by a person under this section.

(h) The treasurer or other individual designated by an entity required to file an electioneering communication report under this section:

(1) shall sign each electioneering communication report; and

(2) is responsible for filing electioneering communication reports in full and accurate detail.

(i) (1) Within 48 hours after a person makes aggregate disbursements of $50,000 or more in an election cycle for electioneering communications, the person shall identify a registered agent located in the State for service of process.

(2) A person making disbursements for electioneering communications shall identify a registered agent on a form prescribed by the State Board.

(j) (1) A person who fails to provide on an electioneering communication report all of the information required by this section shall file an amended report as provided in § 13–327(b) of this subtitle.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, in addition to any other sanction provided by law, the State Board may assess a civil penalty for failure to file properly an electioneering communication report or an amended electioneering communication report in an amount not exceeding the greater of:

1. $1,000 for each day or part of a day that an electioneering communication report or amended electioneering communication report is overdue; or

2. 10% of the amount of the donations or disbursements for electioneering communications that were not reported in a timely manner.

(ii) If the failure to file properly an electioneering communication report or an amended electioneering communication report occurs more than 28 days before the day of a primary or general election, the State Board may assess a civil penalty in an amount not exceeding the greater of:

1. $100 for each day or part of a day that an electioneering communication report or amended electioneering communication report is overdue; or

2. 10% of the amount of the donations or disbursements for electioneering communications that were not reported in a timely manner.

(3) A penalty under paragraph (2) of this subsection shall be:

(i) assessed in the manner specified in § 13–604.1 of this title;

(ii) distributed to the Fair Campaign Financing Fund established under § 15–103 of this article; and

(iii) the joint and several liability of:

1. the person making disbursements for electioneering communications;

2. the treasurer or other individual who signs and files the reports required by this section for the person making disbursements for electioneering communications; and

3. the person exercising direction or control over the activities of the person making disbursements for electioneering communications.

(4) A person who fails to file properly an electioneering communication report or amended electioneering communication report under this section may seek relief from a penalty under paragraph (2) of this subsection for just cause as provided in § 13–337 of this subtitle.

(k) If a treasurer of a person making disbursements for electioneering communications or a person exercising direction or control over the activities of a person making disbursements for electioneering communications has failed to pay any civil penalty or late fee under this title for which the individual is responsible, the individual may not:

(1) serve as the responsible officer of a political committee;

(2) serve in any position of responsibility in any other entity subject to regulation under this title; or

(3) assist in the formation of a political committee or any other entity subject to regulation under this title.

(l) (1) An entity required to file an electioneering communication report under this section shall do at least one of the following, unless neither are applicable to the entity:

(i) if the entity submits regular, periodic reports to its shareholders, members, or donors, include in each report in a clear and conspicuous manner, the information specified in subsection (e)(3) through (5) of this section for each disbursement for electioneering communications made during the period covered by the report that must be included in an electioneering communication report; or

(ii) if the entity maintains an Internet site, post on that Internet site a hyperlink from its homepage to the Internet site where the entity's electioneering communication report information is publicly available.

(2) (i) An entity shall post the hyperlink required under paragraph (1)(ii) of this subsection within 24 hours of the entity's electioneering communication report information being made publicly available on the Internet.

(ii) The hyperlink shall remain posted on the entity's Internet site until the end of the election cycle during which the entity filed an electioneering communication report.

(m) (1) A person required to file an electioneering communication report under this section shall keep detailed and accurate records of:

(i) all disbursements for electioneering communications made by the person; and

(ii) all donations received by the person.

(2) Records required to be kept under this subsection shall be preserved until 2 years after the end of the election cycle in which the person filed the electioneering communication report to which the records relate.

(n) The State Board may adopt regulations as necessary to implement the requirements of this section.

Md. Code Ann., Election Law Article (LexisNexis 2017)
§ 13–309. Filing deadlines – In general.

(a) Subject to other provisions of this subtitle and except as provided in subsection (d) of this section, a campaign finance entity shall file campaign finance reports as follows:

(1) in the gubernatorial election year only, except for a ballot issue committee, on or before the third Tuesday in April, if the campaign finance entity did not file the annual campaign finance report specified under subsection (b)(2) of this section on the immediately preceding third Wednesday in January;

(2) except for a ballot issue committee, on or before the fifth Tuesday immediately preceding each primary election;

(3) except for a ballot issue committee, on or before the second Friday immediately preceding a primary election;

(4) on or before the last Tuesday in August immediately preceding a general election;

(5) for a ballot issue committee only, on or before the fourth Friday immediately preceding a general election;

(6) on or before the second Friday immediately preceding a general election; and

(7) on or before the second Tuesday after a general election.

(b) (1) A campaign finance entity is subject to subsection (a) of this section and this subsection only as to the election in which the entity designates that it will participate.

(2) In addition to the campaign finance reports required under subsection (a) of this section, but subject to paragraph (4) of this subsection, a campaign finance entity shall file a campaign finance report on the third Wednesday in January.

(3) (i) If subsequent to the filing of its declaration under § 13–208(c)(3) of this title, a campaign finance entity participates in an election in which it was not designated to participate, the campaign finance entity shall file all campaign finance reports prescribed under subsection (a) of this section for that election.

(ii) A violation of subparagraph (i) of this paragraph constitutes a failure to file by the campaign finance entity, and the responsible officer is guilty of a misdemeanor and on conviction is subject to the penalties prescribed under Part VII of this subtitle.

(4) If a campaign finance entity has neither a cash balance nor an outstanding obligation at the end of a reporting period, a campaign finance report for that period, clearly marked as "final", shall be filed on or before the due date, and no further report is required.

(c) In addition to the campaign finance reports required under subsection (a) of this section, a continuing political committee shall file a campaign finance report on the third Wednesday in January of each year the committee is in existence.

(d) An authorized candidate campaign committee of a candidate for election to the central committee of a political party:

(1) shall file a campaign finance report on or before the third Tuesday after a gubernatorial primary election; and

(2) except as provided in subsection (c) of this section and § 13–310 of this subtitle, is not required to file any other campaign finance reports.

(e) (1) This subsection applies to a ballot issue committee formed to support or oppose a prospective question under Article XI–A, Article XI–F, or Article XVI of the Maryland Constitution or under § 9–205 of the Local Government Article.

(2) A petition sponsor's ballot issue committee shall file a campaign finance report at the time the petition is filed under § 6–205 of this article.

(3) A ballot issue committee opposing a prospective question shall file a campaign finance report within 10 business days after the petition to place the question on the ballot is filed under § 6–205 of this article.

Md. Code Ann., Election Law Article (LexisNexis Supp. 2018)
§ 13–405. Placement of qualifying paid digital communication on online platform.

(a) (1) A person who directly or indirectly requests placement of a qualifying paid digital communication on an online platform shall expressly notify the online platform at the time the request for placement of a qualifying paid digital communication is made that the communication is a qualifying paid digital communication.

(2) The notice required under paragraph (1) of this subsection:

(i) shall be provided using the method prescribed by the online platform; and

(ii) may not be provided through the inclusion of the authority line required under § 13–401 of this subtitle on the qualifying paid digital communication.

(3) If an online platform does not provide a method for a requester of a qualifying paid digital communication to give notice as required by paragraph (2)(i) of this subsection, the requester shall:

(i) notify the State Board that the online platform is not in compliance with paragraph (2)(i) of this subsection; and

(ii) provide the information required under subsection (b)(6) of this section to the State Board.

(b) (1) An online platform shall make available for public inspection on the Internet in a machine–readable format the records described in paragraph (6) of this subsection regarding qualifying paid digital communications disseminated through the online platform for which the online platform has received notice in accordance with subsection (a) of this section.

(2) An online platform shall allow the public to search the records described in paragraph (6) of this subsection by purchaser.

(3) Except as provided in paragraph (5) of this subsection, the records

described in paragraph (6) of this subsection shall be available for public inspection on the Internet in a clearly identifiable location on the online platform's website:

(i) within 48 hours after a qualifying paid digital communication is purchased; and

(ii) for at least 1 year after the general election following the date when the online platform disseminated the qualifying paid digital communication to which the records relate.

(4) For purposes of paragraph (3) of this subsection, a person shall be considered to have purchased a qualifying paid digital communication if the person has executed a contract to purchase a qualifying paid digital communication.

(5) (i) An online platform may apply to the State Board for a compliance waiver to allow the online platform to make the records described in paragraph (6) of this subsection available for public inspection on the Internet within up to 7 days after a qualifying paid digital communication is purchased.

(ii) The State Board shall require an applicant for a compliance waiver under subparagraph (i) of this paragraph to:

1. describe why complying with the requirements under paragraph (3) of this subsection presents an unreasonable burden on the applicant; and

2. present measures the applicant will take to meet the requirements under paragraph (3) of this subsection within 6 months after the date the compliance waiver is granted.

(iii) The State Board may not grant:

1. more than one compliance waiver to an online platform; and

2. a compliance waiver to an online platform within 30 days before an election.

(iv) A compliance waiver is not effective during the 30 days immediately preceding an election.

(v) If an online platform will apply for a compliance waiver under subparagraph (i) of this paragraph, the online platform shall apply for the compliance waiver before receiving payment for a qualifying paid digital communication.

(6) For each qualifying paid digital communication a purchaser requests to disseminate through an online platform and for which the purchaser has provided

notice in accordance with subsection (a) of this section, the online platform shall maintain the following records:

(i) for each qualifying paid digital communication purchased by a political committee:

1. the name of the person and any contact information for the person required by the State Board, of the political committee;

2. the treasurer of the political committee; and

3. the total amount paid by the purchaser to the online platform for the placement of the qualifying paid digital communication;

(ii) for each qualifying paid digital communication purchased by a person other than a political committee or an ad network:

1. the name of the person and any contact information for the person required by the State Board, of the person;

2. the identity of the individuals exercising direction or control over the activities of the person, including the chief executive officer or board of directors, if applicable; and

3. the total amount paid by the purchaser to the online platform for the placement of the qualifying paid digital communication; and

(iii) for each qualifying paid digital communication purchased by an ad network:

1. the contact information for the ad network; or

2. a hyperlink to the ad network's website where the contact information is located.

(c) (1) An online platform shall maintain and make available to the State Board on request the records described in paragraph (3) of this subsection regarding qualifying paid digital communications disseminated through the online platform for which the online platform has received notice in accordance with subsection (a) of this section.

(2) The records described in paragraph (3) of this subsection shall be available on the request of the State Board:

(i) within 48 hours after a qualifying paid digital communication is first

disseminated on the online platform; and

(ii) for at least 1 year after the general election following the date when the online platform disseminated the qualifying paid digital communication to which the records relate.

(3) For each qualifying paid digital communication a purchaser requests to disseminate through an online platform and for which the purchaser has provided notice in accordance with subsection (a) of this section, the online platform shall maintain the following records:

(i) the candidate or ballot issue to which the qualifying paid digital communication relates and whether the qualifying paid digital communication supports or opposes that candidate or ballot issue;

(ii) the dates and times that the qualifying paid digital communication was first disseminated and last disseminated;

(iii) a digital copy of the content of the qualifying paid digital communication;

(iv) an approximate description of the geographic locations where the qualifying paid digital communication was disseminated;

(v) an approximate description of the audience that received or was targeted to receive the qualifying paid digital communication; and

(vi) the total number of impressions generated by the qualifying paid digital communication.

(5) Information obtained by the State Board under this subsection is not subject to inspection under the Public Information Act.

(d) (1) A purchaser of a qualifying paid digital communication shall provide the online platform that disseminates the qualifying paid digital communication with the information necessary for the online platform to comply with subsections (b) and (c) of this section.

(2) An online platform may rely in good faith on the information provided by a purchaser of a qualifying paid digital communication to comply with subsections (b) and (c) of this section.

(e) An online platform shall make reasonable efforts to allow the State Board to:

(1) obtain the information required under subsections (b) and (c) of this section;

(2) obtain the information that a purchaser of a qualifying paid digital communication provided to the online platform in accordance with subsection (d) of this section; and

(3) otherwise request that a purchaser of a qualifying paid digital communication comply with this section or § 13–401 of this subtitle.

(f) An online platform that disseminates qualifying paid digital communications shall make reasonable efforts, in accordance with the federal Stored Communications Act, to comply with any subpoena that is issued in connection with an investigation concerning the compliance of a purchaser of a qualifying paid digital communication with this section or § 13–401 of this subtitle.

Md. Code Ann., Election Law Article (LexisNexis Supp. 2018)
§ 13–405.1. Investigation of potential violations of § 13-401 or § 13-405 by State Administrator; injunctions.

(a) (1) The State Administrator may investigate a potential violation of § 13–401 or § 13–405 of this subtitle by a purchaser of a qualifying paid digital communication.

(2) In furtherance of an investigation under paragraph (1) of this subsection, the State Administrator may issue a subpoena for the attendance of a witness to testify or the production of records.

(3) A subpoena issued under this subsection shall be served in accordance with the Maryland Rules.

(4) If a person fails to comply with a subpoena issued under this subsection, on petition of the State Administrator, a circuit court of competent jurisdiction may compel compliance with the subpoena.

(b) (1) At the conclusion of an investigation under subsection (a)(1) of this section, subject to paragraph (2) of this subsection, the State Board may request that the Attorney General institute an action in a circuit court for injunctive relief in accordance with the Maryland Rules to:

(i) require a purchaser of a qualifying paid digital communication to comply with § 13–401 or § 13–405 of this subtitle; or

(ii) require an online platform to remove a qualified paid digital communication that does not comply with § 13–401 of this subtitle or if the purchaser of the communication does not comply with § 13–405 of this subtitle.

(2) Before requesting that the Attorney General seek an injunction under paragraph (1) of this subsection, the State Board shall:

(i) notify a purchaser of a qualifying paid digital communication who is the subject of an investigation of the circumstances that gave rise to the investigation; and

(ii) provide the person reasonable opportunity to be heard at a public meeting of the State Board.

(3) A circuit court may grant injunctive relief under this subsection only if the Attorney General shows by clear and convincing evidence that a violation of § 13–401 or § 13–405 of this subtitle is being committed.

(4) A person who violates an injunction issued under this subsection is subject to the penalties provided in § 13–605(b) of this title.

Md. Code Ann., Election Law Article (LexisNexis Supp. 2018)
§ 13–405.2. Currency requirements for purchase or sale of campaign material or electioneering communication.

(a) In this section, "electioneering communication" has the meaning stated in § 13–307(a) of this title.

(b) A person may not purchase campaign material or an electioneering communication using any currency other than United States currency.

(c) A person may not willfully and knowingly sell campaign material or an electioneering communication to a person who uses any currency other than United States currency to pay for the campaign material or electioneering communication.

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 12th day of April 2019, the 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

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Andrea W. Trento