**No. 19-1132**

IN THE
United States Court of Appeals
for the Fourth Circuit

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THE WASHINGTON POST, et al.,

*Plaintiffs-Appellees*,

v.

DAVID J. MCMANUS JR., et al.,

*Defendants-Appellants*.

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On Appeal from the United States District Court
for the District Of Maryland, Supporting Reversal
Case No. 1:18-cv-02527, Judge Paul W. Grimm

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# BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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## INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a not-for-profit, non-partisan law and public policy institute that focuses on the fundamental issues of democracy and justice.[2] Through the work of its Democracy Program, the Brennan Center seeks to bring the ideal of self-government closer to reality by working to eliminate barriers to full participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy. In keeping with these goals, the Brennan Center collaborates with legal academics, civil society, and the private bar to contribute legal strategy, innovative policy development, and empirical research to promote reasonable campaign finance reforms and other policy objectives that are central to its mission.

The Brennan Center testified in support of H.B. 981 – the bill that ultimately became Maryland's Online Electioneering Transparency and Accountability Act (the "Act") – before the Maryland Legislature's House Ways & Means Committee on February 20, 2018. The bill was subsequently amended in significant ways, and

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

[2] This brief does not purport to convey the position, if any, of the New York University School of Law.

enacted into law. The Brennan Center's testimony was cited in the district court's opinion, and in the parties' briefing below.

## SUMMARY OF ARGUMENT

It has now been established beyond any doubt that "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion."[3] As part of a multifaceted attack against our democratic processes, Russian operatives used gaping loopholes in American campaign finance laws to illegally purchase political advertisements and otherwise engage in an online propaganda campaign to influence the outcome of the election. These efforts continued through 2018.[4] Outdated electoral disclosure regimes, many of which have remained static despite the meteoric rise of the internet as a mass medium, proved no barrier; the public remained in the dark.[5] Maryland, like several other

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[3] Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference In The 2016 Presidential Election*, U.S. Dep't of Justice 1 (Mar. 2019), https://tinyurl.com/y4j9pfbu.

[4] A federal criminal complaint released in 2018 alleges Internet Research Agency ("IRA") trolls targeted midterm elections, including candidates Roy Moore, Nancy Pelosi, and Elizabeth Warren. *See* Aff. in Supp. of Crim. Compl. at ¶¶ 48–50, *United States v. Elena Alekseevna Khusyaynova*, No. 1:18-MJ-464, (E.D. Va. Sept. 28, 2018), *available at* https://tinyurl.com/ybcwfcx9 (quoting IRA tweets) [hereinafter "Holt Aff."].

[5] *See generally* Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of America's Elections*, (Apr. 6, 2018), https://tinyurl.com/y36fscnq [hereinafter "*Getting Foreign Funds Out*"].

states,[6] is now working to close some of the loopholes that were exploited so readily in 2016. To that end, the Act requires online platforms that choose to distribute paid political advertisements to collect, retain, and disclose certain information about the purchasers of those advertisements. *See* Md. Code. Ann., Elec. Law § 13-405. But the district court erroneously struck down the Act as likely unconstitutional, granting plaintiffs a preliminary injunction preventing it from going into effect. This court should reverse that error.

The district court's most fundamental error was applying the wrong standard of review: strict scrutiny instead of the less demanding "exacting scrutiny" standard. The district court acknowledged that the Supreme Court has long evaluated campaign-related disclosure requirements under "'exacting scrutiny,' [which] requires the government to show that the record-keeping, reporting, or disclosure provisions of a campaign finance law are 'substantially related' to an

[6] In 2018, New York passed a law requiring online platforms that publish political advertisements to verify buyers' identities. *See* N.Y. Elec. Law § 14-107; N.Y. Elec. App. §§ 6200.10(g), 6200.11. Similarly, the State of Washington's Public Disclosure Commission adopted regulations in 2018 clarifying that its election laws required online publishers of campaign advertisements to maintain and make available for inspection files on, *inter alia*, the ads themselves, the cost of purchase, the audience targeted and reached, and the number of views, or "impressions." *See* Wash. Admin. Code § 390-18-050. Beginning in 2020, California will require platforms that run advertisements relating to candidates or ballot measures to publish a database that tracks similar information. *See* Cal. Assembly Bill No. 2188 (amending the Political Reform Act of 1974). The United States House of Representatives recently passed a bill containing similar requirements. *See* H.R. Rep. No. 116-15§§ 4201, *et seq*. (2019).

'important' government interest." J.A. 431 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent cases). Yet the district court declined to follow this well-established line of precedents, and instead subjected the Act to the far more stringent test of "strict scrutiny," under which the State must show that the law in question "furthers a compelling interest and is narrowly tailored to achieve that interest." J.A. 443 (quotations omitted).

The district court's failure to follow governing Supreme Court precedents in this area cannot be justified, and requires, at a minimum, a remand to the district court for reconsideration. The district court's decision to disregard *Buckley* and its progeny was premised on a distinction between political advertisers and third-party ad publishers that is directly at odds with *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010)), where eight out of nine justices agreed that exacting scrutiny or an equivalent standard applied to a third-party disclosure requirement for media companies. *See id.* at 245–246. The district court's refusal to apply directly on-point Supreme Court precedent was based on an unreasonable over-reading of recent First Amendment cases in non-electoral contexts. And the court placed undue emphasis on the fact that plaintiffs here include media companies, even though 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 (quotations omitted). In fact, the record in this case is insufficient to permit the Court to determine whether plaintiffs even exercise editorial control over the ads running on their sites.

The district court also made an alternative holding, finding that even if "exacting scrutiny" were the proper standard of review, the Act failed that test, too. But the court's application of exacting scrutiny was far too stringent, and was heavily influenced by its "strict scrutiny" analysis, to the extent that in their application, the court erroneously treated the two standards as effectively the same. Moreover, the flaws that the court claimed to identify in the Act did not and could not justify a finding of likely unconstitutionality based on this record and publicly available facts, as explained in detail below. This Court should therefore vacate the decision below, and remand for further consideration.

## ARGUMENT

### I. EXACTING SCRUTINY IS THE RELEVANT STANDARD OF REVIEW FOR ELECTION-RELATED DISCLOSURE PROVISIONS.

For more than forty years, the Supreme Court has consistently made clear that the "exacting scrutiny" standard applies to test the validity of state laws imposing disclosure requirements related to political advertising. *See, e.g.*, *Buckley*, 424 U.S. at 64–66; *McConnell*, 540 U.S. at 194–202; *Citizens United*, 558 U.S. at 366–367. In light of these precedents, this Court has recognized that "'exacting scrutiny' is the appropriate standard to apply in reviewing provisions

that impose disclosure requirements." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012).

The Supreme Court has explained in detail why this relatively moderate standard of constitutional review applies to disclosure provisions. While "[d]isclaimer and disclosure requirements may burden the ability to speak . . . they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64, and *McConnell*, 540 U.S. at 201). And such "requirements, as a general matter, directly serve substantial government interests." *Buckley*, 424 U.S. at 68. Those interests include, *inter alia*, "provid[ing] the electorate with information about the sources of election-related spending," *Citizens United*, 558 U.S. at 367 (quotations omitted), so that citizens may "make informed choices in the political marketplace," *id.* (quotations omitted), and thus "give proper weight to different speakers and messages," *id.* at 371. Electoral disclosure requirements also help regulators "gather[ ] the data necessary to enforce more substantive electioneering restrictions" that protect the integrity of the electoral process. *McConnell*, 540 U.S. at 196 (summarizing *Buckley*, 424 U.S. at 66–68).

These are weighty interests. By fostering a more informed electorate, disclosure strengthens the very marketplace of political ideas whose preservation is the primary purpose of the First Amendment. *See Citizens United*, 558 U.S. at 371

("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."). Governments also have "considerable leeway" to impose transparency requirements "to protect the integrity and reliability" of "election processes generally," *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (quoting *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191 (1999) ("*ACLF*")), because a lack of electoral integrity "not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.'" *John Doe No. 1*, 561 U.S. at 197 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*)). In other words, because "the free functioning of our national institutions is involved," *see Buckley*, 424 U.S. at 66, legislatures' attempts to safeguard electoral integrity via disclosure requirements are subjected to exacting, and not "strict," scrutiny.

### A. The District Court Erred in Concluding That "Strict Scrutiny" Applied to the Act.

The district court nevertheless subjected the Act to strict scrutiny. The district court cited three reasons for doing so, all of which were error. First, based on a misreading of *McConnell*, the court drew an unwarranted distinction between disclosure requirements imposed on political advertisers themselves, and requirements imposed on third-party publishers of such advertisements, such as plaintiffs. Second, the court over-read recent First Amendment decisions in non-

electoral cases, improperly construing them as if they had overturned settled campaign finance doctrine. And third, the court incorrectly assumed that the media-entity status of plaintiffs automatically mandated a higher standard of review, due in part to a lack of understanding of how online ad sales often work. The court was wrong in its analysis on all three fronts.

#### i. *McConnell* and Other Cases Make Clear That "Exacting Scrutiny" Applies to Third-Party Electoral Disclosure Requirements.

The district court held that the Act was "indisputably unlike the various statutes that the Supreme Court and federal courts of appeals have reviewed under the *Buckley* exacting scrutiny standard," because the Act, unlike the other challenged provisions, "burden[ed] ostensibly neutral third parties such as publishers of political advertisements." J.A. 434–435. But that was wrong; as the court acknowledged less than a page later, the Supreme Court has indeed "examined"—and approved—"a regulation that compelled [third-party] media outlets to make disclosures in connection with political advertisements." *Id.* (citing *McConnell*, 540 U.S. at 93). In *McConnell*, the Supreme Court upheld a provision of the Bipartisan Campaign Reform Act ("BCRA"), 47 U.S.C. § 315(e), requiring broadcasters to maintain and disclose records of advertising purchases relating to,

among other things, candidates, elections, and "any political matter of national importance." *McConnell*, 540 U.S. at 246.[7]

The district court distinguished *McConnell* on two grounds, but neither is persuasive. Initially, the court suggested that it was unclear whether *McConnell* had in fact applied exacting scrutiny, as opposed to another standard, to the BCRA disclosure requirements at issue. *See* J.A. 436 (noting that "Justice Breyer's opinion . . . could have been clearer"). But the issue is far more clear than the district court let on. As the court's opinion acknowledged, both "the Chief Justice's dissent and the lower court panel" in *McConnell* unambiguously stated "that *Buckley*'s 'exacting scrutiny' standard applied" to the BCRA disclosure requirements at issue. J.A. 437. Moreover, Justice Breyer's affirmation of Section 315(e)'s constitutionality relied upon the precise interests considered in an exacting scrutiny analysis; namely, that the BRCA disclosure requirements would: (1) help voters "determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate" and; (2) further "compliance with the disclosure requirements and source limitations of

[7] While *Citizens United* overruled other parts of *McConnell*, this aspect of the Court's holding in *McConnell* remains good law.

BCRA and the Federal Election Campaign Act." *McConnell*, 540 U.S. at 237, 239.[8]

The district court also pointed to *McConnell*'s citations to *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), which addresses the government's ability under the First Amendment to impose restrictions on broadcast licensees, and implied that these broadcaster-specific considerations were dispositive in *McConnell*. J.A. 436–437. But the *McConnell* majority referred to *Red Lion* and the FCC's regulatory authority merely to show that the BCRA disclosure requirements at issue imposed no particularly daunting burdens on broadcasters *See* 540 U.S. at 236, 245; *id.* at 238 (relying on "the mass of evidence in related FCC records and proceedings"). Nothing in the *McConnell* majority opinion suggests that the level of constitutional scrutiny was affected by the FCC's arguably greater degree of regulatory authority over broadcasters. The district court was thus wrong to treat *McConnell* as some sort of outlier, when it is in fact one of a consistent line of cases applying exacting scrutiny to all manner of campaign disclosure regimes.

**ii. The Cases Relied Upon by the District Court Are Inapposite.**

The district court also erred by relying heavily on the holdings in two recent First Amendment cases arising in contexts very different from campaign finance

[8] *Citizens United* also strongly suggests that "[d]isclaimer and disclosure requirements" of all types should be "subjected . . . to 'exacting scrutiny.'" *See* 558 U.S. at 366–367.

regulation: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). Those two cases involve totally different factual contexts that do not have any bearing on the election-related issues presented by the Act. Indeed, *Reed* does not involve any form of disclosure.[9]

Despite the very different and unrelated contexts of these cases, the district court reasoned that they established a new paradigm for First Amendment analysis: namely, that all "content-based laws are presumptively unconstitutional . . . absent 'persuasive evidence of a long (if heretofore unrecognized tradition)' of regulation." J.A. 442 (quoting *NIFLA*, 138 S. Ct. at 2372). But this was error, on two grounds. First, even if this doctrinal framework were correct, the district court failed to recognize that campaign-disclosure cases fit snugly into it; as just discussed, there is indeed a "long" recognized "tradition of regulation" in which such disclosure requirements have been evaluated under the exacting scrutiny framework. And second, to the extent that the district court concluded that *NIFLA* and *Reed* signaled that the Supreme Court might treat electoral disclosure requirements differently in the future, the district court did precisely what the

[9] *NIFLA* involved a California law requiring licensed pregnancy clinics to distribute notices that offered information regarding publicly-funded family-planning services. *See NIFLA*, 138 S. Ct. at 2368. *Reed* involved a town's sign ordinance that restricted the size, duration, and location of temporary directional signs for church or other qualifying events. *See Reed*, 135 S. Ct. at 2224.

Supreme Court has cautioned against: it rendered a predictive or anticipatory overruling of Supreme Court precedents. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The district court's overbroad interpretation of *NIFLA* and *Reed* was no justification for overlooking the Supreme Court's on-point campaign finance cases.

### iii. Plaintiffs' Status As Media Entities Does Not Mandate Application of Strict Scrutiny.

The district court also focused on another purported distinction between the Act and other campaign disclosure requirements: that the Act "impos[ed] [disclosure-related] burdens on the media," and thus "implicate[d] a separate First Amendment right . . . the freedom of the press." J.A. 439. This, too, was error, for "the institutional press has [no] constitutional privilege beyond that of other speakers." *Citizens United*, 558 U.S. at 352. Put another way, "[t]he publisher of a newspaper has no special immunity from the application of general laws," *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937), and "generally applicable laws do not offend the First Amendment simply because their enforcement against

the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

The Brennan Center fully and unequivocally supports the media and the crucial role that a free and independent press plays in our democracy. We agree that, in crafting campaign finance rules, the government should tread carefully to avoid impinging on traditional press functions. *Cf.* 52 U.S.C. § 30101(9)(B)(i) (excluding from the definition of regulated "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical," other than candidate-owned outlets). But the Act does not govern "press" activities as such, and certainly does not "single out the press," as the district court intimated. J.A. 439 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994)). Rather, its disclosure provisions apply to *all* online platforms of sufficient size that sell political advertisements, and require that those publishers disclose factual, non-controversial information about what is ultimately a commercial transaction. *See* Md. Code Ann., Elec. Law §§ 1-101(dd-l), 13-405(b), 13-405(c).

There is nothing untoward, or even unusual, about media companies being "compelled" to disclose and publish information about their advertising and business practices. More than 50 years ago, the Federal Trade Commission issued an opinion providing that newspapers should place prominent disclaimers on paid

advertisements that resembled editorial content; the FTC has maintained that position, and indeed extended it to online advertising.[10] And digital media companies are, in many instances, "compelled" by law and their own choices to publish information on their websites. For example, because the *Washington Post* chooses to "collect personal information" about its website's users "in various ways," it must disclose a raft of details about how it collects and uses that personal information, which it does via a "Privacy Policy" posted on its website.[11] The text of that privacy policy reflects the requirements of numerous federal, state, and even international laws, many of which dictate specific content that covered websites must post.[12] The constitutionality of such generally applicable disclosure and disclaimer regimes does not, as a general matter, turn on whether or not media companies choose to engage in covered behavior.

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[10] *See generally Enforcement Policy Statement on Deceptively Formatted Advertisements*, Fed. Trade Comm'n, https://tinyurl.com/heza6vt (last visited April 18, 2019).

[11] *See Privacy Policy*, Washington Post (May 24, 2018), https://tinyurl.com/y8pd2b3p.

[12] For example, the *Washington Post*'s Privacy Policy contains a "Your California Privacy Rights" section; its language mirrors the requirements of California's Privacy Rights for California Minors in the Digital World" law, which requires most websites to, *inter alia*, post various notices and "clear instructions" regarding how minors can request removal of content they have posted. *See* Cal. Bus. & Prof. Code § 22581.

The district court's conclusion that the Act infringed on a distinct "freedom of the press" was particularly problematic given the procedural posture. The district court believed that it was "evident" that the Act intruded on press freedoms, *see* J.A. 439, because it required press companies to "post state-mandated information on their own websites" and thus "intrude[d] on the function of editors" in a manner akin to the "right of reply" statute struck down by the Supreme Court in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). *See* J.A. 446–447.

But it is entirely unclear on this record whether, and to what extent, media companies like plaintiffs exercise *any* editorial discretion with respect to online political advertisements. Public sources indicate that many online publishers contract with third-party advertising exchanges that supply advertisements to platforms in real time, via algorithms, with no opportunity at all for editorial control.[13] At least some plaintiffs here appear to use such third-party exchanges.[14] And in the trial court, the executive director of the Maryland-Delaware-D.C. Press

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[13] *See, e.g.*, Lukasz Olejnik et al., *Selling Off Privacy at Auction* at 1–3, Network and Distributed System Security Symposium (Feb. 2014), https://tinyurl.com/yycgsnbm (describing real-time provision of online advertisements).

[14] *See* Garrett Sloane, *Facebook Says Its Network Now Serves Ads to Washington Post, Rolling Stone and 1 Billion People a Month*, AdAge (Jan. 12, 2017), https://tinyurl.com/y2dz3wtg.

Association submitted a declaration asserting that "[a]lmost all" plaintiffs "receive some ad content through programmatic ad buying," and that "[t]he content delivered through such programmatic advertising is, generally speaking, automated and outside the control" of plaintiffs. *See* J.A. 75–76; *see also* J.A. 297, 305. The district court did not explain how campaign finance regulations regarding Plaintiffs' "automated" provision of third-party content could affect "the function of editors" in any manner, much less a constitutionally relevant one. Moreover, even if plaintiffs exercise *some* control over political advertisements that appear on their websites, the advertisements are plainly *not* plaintiffs' *own* political speech. To the contrary, plaintiffs' practice appears to be to expressly distinguish such ads from editorial content, and so it is entirely unclear (and unexplained in the opinion below) why constitutional doctrines developed to protect the latter should apply to the former.

It may be that some, but not all, plaintiffs use third-party ad exchanges, or that some plaintiffs treat political advertisements differently than other types of commercial displays. But at the very least, the record is insufficiently developed on these points. Given the posture of the proceedings below—a motion for preliminary injunctive relief—the district court could not simply *assume* that "the function of editors" would be impinged; rather, Plaintiffs were obliged to provide evidentiary support for that claim. So far as *amicus* is aware, Plaintiffs provided

none, and the record reveals none. The district court's failure to make factual findings sufficient to support its rationale independently requires vacatur of the decision below.

## II. THE DISTRICT COURT'S EXACTING SCRUTINY ANALYSIS MISCONSTRUED THE IMPORTANT GOVERNMENTAL INTERESTS AT STAKE.

The district court's alternative holding that the Act also failed the exacting scrutiny standard was likewise flawed. The court agreed with Maryland that the Act promoted "sufficiently important"—indeed, "compelling"—governmental interests: namely, preventing foreign influence in elections and promoting electoral transparency. J.A. 451. But the district court nevertheless held that the Act's disclosure requirements were not "substantially related" to those interests, *id.* at 451–453, explaining that those requirements were duplicative, over- and under-inclusive, and insufficiently robust.

The district court's analysis was erroneous as a matter of law and fact. Legally, the district court erred by effectively imposing the same "narrow tailoring" requirement it had previously applied in its strict scrutiny discussion. *See*, *e.g.*, J.A. 451 ("I have already explained . . . "); J.A. 453 ("I have already addressed the first of these defects."); J.A. 454 ("I have already discussed this failing in some detail . . . "). Properly understood, the "substantially related" inquiry is not nearly so demanding as strict-scrutiny narrow tailoring, and

conflating the two is reversible error. *See, e.g.*, *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013) ("Disclosure requirements . . . [do not] require[e] a governmental interest that is narrowly tailored.") (citations omitted). Exacting scrutiny allows policymakers flexibility in combatting election-related ills, including the ability to pick and choose their battles, rather than addressing all perceived problems in one fell swoop. *See John Doe No. 1*, 561 U.S. at 198–199 (finding that disclosure requirements were "substantially related to the important interest of preserving the integrity of the electoral process" where those requirements could "help cure the inadequacies of the [existing] progress" and "prevent *certain types* of" fraud) (emphasis added).

Factually, the district court ignored the various ways in which the Act's disclosure regime—like similar provisions that the courts have long upheld—directly furthered electoral transparency efforts. The context in which the Act was created cannot be overlooked. It is now established that Russia used a network of fake social media accounts ("trolls") and other online tools to spread messages designed to influence American politics, in the 2016 election cycle and beyond. These deceptive online advertising practices likely continue to this day; they were extremely common in the run-up to the 2018 midterm elections, in which trolls

used false online ads not only to spread misinformation about federal and state candidates, but also as a tool for voter suppression.[15]

The rise of the internet and the spread of ever-more-precise technology that powers online propaganda efforts present novel challenges to electoral integrity efforts. Yet "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time [of] *Buckley*." *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014). *Citizens United* recognized the same phenomenon: "[M]odern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide . . . citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizen United*, 588 U.S. at 370–371.

The district court failed to give appropriate deference to the state's efforts to deal with this new reality or to protect the integrity of its elections. In particular, three flaws in its reasoning stand out.

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[15] *See generally* Kevin Roose, *We Asked for Examples of Election Misinformation. You Delivered.*, N.Y. Times (Nov. 4, 2018), https://tinyurl.com/ydcgt44d.

### A. "Duplicative Disclosure" Is a Positive Feature of the Act, Not a Failing.

The district court erroneously concluded that the Act's requirements were invalid in part because they were unduly duplicative of other Maryland campaign finance rules. As the court pointed out, subsection 13-405(b) (the publication requirement) requires online publishers to disclose the identity of political ad buyers and the amount paid for each ad, but the court emphasized that Maryland law "already require[d] the ad buyers themselves to disclose this same information." J.A. 453. That observation was both inaccurate and irrelevant.

First, the Act's reporting and record-keeping requirements are *not* duplicative of existing laws. To take just one example: under Maryland election law, individuals making independent expenditures are only required to make disclosures when their spending aggregates to $10,000 in an election cycle. In contrast, the Act requires online platforms to disclose online ad purchases of any amount, thus revealing new information about those who would seek to float under the radar of the existing disclosure threshold. *Compare* Md. Code. Ann., Elec. Law §§ 13-306(d). 13-307(c) *with id.* §§ 1-101(ll-1), 13-405(b)(6). The Act also covers new types of information, such as ad-targeting data and distribution metrics, which were not previously regulated. *See* Md. Elec. Law §§ 13-405(c)(3)(ii), (iv)-(vi).

More fundamentally, in an exacting scrutiny analysis, overlapping disclosure requirements on advertisers and platforms are *beneficial*, and certainly not presumptively problematic. *McConnell* explicitly held that similar "duplicative" disclosure requirements on advertisers and broadcast networks actually "reinforced" each other and furthered *Buckley*'s informational rationale for upholding electoral disclosures. *See McConnell*, 540 U.S. at 237. The same is true here; platforms' records of their dealings with ad purchasers can be cross-checked with those received and maintained by the state, and omissions can be uncovered and investigated. Viewed through the proper lens, the fact that the Act might serve as a backstop to Maryland's existing disclosure requirements for big-spending campaign advertisers is no vice.

### B. The Act Is Neither Over- nor Under-Inclusive.

The district court also erred in holding that the Act was both "overinclusive" and "underinclusive." The court thought the Act over-inclusive because it regulated smaller publishers in addition to large platforms like Facebook, and was under-inclusive because it regulated only paid advertising and not unpaid social media posts. *See* J.A. 454–455. Both conclusions were unfounded.

#### i. Inclusion of Smaller Online Platforms Does Not Make the Act Over-Inclusive.

The district court suggested that the dangers of digital misinformation are present solely on the largest platforms like Facebook, and not on the websites of

other media publishers, like some plaintiffs here. *See* J.A. 454. This was another area where the district court's assumptions were not borne out by the record, or by the publicly available facts.

First, the platforms of many American media outlets, no different than those of plaintiffs here, are known to have published advertisements placed by Russian trolls. Such advertisements have been seen on *Atlantic*.com and the Fusion Media Group websites.[16] These ads were served through the Facebook Audience Network, in which the *Washington Post* participates. *Supra* n.14. The district court was either unaware of, or overlooked, this.

Nor did the district court have any reasoned basis to distinguish platforms that primarily serve a state or local audience, as some plaintiffs do. It is publicly known that foreign business interests have also sought to manipulate state and local elections though spending on regional media.[17] For example: committees formed to influence ballot questions related to gambling in Maine and Massachusetts in 2016 and 2017 were funded largely by hundreds of thousands of

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[16] *See* Alexis C. Madrigal, The Atlantic *Made $0.004 From Russian Ads*, The Atlantic (Nov. 1, 2017), https://tinyurl.com/y2sle3jq; Bryan Menegus, *Facebook Ran Some Russia-Funded Ads on Gizmodo Media Content. Here's What We Know About It*, Gizmodo.com (Nov. 1, 2017), https://tinyurl.com/ycaylsyu.

[17] *See, e.g.*, *Getting Foreign Funds Out* at 18 & n.103.

dollars from a Japanese firm and two Cambodian employees,[18] resulting in purchases of advertisements in local newspapers.[19] It is understandable that public attention has centered around the problem of foreign influence on larger platforms, but that does not render smaller platforms immune from the same phenomenon.

Nor is it relevant that smaller publishers may not have publicly admitted that they have run advertisements from foreign buyers; after all, as plaintiffs themselves have reported, Google and Facebook both denied that they had hosted illegal foreign ads for months before admitting what had happened.[20]

Indeed, while plaintiffs allege that "there is no evidence" of foreign advertising on Maryland newspapers, J.A. 12, *they do not claim to have looked for it*. Six of the seven declarations in the record below include the same carefully-

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[18] *See* Shawn Musgrave, *Offshore money pours into slot machine initiative in Massachusetts*, New England Ctr. for Investigative Reporting (Nov. 3, 2016), https://tinyurl.com/y4sabhya; Steve Mistler, *Documents Shed Light On Effort To Fund Casino Campaign, Now Facing $4M Fine for Ethics Violations*, Maine Pub. Radio (Nov. 3, 2017), https://tinyurl.com/yyxdon5v.

[19] *See 2016 Nov. 5th Report (BQ)*, Horse Racing Jobs and Education Comm. (95429) (Nov. 22, 2016), https://tinyurl.com/yxafw5ns (listing expenditures on advertisements in the *Revere Journal*); *2016 Campaign Finance Report*, Horseracing Jobs Fairness Comm. (Apr. 11, 2016), https://tinyurl.com/y56znbhy (listing expenditures on advertisements in the *Portland Press Herald/Maine Sunday Telegram*).

[20] *See* Elizabeth Dwoskin et al., *Google uncovers Russian-bought ads on YouTube, Gmail and other platforms*, Washington Post (Oct. 9, 2017), https://tinyurl.com/yc2deexo; *see also* Sheera Frenkel et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. Times (Nov. 14, 2018), https://tinyurl.com/yagzc2cl.

worded phrasing: "I am unaware of any effort—whether by a foreign government or otherwise—to manipulate readers . . . through the use of fake accounts or deliberately false speech." J.A. 48, 54, 56, 65, 70, 73. The seventh, from *The Washington Post*, does not include this denial, despite sharing much of the other language that is identical among all seven declarations, *see* J.A. 39–43, suggesting that the Post possibly *is* aware of efforts by foreign governments to influence readers through fake accounts. In sum, none of the plaintiffs affirmatively state that they have not sold political ads to foreign nationals, and none claim to have pursued the matter. That is hardly an evidentiary basis from which to conclude that Maryland cannot seek to improve electoral-protection efforts on internet platforms within its jurisdiction.

#### ii. The Act Is Not Under-Inclusive for Failing to Regulate Unpaid Social-Media Posts.

The district court also stated that the Act was under-inclusive because it believed that the online misinformation efforts that motivated Maryland's legislation were "largely confined" to unpaid social media posts on "Facebook, Instagram, and other global social media platforms," whereas the Act regulated only paid content. *See* J.A. 454–455. Again, the district court was both legally off-base and factually in error. Maryland was entitled to extend its traditional regulation of paid campaign advertising to the online sphere, *see supra* at p.18,

without tackling the additional problem of misinformation on unpaid social media posts.

Regulating online advertising was well worth Maryland's attention, even if it did not reach unpaid posts; paid online advertising has exploded in recent years, putting a premium on transparency efforts for such advertising.[21] While dollar amounts spent on paid foreign activity may be relatively small—Russian trolls with the Internet Research Agency charged in an indictment brought by Special Counsel, Robert Mueller are known to have spent at least $100,000 on Facebook ads and more than $270,000 on Twitter ads[22]—these organizations have multi-million dollar budgets should they choose to spend more.[23] Furthermore, these paid ads reached millions of people, exerting a strong influence. On Facebook alone, 11.4 million people saw ads paid for by the IRA, and many of these paid ads mentioned candidates, both at the federal and state levels.[24]

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[21] *See Getting Foreign Funds Out* at n.22 (noting that "[i]n the 2004 election, political spending online was only about 2% of what it was in 2016") (citations omitted).

[22] *Id.* at n.33; Twitter Public Policy, *Update: Russian interference in the 2016 US presidential election*, Twitter.com (Sept. 28, 2017), https://tinyurl.com/y6bcne4b.

[23] *See* Holt Aff. ¶¶ 19, 22 (describing that the IRA budget was $10 million for the first six months of 2018; between 2016 and 2018, the budget was $35 million).

[24] *See Getting Foreign Funds Out* at 7 & n.27.

Paid content is also frequently used in concert with unpaid activities in order to increase the effect of both. First, paid advertising is used strategically by foreign actors to increase the reach and effectiveness of their unpaid posts. In the 2016 election, Russian trolls used paid ads to gather followers. *See* J.A. 145–146. They were then able to spread unpaid messages to followers for free.[25] Thus, the effects of unpaid social media postings are not *independent* from paid media, as the district court assumed; rather, to a considerable extent, the two are complementary, and their effects intertwined. What is more, advertisers, including trolls, use paid ads to test messages' effectiveness.[26] Advertisers can and do prepare many versions of the same ad, circulate them all, see which ones obtain the most user engagement; once the most effective messages have been identified, advertisers can then spread them far and wide, in both paid and unpaid content.[27]

Because both the reach and effectiveness of unpaid propaganda is often contingent on paid advertisements, the Act's strategy of targeting paid advertisements is perfectly logical, and constitutionally valid.

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[25] *See Getting Foreign Funds Out* at 7.

[26] Alexis C. Madrigal, *What, Exactly, Were Russians Trying to Do With Those Facebook Ads?* The Atlantic (Sept. 25, 2017), https://tinyurl.com/yde7eycz.

[27] Elizabeth Weise, *Here's how Russian manipulators were able to target Facebook users*, USA Today (May 10, 2018), https://tinyurl.com/yamcr2vr.

### C. The Act's Potential Shortcomings Do Not Render It Unconstitutional.

The district court also criticized the Act as "poorly calibrated to prevent foreign operatives from evading detection." J.A. 453. The court pointed to the fact that ad buyers are required to self-report if their ad is political; if they do not report, the ad publisher disclosure requirements are not triggered. *Id.* at 455. The possibility that nefarious political operatives might simply not report or might submit false information about their identities, the district court reasoned, rendered the Act "substantially mismatched" to its goal of detecting foreign operatives. *Id.*

The district court's skepticism about this aspect of the Act is understandable to a degree; relying on self-reporting to discover deceptive action is not a best practice, and has not been used in other states' enactments.[28] While the Brennan Center shares the same electoral-protection goals as Maryland, and has outlined a proposal for states seeking to limit the pernicious effects of deceptive campaign-related advertising, the final version of the Act contained some provisions that materially differ from those we recommend and those enacted by other states.

All the same, under a proper application of the exacting scrutiny standard, Maryland's policy choices with respect to this aspect of the Act were due more deference than the district court extended. And the district court did not appreciate

[28] *See* N.Y. Elec. Law § 14-107; N.Y. Elec. App. §§ 6200.10(g), 6200.11; Wash. Admin. Code § 390-18-050.

the ways in which the Maryland disclosure scheme could still further valid electoral-protection goals. Within a regime where most political ads are listed in the disclosures required by the Act, members of the public, watchdogs, and journalists will be able to search for information about political ads they see online. If an ad is *not* listed in the platform disclosures, those who see it will be alerted to the possibility that the advertiser is hiding its identity and the ad can be targeted for further investigation. Alternatively, even if foreign operatives submit false information about their identities, such information has the potential to be useful, for even lies can provide clues for investigators. For example, there is substantial evidence that bad actors in the 2016 election used *the same* false identities and email addresses for multiple deceptive online activities, or combinations of real and false information.[29] Gathering information about false identities helps careful observers unearth coordinated deceptive activity.

[29] *See*, *e.g.*, Indictment ¶¶ 62, 69, 73, 76, 79, 80, *United States v. Internet Research Agency.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2016) (showing the use of the same false persona—"Matt Skiber"—to engage in multiple fraudulent election activities).

## CONCLUSION

The district court here did not provide the Act with the reasonable evaluation under the proper standard of review that the law requires. Because the district court conflated its strict and exacting scrutiny analyses, it inappropriately minimized the Maryland legislature's policy judgments and made hasty and unsupported assumptions about the ineffectiveness of disclosure regimes targeted at online political advertisements. At the very least, the district court owes the Act a fresh look on a more developed record, using the well-established exacting scrutiny standard.

For the foregoing reasons, the judgment of the district court should be reversed, and the case should be remanded for further proceedings.

April 19, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on April 19, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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