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, NO. 1:18-CV-2527-PWG
THE HONORABLE PAUL W. GRIMM, PRESIDING

BRIEF OF PLAINTIFFS-APPELLEES

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Counsel for Plaintiffs-Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Washington Post, formally known as WP Company LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Nash Holdings LLC (a privately held company owned by Jeffrey P. Bezos)

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: The Washington Post

CERTIFICATE OF SERVICE

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin (signature) February 19, 2019 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Baltimore Sun Company, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Tribune Publishing Company, LLC

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Tribune Publishing Company, LLC

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: The Baltimore Sun Company, LLC

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin
(signature)

February 19, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Capital-Gazette Communications, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Baltimore Sun Company, LLC
Tribune Publishing Company, LLC

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Tribune Publishing Company, LLC

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: Capital-Gazette Communications, LLC

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin
(signature)

February 19, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carroll County Times, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Baltimore Sun Company, LLC
Tribune Publishing Company, LLC

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Tribune Publishing Company, LLC

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: Carroll County Times, LLC

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin
(signature)

February 19, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

APG Media of Chesapeake, LLC d/b/a The Star Democrat, The Cecil Whig,
(name of party/amicus)

and The Maryland Independent

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Adams Publishing Group

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: APG Media of Chesapeake, LLC

CERTIFICATE OF SERVICE

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin
(signature)

February 19, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

CNHI, LLC (the successor in interest to Community Newspaper Holdings, Inc.) d/b/a
(name of party/amicus)

The Cumberland Times-News

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 25, 2019

Counsel for: CNHI, LLC

CERTIFICATE OF SERVICE

****

I certify that on February 25, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin (signature) February 25, 2019 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ogden Newspapers of Maryland, LLC d/b/a The Federick News-Post
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
The Nutting Company, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: Ogden Newspapers of Maryland, LLC

CERTIFICATE OF SERVICE

****

I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin
(signature)

February 19, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Schurz Communications Inc., formerly d/b/a The Herald-Mail (as reflected below, the newspaper has
(name of party/amicus)

been sold and is now owned by GateHouse Media Maryland Holdings, Inc.)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

On or about February 1, 2019, Schurz Communications Inc. sold The Herald-Mail, and it is now owned by GateHouse Media Maryland Holdings, Inc., an indirect wholly-owned subsidiary of New Media Investment Group Inc., which is a publicly traded company. Counsel plans to file shortly a motion for substitution of parties to accurately reflect the new owner of the publication.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: Schurz Communications Inc.

CERTIFICATE OF SERVICE

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/s/ Seth D. Berlin (signature) February 19, 2019 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1132 Caption: The Washington Post, et al. v. McManus, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Maryland-Delaware-D.C. Press Association, Inc.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:
While it does not have a parent corporation, in the interest of full disclosure Maryland-Delaware-D.C. Press Association, Inc. notes that it is affiliated with the Maryland-Delaware-D.C. Press Foundation, which is a registered 501(c)(3) nonprofit organization.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

Maryland-Delaware-D.C. Press Association, Inc. ("MDDC") is a registered 501(c)(6) trade association. A full list of its members is attached. To the best of MDDC's information and belief: (a) it has no publicly held members whose stock or equity value could be affected substantially by the outcome of the proceeding; and (b) it has no publicly held members whose claims it is pursuing in a representative capacity other than those members who are themselves parties to this case and who have filed disclosure statements accordingly.

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Seth D. Berlin Date: February 19, 2019

Counsel for: Maryland-Delaware-D.C. Press Association, Inc.

CERTIFICATE OF SERVICE

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I certify that on February 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Seth D. Berlin (signature) February 19, 2019 (date)

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Beachcomber (Maryland), MD
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Community Times, MD
County Times, MD
Crofton-West County Gazette, MD
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The Harrington Journal, DE
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Howard County Times, MD
Kent County News, MD
Laurel Leader, MD
Middletown Transcript, DE
The Milford Chronicle, DE
Milford Beacon, DE
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The Peake, MD
The Prince George's Post, MD
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The Record Observer, MD
The Republican, MD
The Times Record, MD
The Washington Informer, DC
The Waterline, MD
Town courier Urbana, MD
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Other Authorities

ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly hold that the portions of Maryland's Online Electioneering Transparency and Accountability Act regulating publishers must satisfy strict scrutiny, and properly find that those provisions fail such scrutiny?

2. Did the District Court properly find that, even if the challenged portions of the law need only satisfy exacting scrutiny, they are nevertheless unconstitutional?

COUNTER-STATEMENT OF THE CASE

A. This Appeal

This is an appeal from an order of the District Court preliminarily enjoining enforcement of two sections of Maryland's recently-enacted Online Electioneering Transparency and Accountability Act (the "Act"), which impose new requirements on "online platforms" that accept political advertising, including virtually every newspaper website published in Maryland. JA-459-61. The plaintiffs/appellees are newspapers that publish throughout Maryland (the "Publishers"), and include both large newspapers like *The Washington Post* and *The Baltimore Sun*, and local papers like the Annapolis *Capital-Gazette*, the *Cumberland Times-News*, and the *Cecil Whig*. JA-14-15. The defendants/appellants are Maryland officials charged with enforcing the Act ("Maryland"). JA-15-16. The District Court found that the

Publishers are likely to succeed on the merits of their First Amendment challenge to the Act's regulation of online platforms, and granted their motion for a preliminary injunction. JA-409-10, 457-58. Maryland appealed. JA-461.

B. The Act

1. The Existing Statutory and Regulatory Framework

As Maryland correctly notes, it has long regulated campaign-related speech by candidates and others directly participating in the political process. Maryland Br. ("Br.") 3. Maryland requires that (a) all "campaign material" include an "authority line," (b) political committees and others making independent election expenditures report to the Maryland Board of Elections (the "Board") details of their spending on political ads ("public communications" and/or "electioneering communications"), and (c) those groups maintain comprehensive records, which are then subject to inspection by the Board. *Id.* at 3-4.

Against this backdrop, the Maryland Legislature passed the Act. Certain provisions, not challenged here, amend the definitions of "campaign material," "public communications" and "electioneering communications" to clarify that they now include online communications. As a result, all online political ads must now include an "authority line" identifying the person(s) or organization behind the ad, and online political advertisers must report to the Board, *inter alia*, (1) the identity of the person or organization making the expenditure, (2) the amount and date of

each expenditure, and (3) the candidate or ballot issue to which the expenditure relates and whether the expenditure is in support or opposition. Md. Code, Elec. Law §§1-101(dd-1), (ll-1), 13-306, 13-307.

None of the above-described provisions was challenged by Publishers. The record is undisputed that Publishers include the authority line in the online political ads they run. JA-133. In addition, although not mentioned in Maryland's brief, the Board maintains a comprehensive, searchable and unified online database, known as the "Campaign Reporting Information System," or "CRIS," which allows the public to access the information political speakers are required to report, including their online political advertising expenditures. JA-178-214 (detailed screenshots from CRIS database); JA-256-62 (extended demonstration of CRIS at preliminary injunction hearing).

2. The Challenged Provisions of the Act

As relevant here, the Act imposes additional requirements on "online platforms," including on Publishers. These include: (1) a "publication" requirement, which compels Publishers to publish, on separate portions of their websites, specified information about each online political ad they accept, and (2) an "inspection" requirement, which requires Publishers to collect information about those ads and to turn it over to state inspectors upon request. Md. Code, Elec. Law §13-405(b)-(c).

The Act applies to all "online platforms," which it defines as "any public-facing website, web application, or digital application, including a social network, ad network, or search engine," that has "100,000 or more unique monthly United States visitors or users" and that "receives payment for qualifying paid digital communications." *Id.* §1-101(dd-1). Based on that definition, the Act applies to each Publisher. JA-14-15, 40, 45, 50, 56, 62, 67, 74.[1]

The Act defines a "Qualifying Paid Digital Communication" as "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." Md. Code, Elec. Law §1-101(ll-1). The Act in turn defines "Campaign Material" as "any material that": (1) "contains text, graphics, or other images"; (2) "relates to a candidate, a prospective candidate, or the approval or rejection of a [ballot] question or prospective [ballot] question"; and (3) "is published, distributed, or disseminated." *Id.* §1-101(k)(1). The statute does not explain what it means for an ad to "*relate*[] to" a candidate or ballot question, or a prospective candidate or ballot question.

[1] In addition to eight individual publishers, plaintiff-appellee Maryland-Delaware-DC Press Association ("MDDC") sought relief on behalf of additional members who operate websites that either meet, or are likely to meet, the statutory definition of "online platform." JA-15, 72-77.

Under the Act's "publication" requirement, once a political advertiser purchases an online political ad and provides notice to a Publisher that the ad is a "Qualifying Paid Digital Communication," a series of obligations is triggered for the Publisher. *Id.* §13-405(a)(1)-(2). The Publisher must publish, within 48 hours, at some "clearly identifiable location" on the Internet, and in searchable and "machine readable format," information relating to (1) the identity of the ad purchaser, (2) its chief decisionmaker, and (3) the total amount paid to the publisher for placement of the ad. *Id.* §§13-405(b)(1)-(3), (6)(i)-(ii). This information must remain on the website for at least a year following the relevant general election. *Id.* §13-405(b)(1)-(3). For political ads purchased through a third-party ad network, however, Publishers need only publish contact information for the ad network or a hyperlink to the network's website. *Id.* §13-405(b)(6)(iii).

Under the Act's "inspection" requirement, for each online political ad, Publishers must maintain the following records:

1. The candidate or ballot issue to which the qualifying paid digital communication relates and whether [it] supports or opposes that candidate or ballot issue;
2. The dates and times that the qualifying paid digital communication was first and last disseminated;
3. A digital copy of the communication;
4. An approximate description of the geographic locations where the communication was disseminated;

5. An approximate description of the audience that received, or was targeted to receive, the communication; and

6. The total number of impressions generated by the communication.

Id. §13-405(c)(3)(i)-(vi). Although much of this information cannot be known until the ad has finished running, the Act requires these records to be made "available on the request" to the Board "within 48 hours" of the ad's publication, and to remain available upon request for at least one year after the relevant general election. *Id.* §13-405(c)(2).

The Act states that, in complying with the publication and inspection requirements, Publishers may "rely in good faith on the information provided" to them by an ad purchaser. Md. Code, Elec. Law §13-405(d)(2). Maryland asserts that this minimizes the burden on platforms because advertisers will supply all the necessary information. Br. 10, 51. Despite this, much of the information the Act requires Publishers to collect, maintain and make available for inspection, such as the total number of impressions displayed, is information solely within the purview of the Publisher. The Act also does not say what happens if there are questions about the accuracy or completeness of the information an advertiser provides, including whether a Publisher is still required to publish it.[2]

[2] In October 2018, Maryland published a video purporting to explain advertisers' responsibilities under the Act. JA-463 (video); JA-162-65 (screen shots). It compounded this confusion by incorrectly describing the provisions of the Act and referring to regulations that did not then exist. JA-155-58.

Finally, if the Board determines that an ad does not comply with the Act's terms, the law empowers the Maryland Attorney General to institute an action for injunctive relief to require removal of the ad, without either advance notice to the platform or a showing that the ad is unprotected speech. Md. Code, Elec. Law §13-405.1(b)(1)-(2). The Act specifies that failure to comply with such an injunction is punishable by criminal penalties, including contempt, fines and imprisonment. *Id.* §13-405.1(b)(4).

3. The Legislative History of the Act

Maryland correctly notes that its Legislature intended the Act to address Russian "meddling" during the 2016 election. Br. 6-7. The record below confirms that its sponsors focused exclusively on problems involving social media platforms like Facebook and Twitter, and so-called programmatic ads placed via Google's ad network, all of which can be targeted to specific groups through the use of sophisticated algorithms.[3] There was no discussion by the Legislature of advertising placed on newspaper websites or any other traditional websites.

[3] *See, e.g.*, http://mgahouse.maryland.gov/mga/play/eb5126c2-5f0b-4512-a03c-c37ce18e159c/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c at 6:31 – 8:33 (Maryland House sponsor's testimony describing obligations bill would impose on "Facebook, Twitter, [and] Google"); http://mgahouse.maryland.gov/mga/play/0f183b99-dfef-4eb4-8dbe-b1f6369a3d56/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c at 1:28:00-1:30:06 (Maryland Senate sponsor's testimony focusing on deceptive Facebook posts); JA-415-16 (District Court's opinion describing same).

The record below also confirms the nature of the "Russian meddling." As Maryland notes, the "Russian influence was achieved 'primarily through unpaid posts,'" and "Russian operatives … promoted content through fake accounts, pretending to be Americans." Br. 6. Despite this, the Act targets paid political advertising and contemplates that Publishers may rely on information provided by such operatives.

Although Maryland Governor Larry Hogan praised the bill's "laudable goals," he refused to sign it because of "serious constitutional concerns," including that the law "could allow the government to coerce news outlets protected by the First Amendment to publish certain material," and is both vague and overbroad. JA-111-12. The Governor explained that, because "[t]he constitutional strict scrutiny of restrictions of political speech demands a more careful and precise demarcation of what is subject to regulation and for what purpose," he fully "expect[ed]" that there "will be a constitutional challenge on these grounds." JA-112.

Despite Governor Hogan's refusal to sign the proposed legislation, the Act became law pursuant to Article II, §17(c) of the Maryland Constitution, and took effect on July 1, 2018. JA-109. A few days prior to that date, Google announced

that it would no longer accept any political ads in Maryland because of the burdens the Act imposed. Br. 19-20.[4]

C. The Publishers' Challenge

In August 2018, Publishers filed suit to challenge the constitutionality of the provisions of the Act applicable to online platforms, and immediately moved for a preliminary injunction. JA-8, 10, 36-37. Maryland agreed not to enforce the Act against Publishers while their motion was pending. JA-113-15, 420.

Publishers articulated six distinct legal grounds for challenging the Act:

1. the Act's publication requirement compels speech based on the government's assessment of what information Maryland readers need to know, in violation of the First Amendment;

2. the Act's publication and inspection requirements also violate the First Amendment because they are content-based restrictions on speech that cannot withstand strict scrutiny review;

3. the Act is unconstitutionally vague because, *inter alia*, it leaves unclear when an ad "*relates to*" an actual or prospective candidate or ballot question, as well as the division of responsibility between advertisers and platforms for supplying or gathering the required information;

[4] Maryland published proposed regulations on March 1, 2019, nine months after the Act's effective date and long after the November 2018 election. Although Maryland contends that the "proposed regulations … address the concerns raised by Google," Br. 20, there is no record evidence supporting such an assertion and, as of the date of this filing, Google still does not accept political ads in Maryland. *See* https://support.google.com/adspolicy/answer/6014595 ("Maryland Restrictions—The following is not allowed: Ads related to ballot measures and candidates for state and local elections").

4. the Act's enforcement provisions authorize injunctions compelling removal of online content without notice or adjudication as to whether the underlying speech is protected, which violates the First Amendment prohibition on prior restraints;

5. the Act's inspection provisions separately violate the Fourth Amendment because they permit Maryland to demand that Publishers produce records without any pre-compliance review; and

6. the Act's regulations on online publishers are preempted by Section 230 of the Communications Decency Act, 47 U.S.C. §230, which bars states from imposing legal duties on online publishers arising out of third-party content they host.

JA-32-34, 36-37, 420.

To support their motion, Publishers submitted Declarations on behalf of each plaintiff news organization describing the burdens—both practical and constitutional—that complying with the Act would impose. JA-39-79. The Declarations explained that Publishers do not routinely collect or retain in a single location or software application the information mandated by the Act's inspection requirement, such that complying would require them to devote substantial resources to purchasing expensive software and training staff members, a particular burden on smaller publishers. JA-41, 46, 51, 57-58, 63, 68, 75. The Declarations also explained that the Act's publication requirement would require Publishers (1) to create new webpages dedicated to complying with the Act, (2) to publish proprietary information about their advertising practices and rates, and (3) to surrender their closely-guarded editorial independence over the content they

publish. JA-41-42, 46-47, 52, 58, 63-64, 68-69, 76. A number of the Declarants also explained that, if the Act were enforced against them, their organization would be forced to stop running online political ads entirely, depriving the public of both paid political speech and the news reporting supported by revenues those ads generate. JA-42, 53, 59, 64, 70, 77.

Publishers also submitted the Declaration of Richard J. Douglas, a then-candidate for Maryland's House of Delegates. JA-150. Douglas described how Google's decision to stop accepting online political advertising in Maryland was inhibiting candidates' ability to communicate with voters, which would be exacerbated if more online platforms followed suit. JA-153-54. He explained that inexpensive online advertising is an important tool for candidates for local office, especially challengers who lack the name recognition of incumbents. JA-151-52.

Finally, Publishers submitted the Declaration of Jonathan Albright, JA-139-49, which Maryland does not mention in its brief, despite the District Court's extensive reliance on it, *see* JA-411, 413-15, 449-50, 454. Albright, the Director of the Digital Forensics Initiative at Columbia University's Graduate School of Journalism, is an expert on efforts to use social media to manipulate public opinion, including during the 2016 election. JA-139-41. The Brennan Center (one of Maryland's *amici*) consulted Albright in connection with its recommendations related to combatting election manipulation. JA-141-42.

In his Declaration, Albright explained that (a) Russian interference during the 2016 election focused almost exclusively on large social media platforms like Facebook and Instagram, rather than on newspaper websites, (b) it primarily involved unpaid social media posts, rather than the paid political advertising the Act regulates, and (c) those social media posts generally did not refer to any particular candidate or campaign, but, rather, addressed divisive social/political issues like race, immigration, or gun rights. JA-144-46 ("For this reason, I typically refer to Russian interference in the 'U.S. political climate,' rather than interference in the 2016 election."). Finally, he explained that Russian operatives' online tactics involved extensive efforts to conceal their identities. JA-147. Albright concluded that, while the "intention of the law is noble," the "sections of the statute regulating online platforms" do not "meaningfully address the actual problem at issue." JA-148-49. Maryland made no attempt to refute Albright's Declaration.

D. The District Court Ruling

On January 3, 2019, the District Court granted Publishers' preliminary injunction motion and barred enforcement against them of Sections 13-405 and 13-405.1 of the Act. JA-459-60. The District Court held that Publishers were likely to succeed on the merits of their First Amendment challenge, and had shown each

of the other factors required for issuing a preliminary injunction. JA-410. (The Court did not reach Publishers' other challenges to the Act. JA-421.)

The District Court subjected the challenged provisions of the Act to strict scrutiny, requiring Maryland to show that they "'further[] a compelling interest and [are] narrowly tailored to achieve that interest.'" JA-443 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015)). Although Maryland had not attempted to demonstrate that the Act satisfied strict scrutiny, the District Court nevertheless analyzed the issue. JA-274-75, 443-450. It found that the interests underlying the Act are compelling, but that it would fail strict scrutiny because it is not "narrowly tailored" to serve those interests. JA-446, 450.

In applying strict scrutiny to the challenged portions of the Act, the District Court rejected Maryland's invitation to apply the "exacting scrutiny" standard from campaign finance-disclosure cases like *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Buckley v. Valeo*, 424 U.S. 1 (1976). JA-427, 443. The District Court explained that those cases are inapplicable because they involved challenges to regulations that "imposed burdens on … direct participants in the electoral process," not "neutral third parties such as publishers of political advertisements." JA-434-35. The Court thus characterized "[t]he 'exacting scrutiny' standard" as "a limited exception to the general rule that compelled disclosure laws, like all content-based regulations, must overcome strict scrutiny." JA-439. The Court

refused to extend that exception to a law that substantially interferes with the editorial independence of Publishers, especially in light of recent Supreme Court decisions categorically applying strict scrutiny to both content-based regulation of speech and compelled speech. JA-439-43, 446-47 (discussing, *inter alia*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), *Reed*, and *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018)). The District Court further held that, even if the exacting scrutiny standard governed, it would not change the result because there was not "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." JA-450 (quoting *Citizens United*, 558 U.S. at 366-67).

In reaching these conclusions, the District Court found that "the Act's requirements and its aims" are "substantially mismatched," JA-455, and based that determination on numerous factual findings, including that:

- The Act was created in "response[] to revelations that Russia exploited social media in a campaign to sway public opinion in the United States ahead of the 2016 presidential election," and, thus, "the Act's primary purpose was to combat foreign meddling in the state's elections." JA-410, 445.

- The Act would not be effective at advancing that primary purpose because it governs only paid political advertisements, whereas Russia's "primary weapons" in its election interference efforts "were *unpaid* social media posts,

rather than paid advertisements." JA-414; *see also* JA-449-50 (same). Moreover, "[f]or the most part, [those unpaid] posts made no explicit references to the election or to any particular candidates," and instead "commented on controversial issues like race, gun rights, or immigration in hopes of stoking outrage, fear, and frustration among American social media users." JA-414.

- The Act regulates substantially more speech than necessary because "all available evidence suggests that foreign operatives largely confined their activities to Facebook, Instagram, and other global social media platforms." JA-454; *see also* JA-449 (finding that "State has not been able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or at any other time").

- The Act would not be effective in deterring ads from foreign sources because an ad "buyer who wishes to avoid detection—as any self-respecting foreign operative surely would—can simply withhold the notice" that the ad is governed by the Act, "in which case the publisher never incurs an obligation to disclose any information about the ad." JA-455.

- The Act's requirements largely duplicate other, unchallenged, provisions of Maryland campaign finance law that regulate purchasers of online political ads directly. JA-447-48, 453.

- There are numerous other means by which Maryland could more readily advance its goals, such as requiring ad buyers themselves to disclose or maintain the requested information, or limiting the Act's application only to the largest online social media platforms and exempting news sites, as New York has done with its comparable election law. JA-448-49 (citing 9 N.Y. Comp. Code R. & Regs. 6200.10(b)(12) (2018)).

- There is a significant risk that, faced with complying with the Act, publishers "might find it preferable to simply decline to accept political ads," which would "run[] counter to the First Amendment's aim of promoting the free expression of ideas." JA-454. That is because the Act "compels online publishers to post state-mandated information on their own websites, treading on their First Amendment-protected interest in controlling the content of their publications," and "obligates [Publishers] to cough up proprietary information about their customer base and the reach of their websites (information akin to circulation figures for traditional print media)." JA-446, 454.

Based on these detailed findings, the District Court concluded that the obligations the Act imposes on Publishers are "ill suited to their missions," and therefore that the Act's "challenged portions … likely would not overcome" even exacting scrutiny. JA-453, 456.

Finally, the District Court held that the other three factors required for preliminary injunctive relief—threat of irreparable harm, balance of equities, and the public interest—all also favored granting Publishers' motion. JA 456-57 (citing cases establishing that "loss of First Amendment freedoms … unquestionably constitutes irreparable injury," and that "upholding constitutional rights is preferable to allowing a state to enforce an invalid law").

SUMMARY OF ARGUMENT

In this appeal, Maryland challenges only the District Court's ruling as to the first preliminary injunction factor, effectively conceding that, if it correctly found that Publishers are likely to succeed on the merits, the preliminary injunction was properly issued. That ruling should be affirmed for three reasons.

First, the District Court made detailed factual findings based on the unrebutted declarations submitted by Publishers. Those findings may not be disturbed on appeal absent clear error, which Maryland has not come close to demonstrating. That effectively forecloses Maryland's arguments for vacating the District Court's order.

Second, the District Court correctly concluded that strict scrutiny applies to the challenged portions of the Act and that Maryland cannot meet that burden. In so doing, the District Court properly rejected Maryland's argument that this case is controlled by campaign disclosure cases, refusing to extend them to the quite

different circumstances presented here. The District Court correctly viewed those cases as a narrow exception to settled law applying strict scrutiny to laws (a) targeting core political speech, (b) compelling speech, including by newspapers (as in cases from *Tornillo* to *NIFLA*), and (c) regulating based on speech's content, including based on its topic (as in *Reed* and its progeny). The District Court also correctly analyzed the interests at stake, recognizing that imposing onerous regulations on an entire class of neutral third-party platforms has a far broader chill on protected speech than disclosure requirements imposed directly on political speakers. And, because Maryland made no effort below to satisfy its burden to demonstrate that the Act survives strict scrutiny, it cannot possibly show that it was an abuse of discretion to find the Act unconstitutional.

Third, the District Court correctly concluded that, even if exacting scrutiny applies, the challenged portions of the Act still fail. The exacting scrutiny standard requires Maryland to show that it has "employ[ed] not necessarily the least restrictive means but … means narrowly tailored to achieve the desired objective." *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014). Maryland cannot meet that standard. A law that regulates paid political advertising about candidates and ballot questions on virtually all websites and requires self-reporting by ad purchasers is not narrowly tailored to address foreign interference that operated primarily through unpaid posts about divisive social issues on large social media

platforms by nefarious actors. Nor is the Act narrowly tailored to accomplish any of its other purported goals, as it largely duplicates other obligations that are, or could easily be, imposed directly on ad purchasers.

This Court should affirm the District Court's preliminary injunction order.

ARGUMENT

I. STANDARD OF REVIEW

A party is entitled to preliminary injunctive relief where it demonstrates that: (1) it is likely to succeed on the merits, (2) it faces irreparable harm in the absence of such relief, (3) the balance of equities tips in its favor, and (4) granting an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On the first factor, however, Maryland bears the burden of demonstrating that the Act is constitutional. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (unless government satisfies "burden of proof on the ultimate question of [the Act's] constitutionality," challengers are "deemed likely to prevail" at preliminary injunction stage); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (in constitutional challenge, "burdens at the preliminary injunction stage track the burdens at trial").

The District Court's order granting Publishers' motion for a preliminary injunction is reviewed "for abuse of discretion." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Under this

"deferential standard," *Mountain Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 213 (4th Cir. 2019), the Court "review[s] factual findings for clear error and legal conclusions *de novo*." *WV Ass'n of Club Owners*, 553 F.3d at 298. An abuse of discretion occurs only where the District Court "applied an incorrect preliminary injunction standard, rested its decision on a clearly erroneous finding of a material fact, or misapprehended the law with respect to underlying issues in [the] litigation." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013). A district court commits "clear error" with respect to its factual findings only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F.3d 326, 336-37 (4th Cir. 2008).

II. THE DISTRICT COURT'S NUMEROUS FINDINGS OF FACT MAY NOT BE DISTURBED BECAUSE MARYLAND HAS FAILED TO DEMONSTRATE CLEAR ERROR.

The District Court based its conclusion that Publishers are likely to succeed on the merits of their First Amendment challenge on numerous findings of fact, each of which is fully supported by the record below.

In particular, as detailed in Part D of the Counter-Statement of Facts *supra*, the District Court found that (1) the Act was primarily aimed at combatting *foreign* (and especially Russian) electoral interference; (2) the interference primarily involved unpaid posts on large social media platforms about divisive social issues,

as opposed to paid campaign ads on newspaper websites; (3) the Act relies on self-reporting by ad purchasers and therefore can be easily evaded; (4) the obligations the Act imposes on Publishers largely duplicate obligations separately imposed upon ad purchasers, and therefore provide little if any additional information to voters or regulators; (5) there are multiple alternatives for pursuing the Act's purported aims, including collecting the information directly from ad purchasers, making information available on its own database, and/or limiting the Act's application to large social media platforms; and (6) the Act will deter Publishers from publishing political ads in Maryland, as it already has for Google, including because the Act requires the disclosure of proprietary information.

On appeal, this Court "accept[s] [those] findings of fact absent clear error." *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 254 (4th Cir. 2003). Thus, in reviewing the District Court's order, this Court should "neither re-weigh evidence nor make factual findings." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 230 n.2, 235 (4th Cir. 2014). "[S]o long as the district court's account of the evidence is plausible in light of the record viewed in its entirety," this Court "may not reverse, even if [it is] convinced that … [it] would have weighed the evidence differently." *Mountain Valley Pipeline*, 915 F.3d at 213 (internal marks omitted).

Here, Maryland has not effectively challenged, or even seriously disputed, any of the District Court's findings. Instead, it simply attempts to re-characterize undisputed evidence. For example, rather than dispute the District Court's finding that Maryland "has not been able to identify so much as a single foreign-sourced paid political ad that ran on a news site, be it in 2016 or any other time," JA-449, Maryland asserts that such foreign-sourced ads *could* have been placed on news sites, Br. 47. But such speculation is a far cry from demonstrating clear error. Likewise, Maryland argues that "[n]othing in the record plausibly indicates that the Act's disclosure obligations are likely to chill speech," *id.* at 51, ignoring both Publishers' uncontroverted declarations and Google's decision, which remains in effect, to stop accepting political advertising in Maryland.

Similarly, while Maryland asserts that, "[a]ccording to some reports, Maryland was one of the three most-targeted states in the 2016 election" for Russian interference, *id.* at 7, it sidesteps the actual facts revealed by the record citation it offers (a footnote in the Brennan Center's written legislative testimony, in turn citing a news report). As the District Court recognized, JA-415, both sources confirm that the posts at issue were placed on social media, not news websites, and that they would not be regulated by the Act because they (a) were unpaid, (b) did not refer to candidates or ballot issues, and (c) were placed "by Russian operatives … through fake accounts pretending to be Americans." JA-118

n.10; *see also* JA-118-19 (Brennan Center testimony noting that "Russian operatives targeted socially polarizing Facebook ads to the Baltimore area" that exploited tensions over the "Black Lives Matter" movement).

Finally, while Maryland does dispute that the obligations the Act imposes on Publishers largely duplicate the obligations it imposes on ad purchasers, *see* Part IV-B *infra* (further addressing that criticism), it does not dispute the District Court's finding that the Board could just as easily require ad purchasers to provide the information directly and could make it available to the public through the CRIS database, rather than conscripting Publishers in that effort.[5]

Based on the record before it, the District Court found that the Act would fail to meaningfully achieve its own primary purpose of protecting against foreign election interference, that the obligations the Act imposes on the Publishers largely duplicate other election-related laws such that the Act would not meaningfully achieve any of its other purposes, that Maryland could easily enact a more finely-targeted law that would be a far better fit for its goals, and that the Act would harm Publishers—and, by extension, citizens who will be deprived of crucial

[5] Maryland also contends that the total amount an advertiser pays is not proprietary. Br. 52 & n.26. But the Act effectively requires Publishers to disclose their ad rates by also requiring disclosure of the number of impressions purchased. *See* Md. Code, Elec. Law §13-405(c)(3)(vi). This is of particular concern given that, as the District Court found, Maryland is itself "a participant in the market for online ads," JA-454, including when purchasing space in "newspapers of general circulation," as required for legal notices, MD. CONST., art. XI-A, §1.

information if Publishers are no longer willing to accept online political ads. Because none of those findings has been meaningfully contested on appeal, they effectively foreclose the conclusion that the District Court abused its discretion. The preliminary injunction order should be affirmed on that basis alone.

III. THE CHALLENGED PORTIONS OF THE ACT FAIL STRICT SCRUTINY.

A. The District Court Properly Concluded That Strict Scrutiny Applies.

The District Court correctly held that the Act's "publication" and "inspection" requirements are subject to strict scrutiny, such that those provisions are unconstitutional unless Maryland can show that they further a "compelling interest" and are "narrowly tailored" and the "least restrictive means" to achieve that interest. JA-443. That holding followed well-established law under which laws that compel speech and/or single out speech on particular topics for regulation are subject to strict scrutiny. JA-423-25, 439-43 (citing cases); *see also Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (strict scrutiny applies to "content-based regulation[s] of speech," which include any law that "applies to particular speech because of the topic discussed or the idea or message expressed") (quoting *Reed*, 135 S. Ct. at 2227); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013) (*en banc*) ("the strict

scrutiny standard generally applies to content-based regulations, including compelled speech").

While the District Court conducted an exhaustive analysis of First Amendment doctrine, Maryland and its *amici* largely sidestep that substantial body of law. Instead, they attempt, as they did below, to shoehorn this case into the framework originating in *Buckley* and its progeny, which evaluates routine campaign finance and disclosure regulations under the slightly relaxed standard of "exacting scrutiny." The District Court correctly recognized, however, that none of those cases addressed the circumstances presented here. As a result, it properly rejected Maryland's myopic view of First Amendment law, explaining that "[t]he 'exacting scrutiny' standard" is "a *limited exception* to the general rule that compelled disclosure laws, like all content-based regulations, must overcome strict scrutiny." JA-439 (emphasis added); *see also Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539, 555 (4th Cir. 2012) (noting that "exacting scrutiny" is narrow exception to rule applying strict scrutiny to compelled speech regulations, and declining to extend it outside strict "campaign-finance" context), *vacated on other grounds*, 721 F.3d 264, 283 (4th Cir. 2013) (*en banc*); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875-77 (8th Cir. 2012) (*en banc*) (expressing skepticism that "Supreme Court

intended exacting scrutiny to apply" to any election-related laws that might be labelled a "disclosure" law).[6]

Applying these speech-protective principles, the District Court properly found that strict scrutiny applies for multiple reasons. First, the District Court recognized that regulations commandeering the pages of a newspaper to communicate messages dictated by the Government are presumptively unconstitutional and subject to strict scrutiny. *Tornillo*, 418 U.S. at 244. Although Maryland and its *amici* barely mention *Tornillo*, the Supreme Court made clear in that case that laws appropriating space in the pages of newspapers for the avowed purpose of better informing the electorate are unconstitutional under the First Amendment. *Id.* While praising the law's goal of attempting to ensure that "a wide variety of views reach the public," the Court nonetheless held that its means of pursuing that goal constituted an unconstitutional intrusion on editorial independence. *Id.* at 248, 254, 259. As the Court explained:

[6] Indeed, while Maryland and its *amici* cite a host of election cases applying to candidates and other participants in the political process, Br. 25-32; Br. of Campaign Legal Ctr. & Common Cause Md. ("CLC Br.") 5-11; Br. of Brennan Ctr. for Justice ("Brennan Br.") 5-8, they identify only three that even purport to address regulations applicable to third parties like Publishers. As explained in Part III-B *infra*, the District Court correctly concluded that two of those cases did not involve third-parties and the third did not apply exacting scrutiny.

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

The Supreme Court has repeatedly applied *Tornillo* and subjected to the highest level of scrutiny laws that require an entity to act as a conduit for a government-mandated message. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11-12, 16 (1986) (invalidating regulation requiring utility company to make space on its billing envelopes available to speakers critical of its practices); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating New Hampshire statute that criminalized covering up state's "Live Free or Die" motto on license plates because it unconstitutionally required residents to "use their private property as a 'mobile billboard'" for speech state wished to disseminate). The Supreme Court forcefully reaffirmed this principle just last year in *NIFLA*, where it applied strict scrutiny to invalidate a California

law that required crisis pregnancy centers to disseminate government-drafted notices because the government may not "co-opt" a private entity "to deliver its message for it." 138 S. Ct. at 2371, 2376; *see also Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'") (citation omitted).

Second, the District Court correctly invoked the well-established principle that content-based regulations are subject to strict scrutiny, as informed and expanded by the Supreme Court's recent decision in *Reed v. Town of Gilbert*. JA-423, 439-43. In *Reed*, which the District Court properly characterized as a "watershed First Amendment case," JA-440, the Supreme Court held that a "speech regulation targeted at specific subject matter is content based"—thus, triggering the application of strict scrutiny—"even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2230. As this Court explained, that holding "conflicted with, and therefore abrogated, [the] previous formulation" for invoking strict scrutiny, *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 632-33 (4th Cir. 2016), since laws targeting speech based on its topic are now "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech," *Reed*, 135 S. Ct. at 2228 (internal marks

omitted); *see also Cahaly*, 796 F.3d at 405 (invalidating under *Reed* "anti-robocall statute" that "applie[d] to calls with a consumer or political message but [did] not reach calls made for any other purpose"); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 165-66 (4th Cir. 2019) (applying *Reed* to find that regulation prohibiting automated debt collection calls, but not other calls, failed strict scrutiny).[7]

Third, against this backdrop, the District Court properly distinguished the election disclosure cases invoked by Maryland and its *amici*. Specifically, the District Court held that the those cases were limited to challenges to regulations that "imposed burdens on … direct participants in the electoral process," not "neutral third parties such as publishers of political advertisements." JA-434-35; *see also* JA-432-34 & n.16 (describing regulations at issue in exacting scrutiny

[7] Other Circuits have readily found that *Reed* requires application of strict scrutiny to regulations that target a particular topic, including both electioneering laws and recordkeeping/disclosure laws. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (invalidating Ohio electioneering law under *Reed* because laws that "only govern speech about political candidates during an election" are "content-based restrictions focused on a specific subject matter" and therefore "subject to strict scrutiny"); *Free Speech Coal., Inc. v. Attorney General*, 825 F.3d 149, 160 n.7 (3d Cir. 2016) (reconsidering and reversing pre-*Reed* decision by same panel that had applied lower level of scrutiny because *Reed* "represents a drastic change in First Amendment jurisprudence" and requires application of strict scrutiny to recordkeeping and disclosure requirements—there, for youthful-looking performers in adult films); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (reversing pre-*Reed* decision and invalidating under strict scrutiny statute barring panhandling but allowing signs seeking donations because "majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation").

cases). It correctly based this assessment on the underlying rationale for relaxing the level of scrutiny in the cases Maryland invokes. JA-438-39. As the Supreme Court explained in *Citizens United*, laws imposing disclosure requirements on political spending are subject to exacting scrutiny because they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64, and *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). That framing only makes sense in the context of laws regulating political participants, where imposing disclosure obligations is itself the less restrictive alternative to restricting their political expenditures and the speech that those expenditures support. *Id.* at 369 ("disclosure is a less restrictive alternative to more comprehensive regulations of speech").

Citizen United further buttresses the conclusion that exacting scrutiny only applies to regulation of political participants' speech. There, the Court relaxed the level of scrutiny because, in that particular context, disclosure regulations have the effect of furthering "political speech" by "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371. Maryland and its *amici* claim a similar benefit here as the basis for avoiding strict scrutiny review. *See* Br. 33; Brennan Br. 6; CLC Br. 30. But to realize that benefit, the regulation must not substantially limit the speech it is regulating. While that may be a safe assumption for motivated political speakers,

that logic does not extend to neutral third-party platforms like Publishers, who have no heightened investment in any particular form of advertising, and have the option of turning exclusively to non-political ads that are not subject to burdensome obligations.[8] The record in this case bears out that concern. Google has already ceased running Maryland political ads, and, if the Act were permitted to be enforced against Publishers, their Declarations confirm that at least some of them will be forced to do the same. *Cf. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.26 (1976) (applying lower level of scrutiny to commercial speech regulations is permissible because commercial speakers are highly motivated, making their speech more "durable than other kinds" of speech such that "there is little likelihood of its being chilled by proper regulation and forgone entirely").

Thus, the rationale for applying a lower level of scrutiny to disclosures required of political speakers does not translate to third-party platforms. Because platforms provide fora for speech on a wide variety of topics, a law that burdens their speech only on one topic veers into the kind of "topical censorship" that so concerned the Court in *Reed*. *Norton*, 806 F.3d at 413 (Manion, J., concurring).

[8] In that regard, *Citizens United* did not even purport to address whether, aside from the authority line in the film and advertisements, the cable channel at issue could be compelled to publish additional information about the purchase of air time or to retain detailed records about where, when and to whom the film was disseminated.

As a result, courts have consistently recognized that topical regulations of platforms for speech are particularly worrisome from a First Amendment perspective and therefore subject to strict scrutiny. *See, e.g.*, *Reed*, 135 S. Ct. at 2230 ("a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed"); *Cahaly*, 796 F.3d at 405 (law restricting robocall company from facilitating political calls but allowing other calls is content-based regulation subject to strict scrutiny); *Susan B. Anthony List*, 814 F.3d at 474-75 (unconstitutional to apply regulation "to commercial intermediaries … like the company that was supposed to erect SBA List's billboard" because "prosecuting a billboard company executive, who was simply the messenger, is not narrowly tailored to preserve fair elections").

In concluding that strict scrutiny applies, the District Court properly credited the substantial authority applying that standard to regulations compelling speech and those targeting a particular topic, and correctly found that the election disclosure cases invoked by Maryland and its *amici* do not extend to these circumstances.

B. The Three Exacting Scrutiny Cases Invoked By Maryland and Its *Amici* Are Inapposite.

In attacking the District Court's ruling, Maryland and its *amici* identify three cases that they assert apply exacting scrutiny to regulations governing third-parties

rather than political speakers themselves. *See* Br. 29-30, 34-35; Brennan Br. 8-10; CLC Br. 12-14. Putting aside that this argument effectively concedes that none of the other election law cases they invoke is on point, they are wrong about those three cases as well.

As an initial matter, neither *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), nor *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), involved application of exacting scrutiny to regulation of third parties. In *American Constitutional Law Foundation*, the Court applied exacting scrutiny to disclosure requirements on the *proponents* of ballot initiatives *themselves*, requiring them to report to the state information about the paid petition circulators they hired. 525 U.S. at 186, 201-02; *see also* Br. 29 (conceding that relevant regulations were imposed on "petition sponsors"). In fact, the only disclosure obligation even arguably imposed on a third party in that case—a regulation requiring paid circulators to wear identification badges—was analyzed under strict scrutiny. *Am. Const. Law Found.*, 525 U.S. at 192 & n.12 (requiring government to show badge requirement was "narrowly tailored to serve a compelling state interest").

John Doe No. 1 likewise required disclosures regarding direct participants in the political process—namely, signatories to referendum petitions submitted to Washington State. 561 U.S. at 191. Because the information was ultimately

disclosed by the state under its Public Records Act, *amici* Campaign Legal Center and Common Cause contend the disclosure was technically made by a "third party." CLC Br. 12. But speech by the government and speech the government conscripts the press to publish are, from a constitutional perspective, polar opposites. Indeed, at most, the decision signals that a disclosure regime in which information about direct participants in the political process is provided to the government and then disclosed by it—as other unchallenged provisions of Maryland's Act contemplate—is subject to exacting scrutiny. But it offers no support to Maryland's claim that imposing similar requirements on the press is also subject to a lower level of scrutiny.

Finally, while *McConnell* did involve diminished scrutiny of regulations imposed on third-parties, 540 U.S. at 233-34, the District Court correctly concluded that was because they were broadcasters, *see* JA-436-37, which, as Maryland concedes, are subject only to "minimal scrutiny" due to their status as licensees of the government-controlled broadcast spectrum. Br. 35 n.17 (citing *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 190 (4th Cir. 1996)). Indeed, as the District Court explained, the majority's analysis in *McConnell* "does not include a single citation to *Buckley* or any other cases applying the 'exacting scrutiny' standard," but "it twice invokes *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), one of the leading cases

establishing that regulations of broadcast media … receive a lower level of First Amendment scrutiny than other laws burdening speech." JA-436 (citing *McConnell*, 540 U.S. at 237 (noting breadth of FCC's "regulatory authority" over broadcasters under *Red Lion*)). The law is clear that the "special justifications for regulation of the broadcast media" are "not applicable to other speakers." *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *see also Adventure Commc'ns v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999) (Supreme "Court has typically applied a relaxed form of scrutiny to general regulation of over-the-air broadcasters as opposed" to other media).[9]

Accordingly, none of the three cases invoked by Maryland and its *amici* supports the application of exacting scrutiny here.

C. The Other Arguments Advanced by Maryland and Its *Amici* Are Similarly Unpersuasive.

First, Maryland and its *amici* argue that the Act does not meaningfully compel speech because it does not mandate editorial speech on a controversial

[9] Maryland cites to analogous regulations on cable and satellite operators to suggest that they are permissible outside the broadcast context. *See* Br. 35 n.18 (citing 47 C.F.R. §76.1701 (cable) and 47 C.F.R. §25.701 (satellite)). That those regulations exist says nothing about what standard of review would apply were those regulations challenged under the First Amendment, let alone whether that same standard would apply to regulation of websites, which the Supreme Court emphasized in *Reno* were entitled to full constitutional protection and to review under strict scrutiny. *See* 521 U.S. at 868-69.

topic, but merely compels disclosure of data about political advertising. Br. 37-38; Brennan Br. 15-17. But the compelled speech doctrine, including its application of strict scrutiny, applies to both editorial opinions and more mundane facts, including facts about spending. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) ("[The] general rule … that the speaker has the right to tailor the speech … applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (holding that "compelled statements of 'fact,'" like "compelled statements of opinion," "burden[] protected speech," and applying strict scrutiny to regulation requiring disclosure of spending by charitable solicitors).

Moreover, *Tornillo* itself makes clear that "[t]he choice of material to go into a newspaper" rests with editors and publishers and that such a choice applies to "news, comment *and advertising*." 418 U.S. at 258 (emphasis added); *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (affording full First Amendment protection to decision to publish paid political ad). Indeed, not only does the Act interfere with the selection of advertising (by attaching burdens to only one type of ad), it represents an additional affront to editorial independence

by requiring news organizations to publish, as their own speech, information provided by advertisers, regardless of its accuracy or completeness.[10]

Second, Maryland and its *amici* criticize the District Court for also relying in passing on the Free Press Clause and purportedly affording heightened protection to the "institutional press." Br. 36-39 (citing *Citizens United*, 558 U.S. at 352); Brennan Br. 12-13 (same). Although *Tornillo* itself involved a newspaper, and is especially germane here for that reason, subsequent Supreme Court decisions have made clear that *any* law that conscripts the forum of a private entity (whether media or otherwise) for purposes of conveying government-mandated information represents a significant intrusion on First Amendment interests. *See* Part III-A *supra* (citing non-media cases applying that principle).

Third, Maryland argues that any special First Amendment burdens imposed by the Act when applied to third-party publishers can be addressed through the application of exacting scrutiny. Br. 36-37. This misapprehends the law. The whole point of applying different levels of scrutiny to different types of speech

[10] Maryland and its *amici* also point to other disclosure requirements imposed on Publishers, apparently to contend that compelled disclosures are not inherently offensive to the First Amendment. Br. 38 (citing to *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365 (D.C. Cir. 1988)); Brennan Br. 13-14. But their examples either mirror the "authority line" (in the case of disclosing paid advertisements resembling editorial content) or involve Publishers' subscription operations rather than what they publish, where special First Amendment considerations are at stake.

regulations is that, by their very nature, some regulations—including those that compel speech by third parties or target an entire topic—constitute greater burdens on First Amendment interests than others. *See, e.g.*, *Reed*, 135 S. Ct. at 2226 ("[c]ontent-based laws" must satisfy strict scrutiny test because they are "presumptively unconstitutional"). Maryland's suggestion that this Court dispense with that framework and let the implicated First Amendment interests affect only *how* the test is applied, not *what test* is applied, is contrary to the well-settled tiers-of-scrutiny approach.

Fourth, Maryland and its *amici* criticize the District Court's reliance on *Reed* and *NIFLA* on the ground that neither decision dealt with election-disclosure laws, and, thus, neither purported to overrule prior decisions applying exacting scrutiny to such regulations. Br. 36 n.19; CLC Br. 18-19; Brennan Br. 11-12. That misunderstands their import. As the District Court recognized, JA-439-40, those cases underscore that any exception to the general rule applying strict scrutiny to compelled speech and content-based restrictions on speech should be narrow in scope. Indeed, in *NIFLA*, the Court expressly cautioned against chipping away at applying strict scrutiny to such regulations, emphasizing that it has been "reluctant to 'exemp[t] a category of speech from the *normal prohibition on content-based restrictions*,'" and that its "precedents do not permit governments to impose content-based restrictions on speech without 'persuasive evidence … of a long (if

heretofore unrecognized) tradition' that that effect." 138 S. Ct. at 2372 (emphasis added) (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012)).

Finally, in a similar vein, *amici* Campaign Legal Center and Common Cause complain that *Reed* and its progeny are inapposite here because they involved regulations *banning* speech, not regulations allowing speech but requiring disclosure. CLC Br. 16-17. But, "[t]he distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) (applying strict scrutiny to invalidate law that placed substantial burdens on cable operators). As this case illustrates, the Act has already caused Google to stop accepting political advertising in Maryland, and the uncontroverted declarations indicate that many Publishers will be forced to follow suit. *See* JA-42, 53, 59, 64, 70, 77, 153. As such, the argument that cases like *Reed* have nothing to say about this case is unavailing. Simply put, a regulation of virtually all platforms that threatens to knock out an entire category of speech—and not just any speech, but core electoral speech—is properly subject to strict scrutiny.

D. The Challenged Portions of the Act Cannot Withstand Strict Scrutiny.

Because strict scrutiny applies to the challenged portions of the Act, Maryland must show that they are "narrowly tailored to further a compelling governmental interest." *Am. Ass'n of Political Consultants, Inc.*, 923 F.3d at 167.

To meet this "narrow tailoring" requirement, Maryland must show that "no 'less restrictive alternative' would serve its purpose." *Central Radio*, 811 F.3d at 633 (quoting *Playboy*, 529 U.S. at 813).

In the briefing and argument below, Maryland did not attempt to demonstrate that the Act can satisfy that standard, "placing all its bets" on arguing that exacting scrutiny applied. JA-274-75, 443, 450. Having taken no steps to satisfy its burden, Maryland cannot possibly demonstrate that the District Court abused its discretion in finding that the Act failed strict scrutiny and is therefore unconstitutional.

Despite Maryland's silence, the District Court, apparently believing that Publishers bore the burden on this issue under *Winter*, addressed the application of strict scrutiny to the challenged portions of the Act in some detail. JA-443-50. The Court accepted that the interests the Act purports to advance—combatting foreign election meddling, informing voters about the source of online ads, and deterring corruption—are sufficiently compelling. JA-445. It ultimately concluded, however, that "there is simply no way the State can show its law is the least restrictive means" of advancing those interests, for two principal reasons. JA-444-45, 450. First, Maryland did not adequately explain why it was necessary to "enlist[] the press in the government's regulatory scheme," when Maryland either already does, or easily could, require ad purchasers themselves to disclose and/or

make available for inspection the relevant information. JA-447-48. Second, the Russian electoral interference that principally motivated the Act operated mostly by way of *unpaid* posts on large social media platforms, while the Act regulates *paid* political ads on any website that meets a relatively small threshold of monthly visitors. JA-448-50. These conclusions are amply supported by the District Court's factual findings, which are detailed *supra*.

Before this Court, Maryland half-heartedly, and for the first time, attempts to argue that the Act satisfies strict scrutiny for three reasons. Each of Maryland's arguments is easily disposed of—to the extent that it is appropriate to reach them at all, given that Maryland took no steps to meet its burden on this element below.

First, Maryland argues that the obligations the Act imposes on Publishers do not entirely duplicate the obligations it imposes on ad purchasers, since purchasers must provide slightly less data and do so on a "periodic," as opposed to "instantaneous," basis. Br. 55. But, given Maryland's assertion that the Act already requires ad purchasers to provide Publishers "with the information necessary … to comply with the[ir] disclosure obligations," *id.* at 10, Maryland could easily require ad purchasers themselves to make the disclosures directly, and on an accelerated timetable. Failure to do so demonstrates a lack of narrow tailoring.

Second, Maryland argues that its decision not to limit the Act just to "social media giants" does not render it overbroad because there is "evidence … that foreign operators infiltrated ad networks that served ads to plaintiffs' sites." *Id.* at 55-56. Leaving aside that this does nothing to justify the Act's extensive regulation of ads placed *directly* with Publishers (which comprise the bulk of regulated ads), this argument does not even work on its own terms. For ads supplied by an ad network, the Act requires only that Publishers disclose the contact information for the ad network, or hyperlink to that ad network's website. Md. Code, Elec. Law §§13-405(b)(6)(iii), (c)(1) & (2). That requirement does nothing to inform voters or to deter foreign influence, and is not tailored at all to serve those aims.

Third, Maryland argues that its decision to target only paid political ads does not render the Act underinclusive because it likely could not constitutionally regulate unpaid social media posts. Br. 56. That is tantamount to a confession that Maryland is not regulating the actual source of the problem. That is the opposite of what is demanded by strict scrutiny, which requires Maryland to identify "an 'actual problem' in need of solving," and to show that "the curtailment of free speech [is] actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

Because the District Court correctly held both that strict scrutiny applies to the challenged portions of the Act and that they are unlikely to survive strict scrutiny, the preliminary injunction order should be affirmed.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ACT ALSO CANNOT SATISFY EXACTING SCRUTINY.

Even if Maryland were correct that exacting scrutiny governs, the Act is nevertheless unconstitutional. That standard requires Maryland to show (1) a "sufficiently important governmental interest," (2) a "substantial relation between" the Act and that interest, and (3) that "the actual burden on First Amendment rights" is proportionate to "the strength of the governmental interest." *John Doe No. 1*, 561 U.S. at 196 (citations and internal marks omitted).

Crucially, while this is a somewhat less demanding standard than strict scrutiny, it "is more than a rubber stamp." *Minn. Citizens*, 692 F.3d at 876-77. Like strict scrutiny, exacting scrutiny requires a substantial fit between the governmental interests animating the law and the means it employs. Indeed, as the Supreme Court has explained, "[i]n the First Amendment context, fit matters." *McCutcheon*, 572 U.S. at 218. Thus, "[e]ven when the Court is not applying strict scrutiny, [it] still require[s] 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,'" and "that employs not necessarily the least restrictive means but … means *narrowly tailored* to achieve the desired objective."

Id. (emphasis added; citation omitted); *see also McIntyre*, 514 U.S. at 347 (invalidating disclosure requirement under "exacting scrutiny," because it was not "narrowly tailored to serve an overriding state interest").

As *McCutcheon* makes clear, Maryland's *amici* are simply wrong in asserting that exacting scrutiny does not require a form of narrow tailoring. *See* Brennan Br. 17-18 (accusing District Court of committing "reversible error" by applying "narrow tailoring" in exacting scrutiny context); CLC Br. 27-28 (same). In evaluating whether a statute is narrowly tailored, the exacting scrutiny test properly considers whether there are "less speech-restrictive means" easily available, even if it does not require choosing the absolutely least restrictive alternative. *Alvarez*, 567 U.S. at 729 (plurality opinion) (invalidating statute under "exacting scrutiny" because there was there was "at least one less speech-restrictive means" available); *Free & Fair Election Fund v. Missouri Ethics Comm'n*, 903 F.3d 759, 766 (8th Cir. 2018) (restriction on PACs did not satisfy exacting scrutiny because "availability of less restrictive alternatives contributes to [the] conclusion that the [challenged] provision is not closely drawn"), *cert. denied*, 139 S. Ct. 1601 (2019).

Here, the District Court correctly ruled that, because "the Act's requirements and its aims" are so "substantially mismatched," the challenged portions of the Act cannot survive exacting scrutiny. JA-455. Specifically, as described *supra*, it

properly concluded that the Act would be ineffective at preventing foreign election interference and provides only minimal benefits not already provided by other Maryland campaign regulations. JA-453-56.

This conclusion is in accordance with the Supreme Court's exacting scrutiny decisions, in which it has repeatedly held that regulations that burden speech, while providing little, if any, benefit not already achieved by existing regulations, cannot survive exacting scrutiny. For instance, in *McIntyre*, the Court applied exacting scrutiny to invalidate an Ohio ban on distributing anonymous communications "designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election." 514 U.S. at 338 n.3. While the Court recognized the state's substantial "interest in preventing fraud" by requiring disclosure of the speaker's identity, it observed that the challenged restriction "is not its principal weapon against fraud," but instead merely "serves as an aid to enforcement." *Id.* at 349-51. The Court explained that, although the ordinance's "ancillary benefits are assuredly legitimate, we are not persuaded that they justify" the First Amendment burden. *Id.* The Court thus rejected the same argument Maryland advances here to argue that, despite advertisers' own disclosures, the challenged provisions might help "the Board to investigate and enforce" other campaign laws. Br. 43.

Similarly, in *Buckley v. American Constitutional Law Foundation*, one of the three principal cases invoked by Maryland and its *amici*, the Court invalidated under exacting scrutiny a provision of Colorado law mandating that proponents of ballot initiatives disclose individuals who circulated their ballot petitions and the amounts they were paid. 525 U.S. at 202-03. The Court acknowledged Colorado's interest in "disclosure as a control or check on domination of the initiative process by affluent special interest groups." *Id.* But, the Court explained, because the law already mandated "[d]isclosure of the names of initiative *sponsors*, and of the amounts they have spent gathering support for their initiatives," the "added benefit of revealing the names of paid *circulators* and amounts paid to each circulator … is hardly apparent and has not been demonstrated." *Id.* (emphases added); *see also Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (campaign-finance law justified as "necessary as a prophylactic measure to make known the identity of supporters and opponents of [ballot] measures" failed exacting scrutiny because separate provision of law already required committees to disclose their donors, leaving "no risk that … voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure").

Most recently, in *United States v. Alvarez*, the Court addressed the problem of policing false speech, a key aim of the Maryland Act (although it also regulates

substantial amounts of concededly true speech). The Court applied exacting scrutiny to invalidate the federal Stolen Valor Act, which criminalized false claims of having received military honors, because, *inter alia*, the government failed to show "a direct causal link between the restriction imposed and the injury to be prevented." 567 U.S. at 715, 725-26. The Court observed that a "Government-created" database of military honors would make it "easy to verify and expose false claims," such that "there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny." *Id.* at 729. Even the concurrence, which applied a lower level scrutiny, found the statute invalid because it was "possible substantially to achieve the Government's objective in less burdensome ways." *Id.* at 737 (Breyer, J., concurring in the judgment).

Applying these precedents, the District Court properly concluded that the challenged provisions of the Act cannot survive exacting scrutiny. Given that political advertisers are already required to disclose their identity in ads and to report their spending, the additional disclosures by individual Publishers are like the supplemental disclosures deemed superfluous and unconstitutional in the Supreme Court's exacting scrutiny jurisprudence. As a result, because of the minimal benefits the challenged provisions provide, they do not justify the burdens imposed on Publishers. None of the contrary arguments offered by Maryland or its *amici* has merit, as explained below.

A. The Act Does Not Meaningfully Curtail Foreign Interference.

Though Maryland focuses most of its attention on whether the Act meaningfully promotes an informed electorate, the District Court correctly found that "the Act's *primary* purpose was to combat *foreign* meddling in the state's elections." JA-445 (emphases added). On this record, Maryland cannot possibly show that the foreign election interference that is the Act's *raison d'etre* would be meaningfully addressed by the challenged provisions. That is because, as explained *supra*, foreign interference in the 2016 election principally involved (a) *unpaid* social media posts on (b) large social media platforms that (c) addressed broadly divisive social issues, not candidates or ballot questions, and (d) were placed by foreign operatives eager to evade detection, making them unlikely to self-identify as required by the Act. In the District Court's words, the Act "fail[s] to remedy the harms that inspired its enactment," and its requirements are "ill suited to their mission." JA-453-54.

In response, Maryland asserts that, even though the record does not reflect "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," JA-449, news sites can nevertheless be regulated because there is "evidence that Russian operatives infiltrated ad networks that served [Publishers'] websites." Br. 47. This argument fails because (a) the prospect that foreign operatives targeted ad *networks* provides no basis for

extensive regulation of the bulk of the ads that are placed *directly* with Publishers, and, (b) even for ads placed through ad networks, the Act only requires Publishers to identify the ad network, not any information that would actually aid in detecting and deterring foreign infiltration of those networks by operatives bent on evading detection. *See* Parts II, III-D *supra*. As this Court has made clear, "'in the realm of First Amendment questions,' legislatures 'must base [their] conclusions on substantial evidence,'" which is entirely lacking in connection with Maryland's attempt to justify imposing onerous requirements on Publishers based on problems with ad networks. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 283-85 (4th Cir. 2013) (citation and internal marks omitted) (finding evidence did "not justify the legislature's decision" to impose regulation targeting electioneering communications in newspapers and other periodicals).

Next, Maryland claims that it must be allowed to address foreign meddling by regulating paid ads because "it is not clear that regulating the content of unpaid, anonymous posts on social networks," of the type that Russian operatives chiefly used, is an option "available" under the First Amendment. Br. 47-48. Maryland cites no case authorizing it to regulate activity adjacent to the problem it targets merely because the latter is outside the scope of its regulatory authority.

Maryland's *amici* Campaign Legal Center and Common Cause also argue unconvincingly that the Act will actually help combat foreign election interference.

They assert that, even if foreign operatives fail to self-identify, the public would nevertheless benefit from "missing or false disclosures" that "can provide a starting point for journalists, watchdog groups, and law enforcement agencies to investigate efforts by foreign *or* domestic actors to promote political ads without disclosing their true identity." CLC Br. 24. It is no small irony that *amici* highlight the value of investigative journalism in defending a law that, according to the uncontroverted declarations in the record, would draw limited resources *away* from local newsrooms by imposing costly burdens. *See* JA-44-79. Regardless, to the extent that an ad purchaser's failure to comply with the Act's disclosure obligations conveys useful information, the obligations imposed directly on such purchasers are more than adequate to identify such failures.

Amicus Brennan Center strains even harder to argue that the Act would meaningfully assist Maryland's efforts to combat foreign election interference. It trumpets evidence of "published advertisements placed by Russian trolls," via Facebook's ad network, on "the platforms of many American media outlets." Brennan Br. 22. Even if this Court were to allow the record to be supplemented on appeal and by an *amicus*, the reports cited by the Brennan Center actually confirm the rarity of *paid* Russian ads: one notes that during a "17-month span," in which *The Atlantic*'s website ran approximately 3 *billion* total ads, that site published *four* Russian-purchased ads; the other notes that during a 16-month span, Russian-

purchased ads generated approximately one cent in revenue for Fusion Media. *Id.* at 22 & n.16. Moreover, as the Brennan Center concedes, *id.*, those ads were placed through ad networks, which, as explained *supra*, means that the Act's requirements on Publishers would have done nothing to expose their origin.

The Brennan Center further suggests that Publishers might simply be lying if they have "not publicly admitted that they have run advertisements from foreign buyers," noting that "Google and Facebook both denied that they had hosted illegal foreign ads for months before admitting what had happened." *Id.* at 23; *see also id.* at 23-24 (parsing one Publisher's declarations to suggest that, because it did not affirmatively *deny* knowledge of foreign interference, it "possibly *is* aware of efforts by foreign governments to influence readers through fake accounts"). But speculation that declarants might be lying, including based on inferences from an omission in a declaration, fall far short of demonstrating the clear error required to disturb the District Court's factual findings. This is especially so in light of multiple Congressional and law enforcement investigations confirming that Russian interference effectively targeted Facebook and other large social media sites. JA-411-413 (District Court's summary of same); JA-143-44 (Albright Declaration describing same).

Neither Maryland nor its *amici* have done anything to demonstrate that the District Court abused its discretion in finding a substantial mismatch between the

Act's principal goal—combatting foreign election interference—and the means the Act employs.

B. The Act Does Not Meaningfully Inform the Electorate or Deter Corruption.

There is likewise no substantial relation between the challenged provisions and the Act's goals of promoting an informed electorate, deterring corruption, and aiding enforcement of other campaign finance laws. As an initial matter, while Maryland's *amici* accuse the District Court of ignoring these secondary goals, *see* Brennan Br. 18; CLC Br. 20-24, 26-27, that charge is misplaced. The District Court expressly held that those secondary goals also are not meaningfully promoted by the obligations the Act imposes on Publishers because they largely duplicate obligations imposed on ad purchasers. JA-453-54.

The Brennan Center gamely attempts to spin this burden into a benefit, arguing that "'duplicative disclosure' is a positive feature of the Act, not a failing." Brennan Br. 20 (alterations omitted). But duplication is, by definition, not narrow tailoring. Indeed, the Supreme Court has directly rejected the Brennan Center's argument, explaining that a regulation employing a "'prophylaxis-upon-prophylaxis approach' requires that we be *particularly diligent* in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221 (emphasis added).

For its part, Maryland attempts to dispute the conclusion that the Act is actually duplicative, Br. 43-46; *see also* CLC Br. 24-25, but its arguments are

unconvincing. Given the "authority line" requirement (indisputably followed by Publishers, JA-133) and the reporting already required of political speakers, the challenged portions of the Act deliver, at most, two non-duplicative benefits: (1) reporting certain granular information about online political ads, such as the number of impressions; and (2) accelerating when certain information, such as the amount spent on an ad, has to be disclosed.

The broad goals of "informing the electorate" and "deterring corruption" do not justify these negligible benefits or the burdens the Act imposes on Publishers to achieve them. Br. 40-41; *see also* JA-454 ("It is far from clear how forcing online publishers to reveal details about the number, demographic makeup, and geographic dispersion of visitors to their site might advance the Act's goals."). Neither the State nor its *amici* offer any explanation of how this information meaningfully advances the Act's goals. And, even if one could imagine a circumstance where a particular enforcement action required such information through an administrative subpoena, there is certainly no basis for imposing the substantial burden on publishers large and small of collecting such information and making it available to inspectors as a matter of course.

Finally, Maryland also contends that there is a benefit of having information available to the public immediately at the "point of publication," Br. 43-46; *see also* CLC Br. 24-25, but, in so doing, misreads its own Act. Other than the

authority line, not challenged here, the Act does not require information to be in or adjacent to an ad, but merely "on the Internet," and does not require that it be published contemporaneously, allowing 48 hours. Maryland does not explain how a voter desiring information obtains more information from visiting a Publisher's separate website than from the Board's unified CRIS website.[11]

C. Maryland Cannot Show That the Act's Harms to Protected Speech Are Justified.

Even if Maryland could show a "substantial relation" between the obligations the Act imposes on Publishers and the interests it purportedly advances, the Act would still fail to satisfy the final exacting scrutiny requirement: that "the actual burden on First Amendment rights" be proportionate to "the strength of the governmental interest." *John Doe No. 1*, 561 U.S. at 196. The

[11] In trying to refute this point, *amici* Campaign Legal Center and Common Cause baldly misrepresent the record. They contend that Publishers' counsel "acknowledg[ed]" at the preliminary injunction hearing "that attempting to identify a particular ad expenditure by navigating through 'rows and rows and rows of data' on [the] state election board's website can be 'cumbersome.'" CLC Br. 25 (citing JA-258:16-17 & 259:4-6). As the transcript makes clear, however, that statement referenced the "PDFs of individual candidates' [quarterly] reports," not the searchable electronic portion of the CRIS database. JA-258:13-259:6. *Amici* omit the very next passage of the hearing transcript in which Publishers' counsel demonstrated that the CRIS system permits citizens to easily search and filter expenditure records, which users can "slice" and "dice" in many ways, and which "not only duplicates what the state is asking [Publishers] to do … but it actually does it better, because it's all in one place. It's aggregated, it's unified and makes it easier for voters to know what's going on." JA-259:7-262:24; *see also* JA-180-214 (screen shots of CRIS demonstrating ease of searching for data about on-line advertising expenditures).

record demonstrates that the burdens the Act imposes on speech far outweigh the modest benefits supposedly derived from the challenged provisions.

First, as the District Court found, there is a significant risk that Publishers, faced with the burdens imposed by the Act, will "find it preferable to simply decline to accept political ads." JA-454. Rather than address this concern on its merits, Maryland asserts that "[n]othing in the record plausibly indicates that the Act's disclosure obligations are likely to chill speech." Br. 51. But the record plainly demonstrates that Google has already stopped accepting political ads as a consequence of the Act, and that at least some Publishers will be forced to do so as well if the Act ultimately is enforced against them. JA-42, 53, 59, 64, 70, 77, 153.

A regulation that significantly diminishes core political speech, as the uncontroverted record demonstrates in connection with the Act, does not survive exacting scrutiny. *See Am. Const. Law Found.*, 525 U.S. at 200 (disclosure law failed exacting scrutiny because law's likely effect would be to "discourage[] participation in the petition circulation process"); *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16-17 (D.C. Cir. 2014) (disclosure requirement that "impoverishes and inhibits public debate instead of protecting First Amendment concerns" would fail exacting scrutiny); *Minn. Citizens*, 692 F.3d at 873-77 (disclosure regime failed exacting scrutiny where speakers must "decide whether exercising [their] constitutional right is worth the time and

expense of entering a long-term morass of regulatory red tape," and law "manifestly discourage[d] … protected political speech," particularly where the government "can accomplish any disclosure-related interests … through less problematic measures, such as requiring reporting whenever money is spent, as the law already requires") (citations omitted).

Second, the Act significantly interferes with Publishers' editorial independence by compelling publication of state-mandated webpages. Maryland attempts to minimize this interference on the ground that it only involves the publication of "a line or two of factual information." Br. 53. But, as explained in Part III-A *supra*, not only does compelling publication of factual information violate the First Amendment, but laws dictating what a newspaper must publish are a serious interference with editorial independence. As Justice White explained in *Tornillo*:

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle [in what newspapers publish]…. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.'

418 U.S. at 259-61 (White, J., concurring) (citation omitted). In short, the heavy burdens that the Act imposes on Publishers outweigh what are at-most slight benefits. It cannot survive exacting scrutiny for that reason as well.

CONCLUSION

The District Court correctly concluded that Publishers are likely to succeed on the merits of their First Amendment challenge. Because Maryland does not challenge the District Court's preliminary injunction order on any other grounds, that order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) because, as determined by the "word count" feature of Microsoft Word 2016, the brief contains 12,987 words, excluding the parts of the document exempted by Fed. R. App. R. 32(f).

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Dated: May 31, 2019

/s/ Seth D. Berlin
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CERTIFICATE OF SERVICE

I certify that on May 31, 2019, the foregoing Brief of Plaintiffs-Appellees was served on counsel of record for all parties and *amici* through the CM/ECF system.

Dated: May 31, 2019

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