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NEWSLETTER

Washington Post Wins Legal Challenge Against Maryland's Political Disclosure Law

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Privacy in Focus®

Privacy in Focus previously reported on the Washington Post Company's constitutional challenge to a Maryland statute requiring media companies to collect and publish information identifying the sponsors of political advertising on their online platforms. The Washington Post Company and other media companies asserted that the Maryland law violated the First Amendment. The U.S. District Court for the District of Maryland ruled in favor of the media companies and issued a preliminary injunction on the ground that the state law likely violated the First Amendment. Maryland appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit.

Preliminary Injunction Affirmed

On December 6, 2019, the Fourth Circuit affirmed the district court's ruling on the basis that Maryland's imposition of campaign finance disclosure burdens on the online advertising platforms of media companies presents "a compendium of traditional First Amendment infirmities." Among the infirmities, the court found Maryland's law to be a "content-based regulation" that singles out campaign-related speech for unique regulatory treatment. Judge Wilkinson's opinion declared that content-based regulation of political speech is particularly problematic, because political speech is at the core of the First Amendment's protection. The court also found Maryland's law infirm because "the Act compels speech. And it does so in no small measure." As the district court had found, the appeals court ruled that the law's compulsory disclosure and publication provisions improperly "force elements of civil society to speak when they otherwise would have refrained."

Authors

Lee E. Goodman
Partner
202.719.7378
lgoodman@wiley.law

Practice Areas

Election Law & First Amendment Litigation
Election Law & Government Ethics
Privacy, Cyber & Data Governance

Conscripting the Press

The court was particularly concerned with the conscription of press entities to serve as investigative arms of the government. The court distinguished traditional campaign finance regulations requiring disclosures from the Maryland statute on the basis that the latter "burdens platforms rather than political actors." The court was not convinced that government's traditional anti-corruption rationale justifies the regulation and punishment of neutral third-parties' advertising platforms in the same way it might apply to political participants. The court recognized the very real consequence that online advertising platforms would simply close their platforms to political advertising rather than incur the costs and legal risks associated with the regulatory requirements. This, the court found, presented a unique kind of First Amendment problem.

The court also distinguished Maryland's compulsory disclosure requirements for online platforms from those that apply to broadcasters under federal communications laws. Broadcast frequencies are publicly owned and scarce, while the internet is private and infinite.

The considerations reflected in the Fourth Circuit's reasoning recently were debated within the Federal Election Commission (FEC) in an enforcement case involving the *Chesterland News*, a newspaper in Chesterland, Ohio. There two FEC Commissioners proposed edits to a staff legal analysis to suggest that newspapers might have the legal responsibility to ensure paid ads comply with FEC disclaimer rules. That move triggered a rebuke from another commissioner that invoked 35 years of FEC enforcement history and reasoning very similar to the Fourth Circuit's.

Anonymous Political Speech Protected

The Fourth Circuit also concluded that "the fact that the Act compels third parties to disclose certain identifying information regarding political speakers implicates protections for anonymous speech." The court cited two lines of First Amendment jurisprudence in support of this protection. First, it cited the newsman's right to resist disclosure of news sources to government recognized in *Branzburg v. Hayes* (1972). Second, it cited the "respected tradition of anonymity in the advocacy of political causes" recognized by *McIntyre v. Ohio* (1995).

The Fourth Circuit's nod to the right of anonymous political speech and *McIntyre* could well signal a revival of sorts for the First Amendment's right of political privacy. As previously reported in *Privacy in Focus*, two federal district courts recently rejected New York and New Jersey compulsory disclosure laws targeting political speech and association on the basis that they infringed the First Amendment right of anonymous political speech and association. Those cases are likely headed to the Second and Third Circuits, respectively. Meanwhile, two petitions for certiorari are pending before the Supreme Court in political privacy cases emanating from the Ninth Circuit. *Privacy in Focus* has summarized the important issues in need of clarification in this area of First Amendment jurisprudence.

Standard of Review

In reaching its conclusion, the Fourth Circuit acknowledged "the imperative of some form of heightened judicial scrutiny," although it declined to apply "strict scrutiny," the standard of review that places the heaviest burden on government to justify laws impairing First Amendment rights. Instead, the court applied a high-bar "exacting scrutiny" standard, with the admonition that such a standard of review is decidedly not deferential to government. Under the exacting scrutiny standard, a "disparity between Maryland's chosen means and purported ends" doomed the law.

Implications for Legislation

The Fourth Circuit's opinion has particular relevance to Congress' consideration of the Honest Ads Act which has been pending in Congress for several years. The Honest Ads Act imposes almost identical disclosure burdens upon large media companies as the Maryland law imposed. At least in the Fourth Circuit, the Honest Ads Act would likely be void from its inception were it passed by Congress. This obvious limitation might encourage more members of Congress to look at alternatives, like the Honest Elections Act (H.R. 4736) which attacks foreign propaganda by expanding the U.S. Department of Justice's purview under the Foreign Agents Registration Act rather than imposing speech burdens on American citizens or American media companies. Wiley partner Lee Goodman discussed this approach in The Hill last year.