

# The Washington Post Resists Disclosure Burdens in the Fourth Circuit

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*The Washington Post's* initially successful legal challenge to Maryland's campaign finance disclosure law for online political ads was analyzed in a previous article. The U.S. District Court of Maryland preliminarily enjoined enforcement of the Maryland Online Electioneering Transparency and Accountability Act on the basis that it quite likely violated the First Amendment rights of press platforms that sell advertising space for political messages.

That law requires online advertising platforms, such as [www.washingtonpost.com](http://www.washingtonpost.com), to collect and post information about all "campaign materials" placed on their platforms for a fee. "Campaign material" is defined to include any text, graphic, or image that vaguely "relates to a candidate, a prospective candidate, or the approval or rejection of a [ballot] question or prospective [ballot] question." The media company is required to post on its website the name and contact information of each ad purchaser, the identity of people who control the organization, and the total amount paid by the ad sponsor. Additionally, the media company must retain extensive information about the candidate or ballot issue to which the ad relates and whether the ad supports or opposes the candidate or issue, the dates on which the ad was published, the "geographic location" where it was disseminated, its target audience, and total screen views of each ad.

After the District Court enjoined enforcement of the statute against the *Post* and the other plaintiffs, Maryland appealed the District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit. Briefing has concluded, and the Fourth Circuit has tentatively set argument for

## Authors

Lee E. Goodman  
Partner  
202.719.7378  
[lgoodman@wiley.law](mailto:lgoodman@wiley.law)

## Practice Areas

Election Law & Government Ethics  
Federal & State Campaign Finance  
Privacy, Cyber & Data Governance

either September 18, 19, or 20, 2019. The case is styled *The Washington Post, et al. v. McManus*, Appeal No. 19-1132.

### **Maryland's Brief**

Maryland argues that the District Court erred by applying the "strict scrutiny" standard of review to a campaign finance disclosure statute and that its statute should have been reviewed under a more deferential "exacting scrutiny" standard. Under that standard, Maryland argues its statute is constitutional because its disclosure and record-keeping obligations are substantially related to Maryland's important interests in providing the electorate with information regarding the sources of "election-related" spending, deterring political corruption, enforcing other campaign regulations, and protecting Maryland elections from foreign influence. Although that latter interest received significant attention in the District Court (specifically Maryland's reaction to "Russian meddling" in the 2016 federal elections), Maryland's brief before the Fourth Circuit emphasizes Maryland's efforts to update its campaign disclosure laws to improve disclosure of online political advertising for more general domestic purposes.

### **Amici Briefs in Support of Maryland**

Three liberal organizations that advocate greater restrictions on political speech filed friend of the court briefs in support of Maryland. The Campaign Legal Center and Common Cause Maryland filed a joint brief. The Brennan Center for Justice also filed a brief. The Campaign Legal Center and Common Cause devote most of their brief to arguing for a highly deferential "exacting scrutiny" standard of review. They also posit that by forcing press entities to collect and post information about citizens who advertise on their platforms, Maryland's law advances the First Amendment rights of Maryland citizens to know who is speaking. The Brennan Center also presses for a deferential "exacting scrutiny" standard and argues that the District Court underestimated Maryland's asserted interests.

### **The Washington Post's Brief**

*The Washington Post*, the *Baltimore Sun* and other newspapers emphasize in their brief that they do not challenge Maryland's authority to require ad sponsors to identify themselves in certain election advocacy ads. Rather, they challenge the requirement that online platforms publish, on separate portions of their websites, the detailed information about each advertiser and political message and collect and retain information about all political ad sponsors.

The newspapers argue that "strict scrutiny" is the appropriate legal scrutiny for a law that compels third-party press entities, rather than the ad sponsors, to communicate a message dictated by the government. Applying that standard, the District Court ruled that Maryland failed to demonstrate that the statute "furthers a compelling interest and is narrowly tailored to achieve that interest." As a law compelling certain speech, the statute should be adjudged according to strict scrutiny, not any kind of lower standard of review. The newspapers argue that the "exacting scrutiny" standard, especially the highly-deferential construction of that standard advanced by Maryland and its *amici*, is inapposite to this law, and merely calling it a "campaign finance disclosure" law oversimplifies and sidesteps the real constitutional concern.

The newspapers argue that the Maryland law fails both strict scrutiny and exacting scrutiny (if it were to apply). In addressing the law's purposes, the newspapers suggest that Maryland is engaged in revisionist legislative history when it argues that the law was enacted for reasons other than addressing "Russian meddling." Their brief goes on to highlight the law's inadequacies in addressing that problem. The law also is not tailored to advancing the other interests asserted, such as informing the electorate, because the law is duplicative of other disclosure requirements.

### ***Amici* Briefs in Support of *The Washington Post***

Seventeen news media organizations filed a friend of the court brief supporting *The Washington Post*. The friends include The New York Times Company; The Associated Press; Dow Jones & Company, Inc.; and the Reporters Committee for Freedom of the Press. The National Association of Broadcasters and NCTA – The Internet & Television Association submitted a similar brief. And the Institute for Free Speech filed an *amicus* brief.

The news media organizations chastise Maryland for "seeking illegitimately to ratchet down First Amendment protections" by diluting the level of scrutiny and, in any event, argue the Maryland law fails any level of scrutiny.

The National Association of Broadcasters and the NCTA – The Internet & Television Association press similar points, but also request the Fourth Circuit to *expand* the District Court's injunction beyond the newspapers that were plaintiffs in the District Court. These friends argue that the constitutional burdens and infirmities of the Maryland law apply equally to all online publishers, not just newspaper publishers. They want the Fourth Circuit to expand the injunction to prohibit Maryland from attempting to enforce it against social media websites and similar non-newspaper websites. "The relevant question, therefore, is whether Maryland can lawfully compel *any* of these third-party online platforms to publish the required information on their private websites," these friends posit. "[T]he answer under well-established First Amendment principles is *no*."

Finally, the Institute for Free Speech emphasizes Maryland's heavy evidentiary burden to prove its law is necessary and properly tailored. The Institute also holds Maryland to its original assertions about "Russian meddling" and bluntly asserts that "Maryland has not demonstrated that its law is properly tailored to deter foreign expenditures, which is unsurprising because the law instead targets Americans."

### **Looking Ahead**

The Fourth Circuit must decide which level of constitutional scrutiny applies to a campaign finance disclosure law that burdens not the free speech rights of the political ad sponsor but a third party – the advertising platform – which is drafted by government into a law enforcement function. Even if the Fourth Circuit were to adopt "exacting scrutiny" over "strict scrutiny," determining just how demanding "exacting scrutiny" is remains a legal question in need of clarification. And there are rich questions about Maryland's true objectives and this law's tailoring. These issues are clearly joined.

Looking beyond the Fourth Circuit, *The Washington Post's* lawsuit has the makings of a future Supreme Court case. The plaintiffs are well established, high profile press entities. Maryland was one of the first states in the country to announce it was solving the problem of "Russian meddling" after 2016, which adds an intriguing dimension to the case. There are many similar laws emerging and bills pending in legislatures across the states and in Congress (e.g., the Honest Ads Act), so guidance at this time would have national importance. Some speculate that there might be a group of four Justices – Thomas, Gorsuch, Kavanaugh and Alito – looking for a proper case to address the boundaries of government-compelled disclosure, a subject that has meandered in lower courts with little clear guidance from the Court. A case about compelled speech and First Amendment burdens imposed upon press entities might afford these Justices a favorable context in which to begin drawing clearer lines.

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