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NEWSLETTER

Federal Court Enjoins Maryland Internet Disclosure Law, But...

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A U.S. District Court has preliminarily enjoined enforcement of the Maryland Online Electioneering Transparency and Accountability Act as likely violating the First Amendment. As viewed by Judge Paul W. Grimm, the statute, enacted in May 2018, was Maryland's legislative 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." The act requires social media and press websites that carry online advertising to collect information about the sponsors of political ads and to publish that information for state and public inspection. It would impose burdens on websites such as *The Washington Post, The New York Times*, Facebook, Twitter, and similar websites that sell online advertising space.

The Washington Post and other news organizations brought suit challenging the statute in August, leading to the subject January preliminary injunction ruling. *The Washington Post v. McManus*, 2019 WL 112639 (D. Md.). The state has now appealed the preliminary injunction to the Fourth Circuit, where briefing is scheduled to begin in April. (T*he Washington Post v. David J. McManus, Jr.*, No. 19-1132). Consequently, this test of First Amendment rights merits continuing attention.

Judge Grimm's Analysis

"All compelled disclosure laws implicate the Free Speech Clause," the court wrote, "but laws imposing those burdens on the media implicate a separate First Amendment right as well: the freedom of the press." After noting the lack of clarity in case law over whether

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disclosure requirements in the campaign finance area trigger "strict scrutiny" or "exacting scrutiny," the court applied "strict scrutiny," where the government bears the burden of showing the challenged regulation "furthers a compelling interest and is narrowly tailored to achieve that interest."

In doing so, Judge Grimm rejected Maryland's argument that a less demanding "exacting scrutiny" standard applies, under which Maryland contended the government must demonstrate merely that disclosure requirements are "substantially related" to an "important" government interest. Maryland argued that the more lenient standard was held applicable to campaign finance law disclosure requirements in *Buckley v. Valeo*, 424 U.S. 1 (1976), a characterization of *Buckley* that some commentators dispute. Judge Grimm observed the exacting scrutiny standard was upheld as to requirements imposed directly on "candidates, campaigns, political committees or donors." Because the Maryland statute imposed disclosure obligations on independent third-party press entities, applying exacting scrutiny here would go beyond the exception to strict scrutiny established by *Buckley*. He declined to expand the exception.

The court ruled the Maryland law did not meet the "strict scrutiny" test for restrictions upon First Amendment rights of the press, because it forces them to collect and post publicly information that they, in their editorial judgment, otherwise would choose not to publish, in violation of legal precedents proscribing such government dictates on the press. The court also ruled that Maryland could obtain the same information by imposing legal responsibilities directly upon ad sponsors rather than the neutral third-party web platforms.

In analyzing the statute under the strict scrutiny test, Judge Grimm accepted that "states have a compelling interest in preventing foreign governments and their nationals from interfering in their elections." The problem was that the Maryland statute appeared not "'narrowly tailored' to promote these interests, meaning that 'no less restrictive alternative would serve its purposes.'" A statute fails if it is "overinclusive" so that it "unnecessarily circumscribes protected expression" or "underinclusive" and thus "leaves appreciable damage to the government's interest unprohibited." The court found that the statute failed because it "regulates substantially more speech than it needs to while, at the same time, neglecting to regulate the primary tools that foreign operatives exploited to pernicious effect in the 2016 election."

Overinclusiveness included that the statute imposed publication, record-keeping, and government access requirements on all "online platforms," defined so broadly as to sweep in many entities, not just "social media giants," even though "the 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."

Underinclusiveness included that the statute applied only to paid political ads whereas the "primary evil the act was intended to redress was *unpaid* Internet postings (many of which mentioned no election or candidate at all)." Thus, the statute would not really address the problem.

Judge Grimm then went on to find that even if a less demanding "exacting scrutiny" standard applied, the Maryland statute would fail due to the "mismatch" of the disclosure requirement's "means and its ends." Here the requirements "are duplicative of other campaign finance disclosure requirements," "they do not target the deceptive practices that Act ostensibly seeks to deter," and "they are poorly calibrated to prevent foreign

operatives from evading detection."

The court stopped short of enjoining the law altogether, choosing instead to enjoin its application to the specific press plaintiffs who brought the challenge (*The Washington Post, Baltimore Sun*, Capital-Gazette Communications LLC, APG Media of Chesapeake LLC, Community Newspaper Holdings Inc., Ogden Newspapers of Maryland LLC, Schurz Communications Inc., and the Maryland-Delaware-D.C. Press Association, Inc.).

Broader Implications

The Fourth Circuit appeal presumably will involve numerous arguments about what standards should apply to the First Amendment review of statutes that impose burdens on Internet platforms and require disclosure of the identity of payors. The January preliminary injunction decision undercuts the conventional wisdom that disclosure statutes are always constitutional when they touch candidate elections. If the district court ruling stands, it should impact the behavior both of legislatures and administrative agencies, some of which have been working to expand compelled disclosure requirements.

The implications are important for current legislative efforts like the Honest Ads Act in the last Congress and other state laws that attempt to regulate Internet-based advertising platforms. In several respects, the Maryland law is less onerous than the burdens proposed for web and press platforms in the Honest Ads Act (which would impose both civil and criminal liability). Judge Grimm's decision will likely introduce caution in Congress, especially if it is upheld by the Fourth Circuit.

The decision also has implications for potential efforts by agencies such as the Federal Election Commission (FEC) to impose legal responsibility and liability upon advertising platforms for the posting of disclaimers. The issue arose in a matter resolved by the FEC in early 2018 involving a political ad run in the *Chesterland News*, an Ohio newspaper (Matter Under Review 7210). For over 35 years, the FEC has imposed legal responsibility for ad disclaimers solely upon ad sponsors, who control funding and content of the ads, not advertising platforms. Yet, last year, two of the six Commissioners proposed to alter that long-standing rule in the *Chesterland News* matter. The effort failed. The issue was analyzed in a Concurring Statement of Commissioner Lee E. Goodman dated February 12, 2018, which discussed the First Amendment rights of the press to resist such liability: http://eqs.fec.gov/eqsdocsMUR/18044436380.pdf. Decisions like Judge Grimm's would inhibit such attempts in the future.