IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

The Washington Post, *et al.*, Plaintiffs, v. David J. McManus, Jr., Chairman, Maryland State Board of Elections, in his official capacity, *et al.*, Defendants.	Civil Action No: 1:18-cv-02527

[PROPOSED] MEMORANDUM OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND COMMON CAUSE MARYLAND IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Campaign Legal Center ("CLC") and Common Cause Maryland certify that neither one has a parent corporation or issues stock and therefore that no publicly held company owns 10% or more of either of their stock.

STATEMENT OF INTERESTS

CLC is a nonpartisan, nonprofit organization that represents the public interest in administrative and legal proceedings to promote the improvement and enforcement of laws governing campaign finance, political disclosure, and government ethics. CLC has participated in numerous cases addressing state and federal campaign finance issues, including *McConnell v. FEC*, 540 U.S. 93 (2003), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 572 U.S. 185 (2014).

Common Cause Maryland, founded in 1974, is a nonpartisan grassroots organization with more than 20,000 members and supporters dedicated to upholding the core values of American democracy. Together with the national organization Common Cause and its 1.2 million members and supporters, Common Cause Maryland works to create open, honest, and accountable government that serves the public interest; to promote equal rights, opportunity, and representation for all; and to empower all people to make their voices heard in the political process. Common Cause Maryland was a strong supporter of Maryland's Online Electioneering Transparency and Accountability Act.

Amici submit this memorandum out of concern for the potential harm that could result from plaintiffs' arguments, which misapply well-settled precedent regarding disclosure rules and could jeopardize disclosure provisions in other states.

Both parties have consented to *amici*'s participation in this case. Plaintiffs specifically indicated that they "do not oppose *amici*'s motion in light of the Court's September 23, 2018 order extending the time for plaintiffs to file their reply brief in order to accommodate *amici*'s motion for leave and *amicus* brief."

INTRODUCTION AND SUMMARY OF ARGUMENT

"Democracy Dies in Darkness." This is the slogan The Washington Post adopted in February 2017, which the newspaper continues to display prominently beneath its online masthead and on t-shirts and baby onesies that it sells through its online shop.[1] During an interview a few months after adopting the slogan, the newspaper's owner Jeffrey Bezos explained, "'I think a lot of us believe this, that democracy dies in darkness, that certain institutions have a very important role in making sure that there is light.'"[2]

Maryland's Online Electioneering Transparency and Accountability Act ("Act") reflects the "very important role" that online platforms have in helping to keep democracy out of the dark. The Act imposes reasonable disclosure and recordkeeping obligations on certain online platforms, including the plaintiff newspapers, in the limited context of their dissemination of paid political advertising on their websites. It does not infringe on the freedom of the press. Nor does it otherwise prohibit or restrict the content of plaintiffs' or anyone else's speech. The Act affirmatively promotes First Amendment interests by providing the public with easy access to information about the sources, financing, and distribution of paid political advertising and enabling citizens to make

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1 *Collections*, Wash. Post, https://washpostshop.myshopify.com/products/.

2 Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, Wash. Post (Feb. 24, 2017), https://wapo.st/2POEwVd (quoting statements by Bezos during an interview with Washington Post's executive editor, Martin Baron).

informed choices in the political marketplace. It easily satisfies the intermediate level of "exacting" constitutional scrutiny that courts apply to disclosure requirements.

Plaintiffs' contention that their newspapers are categorically exempt from any generally applicable responsibility to inform the public about the paid political ads on their websites is not only hypocritical, but legally wrong. Plaintiffs misconstrue the First Amendment's freedom of the press as a cloak that shields all of their activities from any government regulation, no matter how disconnected such activities may be from their journalism. Plaintiffs also err in their First Amendment free speech analysis, wrongly arguing that the Act's disclosure requirements must satisfy strict scrutiny and baselessly claiming to have a greater First Amendment interest in their advertisers' speech than the advertisers do themselves. In fact, the Supreme Court and every one of the *eleven* federal circuit courts to address the question has held that disclosure requirements are subject to a lower level of scrutiny, which requires that a law be "substantially related" to a "sufficiently important" government interest. Plaintiffs' arguments about narrow tailoring and less restrictive alternatives are thus beside the point, and fail to advance their constitutional challenge.

Likewise flawed are plaintiffs' arguments about the burdens the Act imposes on them. Plaintiffs exaggerate their own obligations under the Act to obtain the information they are required to disclose, ignoring that the Act requires advertisers (or ad networks) that place the ads both to make the determination that an ad falls within the scope of the Act and to provide the necessary information to the online platforms so that they can comply with the disclosure requirements that apply to them. In fact, the Act goes a step further in protecting plaintiffs and other online platforms from bearing such responsibility, expressly providing that they may "rely in good faith on the information provided" by advertisers or ad networks to fulfill their own legal obligations under the Act. Md. Code Ann. Elec. Law § 13-405(d)(2). And while plaintiffs may

incur some financial costs to comply with their disclosure and recordkeeping duties under the Act, such costs plainly do not amount to a violation of plaintiffs' First Amendment rights.

Finally, plaintiffs' prior restraint argument is procedurally deficient and substantively wrong. Plaintiffs lack standing to challenge a supposed prior restraint of other people's speech, and, in any event, the Act's injunction provisions do not prohibit any online platform from posting ads that fail to comply with its disclosure requirements. Nor do those provisions foreclose a constitutional challenge to the application of the disclosure requirements to a particular advertisement.

ARGUMENT

Political disclosure has been a cornerstone of American election law for more than a century. *See* Federal Corrupt Practices Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 823-24 (1910). The Supreme Court has long recognized that such laws further multiple important government interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam).

Although Maryland's important interest in informing its citizens "alone is sufficient to justify" the Act's disclosure requirements, *Citizens United*, 558 U.S. at 369, the Act also facilitates enforcement of substantive campaign finance rules, including the prohibition on foreign influence in American elections. Indeed, by modernizing Maryland's disclosure rules to reflect the dramatic shift of political advertising to online media, the Maryland General Assembly acted both to promote the public's informational interest and to close a loophole that enabled foreign actors to

engage in stealthy online advertising campaigns in an attempt to influence American voters. The Act does not infringe on plaintiffs' First Amendment rights, and, as detailed below and in the Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opp'n"), plaintiffs' various arguments to the contrary are both factually and legally deficient. Plaintiffs are not likely to succeed on the merits of their claims, and their preliminary injunction motion should be denied.

I. Requirements to Disclose the Sources and Financing of Third Parties' Paid Advertising Do Not Infringe on the Freedom of the Press.

There is no doubt that freedom of the press is fundamental to our democracy. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (finding that First Amendment protections safeguard the "'unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"). And there is no dispute that the government's authority to intrude on editorial and journalistic freedom is strictly limited. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (finding that the First Amendment bars intrusions into editorial control over the content published by a newspaper).

Nevertheless, the Supreme Court has made clear that the First Amendment is not a blanket exemption for newspapers from any government requirements. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973) ("As the press has evolved from an assortment of small printers into a diverse aggregation . . . the parallel growth and complexity of the economy have led to extensive regulatory legislation from which the publisher of a newspaper has no special immunity." (internal quotations omitted)); *see also P.A.M. News Corp. v. Butz*, 514 F.2d 272, 277 (D.C. Cir. 1975) ("It is clear that not every action by the government which affects the press violates the first amendment."). In *Pittsburgh Press*, the Supreme Court rejected a challenge to a local ordinance that regulated the manner in which a

newspaper presented third-party advertisements to its readers. 413 U.S. at 389 (finding that the government's interest in prohibiting sex discrimination in employment outweighed any First Amendment interest held by a newspaper in categorizing employment advertisements by sex). The Court distinguished the ordinance's prohibition on sex-designated advertising columns from restrictions on the newspaper's "editorial judgment and [ ] free expression of views." *Id.* at 391.

Like the requirement challenged in *Pittsburgh Press*, the Act does not purport to restrict the editorial judgment or free expression of the plaintiff newspapers, or anyone else. Instead, it narrowly addresses one limited way in which some press entities, including plaintiffs here, have expanded the scope of their activities beyond the traditional press functions of covering and commenting on the news. As plaintiffs themselves acknowledge, *e.g.*, Mem. of Points and Authorities in Supp. of Pls.' Mot. For Prelim. Inj. ("Prelim. Inj. Mem.") at 14, the challenged provisions only apply to their newspapers' activity of "supplying the [online] forum" for the *paid speech of others*. And importantly, even in that limited context, the Act only requires public disclosures and recordkeeping of information about the sources, financing, and distribution of the third parties' paid advertisements. It does not impose any restrictions on the content of those ads, nor does it touch plaintiffs' freedom to "exercise[ ] independent editorial judgment regarding the news, opinion and advertising content." Davey Decl. ¶ 10; Fike Decl. ¶ 12; Thomas Decl. ¶ 10; *contra* Prelim. Inj. Mem. at 15 (arguing that the Act places their "editorial independence [ ] at stake"). Indeed, aside from plaintiffs' conclusory statements that the Act will harm their editorial role, their supporting affidavits do not contain a single specific example illustrating how disclosing information about their paid advertisers' speech would affect their own speech.

Plaintiffs nevertheless try to shoehorn this challenge into a First Amendment freedom of the press case by recasting the Act's disclosure requirements as "publication . . . obligations." *E.g.*,

Prelim. Inj. Mem. at 1, 19, 24. But requirements to disclose information about the sources and financing of political ads have been repeatedly upheld, *see infra* pp. 11-12 & n.7, and plaintiffs fail to identify anything about the Act's requirements that actually interferes with their free exercise of independent judgment regarding any substantive content—news, opinion, or even paid advertising—on their websites. Plaintiffs' objections to the Act thus appear to be premised on the erroneous view that their status as newspapers amounts to a constitutional exemption from the Act's disclosure and recordkeeping provisions. Although the Supreme Court has acknowledged the press's "special and constitutionally recognized role . . . in informing and educating the public, offering criticism, and providing a forum for discussion and debate," the Court has rejected the proposition that the institutional press is entitled to greater constitutional protection than other speakers. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782-83 & n.18 (1978).[3]

Nothing about the Act's disclosure requirements for paid political advertisements disseminated on plaintiffs' websites interferes with plaintiffs' editorial independence. Their purported reliance on the First Amendment freedom of the press is misplaced and the Court should review the challenged provisions under the well-settled First Amendment framework that applies to political disclosure requirements. *Citizens United*, 558 U.S. at 366-69 (reaffirming that

[3] Indeed, most newspaper organizations are subject to other types of reporting and disclosure requirements that apply generally to corporations and employers. For example, employers covered by the Fair Labor Standards Act must maintain detailed records for employees who are subject to federal minimum wage and overtime protections and must make these records available for inspection by the Department of Labor. *See* 29 C.F.R. pt. 516; *see also id.* § 516.4 (requiring employers to display notices in the workplace describing federal minimum wage and overtime laws). Most large employers must also comply with recordkeeping and reporting obligations relating to equal employment opportunity. *See* 29 C.F.R. pt. 1602. Public companies like tronc, Inc., which owns The Baltimore Sun, are subject to yet another, distinct set of reporting and public disclosure requirements. *See, e.g.*, 15 U.S.C. §§ 78m, 78o(d); 17 C.F.R. § 249.310. *See also Pittsburgh Press Co.*, 413 U.S. at 382-83 (citing "extensive regulatory legislation," including the National Labor Relations Act, the Fair Labor Standards Act, and the Sherman Antitrust Act, "from which '[t]he publisher of a newspaper has no special immunity").

intermediate "exacting" scrutiny applies to disclosure and disclaimer requirements); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013) (noting federal appeals courts' universal application of exacting scrutiny to political disclosure schemes); *cf. Wagner v. FEC*, 793 F.3d 1, 32 (D.C. Cir. 2015) (en banc) (unanimously rejecting plaintiffs' "doctrinal gambit" to subject political contribution restrictions to a more rigorous standard of constitutional scrutiny by "dressing their argument as an equal protection claim," despite courts' routine consideration of such claims under First Amendment free speech jurisprudence).

II. The Act's Disclosure Requirements Promote First Amendment Interests and Do Not Infringe on Plaintiffs' Freedom of Speech.

A. Political disclosure laws promote First Amendment interests.

Contrary to plaintiffs' suggestions, Prelim. Inj. Mem. at 14-15, political disclosure laws should not be assessed only with regard to burdens they supposedly impose on speech. Plaintiffs ignore entirely that such laws also *advance* and *protect* First Amendment interests—the very same interests that at least some of the plaintiffs claim to promote. *See, e.g.*, Editorial Board, *Ending Secret Money in Politics*, Wash. Post (Feb. 19, 2012), https://wapo.st/2OGJ0wK (criticizing Congress's failure to pass the DISCLOSE Act, which "would have required disclosure of the gusher of secret money flowing into elections," and asking "[w]hat, exactly, is the problem with transparency?"); Farhi, *supra* note 2 (quoting statements by The Washington Post's owner suggesting that the press has "a very important role" in keeping democracy out of the dark).[4]

[4] Indeed, even in the midst of briefing on plaintiffs' preliminary injunction motion, The Washington Post's Editorial Board praised a recent court decision requiring greater disclosure of the financing of certain political ads as "a positive step for democracy and for the health of the political system." Editorial Board, *A Judge Just Cast Some Much-Needed Light on Dark Money*, Wash. Post (Sept. 20, 2018), https://wapo.st/2IdTRfa.

Political disclosure laws like the Act, which "impose no ceiling on campaign-related activities and do not prevent anyone from speaking," *Citizens United*, 558 U.S. at 369, promote the right to self-government and ensure that officeholders remain responsive to the public—both core First Amendment values. Thus, courts reviewing disclosure laws need to take account of these countervailing democratic interests on the other side of the ledger. The Supreme Court has, for example, criticized plaintiffs challenging a federal disclosure law for "'ignor[ing] the *competing First Amendment interests* of individual citizens seeking to make informed choices in the political marketplace.'" *McConnell*, 540 U.S. at 197 (emphasis added).

In our representative democracy, "self-government" means that we govern ourselves by collectively debating and voting on who will be our representatives and executive officers. As the Supreme Court has explained, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). To fully participate in the political process, however, voters need enough information to determine who supports which positions and why. Therefore, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339.[5] More generally, a key purpose of the First Amendment is to preserve "uninhibited, robust, and wide-open" public debate. *N.Y. Times Co.*, 376 U.S. at 270. By providing the public with information that is crucial to self-governance, disclosure laws expand robust debate and advance First Amendment interests.

[5] *See also Knox v. Serv. Emps. Int'l. Union, Local 1000*, 567 U.S. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment.").

As detailed in Maryland's opposition (at 7-13), the Act builds upon and modernizes existing disclosure rules to ensure that Maryland citizens are easily able to obtain meaningful information about groups and individuals seeking to influence their votes. It thus not only protects against corruption and unlawful foreign influence in American elections but also actively promotes core First Amendment values. Through the Act, Maryland "is increasing, not limiting, the flow of information. The [F]irst [A]mendment profits from this sort of governmental activity." *P.A.M. News Corp.*, 514 F.2d at 278. It is impossible for "'uninhibited, robust, and wide-open' speech [to] occur when organizations [or foreign actors] hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197. This is why "disclosure requirements have become an important part of our First Amendment tradition." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010).

B. Disclosure rules do not prevent speech and receive less demanding First Amendment scrutiny than other laws affecting political speech.

The Supreme Court has repeatedly recognized that disclosure requirements "may burden the ability to speak," but they "'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (2010) (quoting *McConnell*, 540 U.S. at 201). Disclosure requirements thus receive intermediate scrutiny and are constitutional so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases); *Citizens United*, 558 U.S. at 366-67; *McConnell*, 540 U.S. at 231-32; *Buckley*, 424 U.S. at 64, 66; *see also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012) (rejecting argument that political committee disclosure requirements are

subject to strict scrutiny and analyzing such requirements "under the intermediate scrutiny level of 'exacting scrutiny'").

The Supreme Court has upheld political disclosure regimes three times in recent years, each time by an 8-to-1 margin.[6] Indeed, even as the Court has invalidated laws that place limits on political contributions or spending, it has consistently upheld disclosure laws as a constitutionally preferable alternative. *See Citizens United*, 558 U.S. at 369 (describing *Buckley* and *McConnell* and noting that the Court in *United States v. Harriss*, 347 U.S. 612 (1954), "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself"); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299, 294 n.4 (1981) (striking down contribution limit because "the integrity of the political system will be adequately protected" by "publication of a list of all contributors of more than $50"); *Bellotti*, 435 U.S. at 792 & n.32 (striking down corporate expenditure ban in part because disclosure sufficed to enable "the people . . . to evaluate the arguments to which they are being subjected").

Likewise, "every one of [the] Circuits who have considered the question" since *Citizens United*—including the Fourth Circuit—"have applied exacting scrutiny to disclosure schemes," *Worley*, 717 F.3d at 1244 (collecting cases); *see Real Truth About Abortion*, 681 F.3d at 549.[7] And

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[6] *Doe*, 561 U.S. at 199; *id.* at 216-18 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 228 (Scalia, J., concurring in the judgment); *Citizens United*, 558 U.S. at 366-71; *McConnell*, 540 U.S. at 194-99; *id.* at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also McCutcheon v. FEC*, 572 U.S. 185, 222-25 (2014) (plurality opinion) (emphasizing the availability of disclosure requirements as an alternative to other campaign finance restrictions).

[7] Since the Eleventh Circuit Court of Appeals issued its decision in *Worley*, the Second, Third, and Fifth Circuits have joined the First, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuit Courts of Appeals in upholding various state and federal political disclosure regimes under the exacting scrutiny standard. *See Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 131 (2d Cir. 2014); *Justice v. Hosemann*, 771 F.3d 285, 301 (5th Cir. 2014); *see also, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016); *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir.

to the extent plaintiffs separately challenge the Act's requirements that plaintiffs retain records necessary to make the required disclosures, the Supreme Court held long ago that "recordkeeping, reporting, and disclosure requirements" are assessed collectively under the exacting scrutiny standard. *Buckley*, 424 U.S. at 66-68; *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (explaining that the Court in *Buckley v. Valeo* upheld "as substantially related to important governmental interests, the recordkeeping, reporting, and disclosure provisions of the Federal Election Campaign Act"); *Vt. Right to Life Comm.*, 758 F.3d at 137 (explaining that Vermont's registration, recordkeeping, and reporting requirements "amount to the establishment of a disclosure regime" and upholding that disclosure regime under exacting scrutiny).

Plaintiffs ignore the applicable constitutional standard, tacitly admitting that they cannot satisfy it. Prelim. Inj. Mem. at 17-22 (focusing instead on the irrelevant question of whether the Act can "withstand strict-scrutiny review"). Even worse, plaintiffs attempt to contort *Citizens United*'s holding about a ban on corporate speech to support their misguided argument that information about paid political advertisements on their websites is "'entitled to special protection'" and exempt from the challenged disclosure rules. Prelim. Inj. Mem. at 14 (quoting *Snyder v. Phelps*, 562 U.S. 443, 444 (2011), and relying on the portion of *Citizens United* invalidating a federal ban on certain political communications financed with corporate general

2013); *Real Truth About Abortion*, 681 F. 3d at 551-52; *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *Human Life of Wash.*, 624 F.3d at 1016; *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). The Eighth Circuit has also applied exacting scrutiny to political disclosure requirements, but it struck down a law requiring every association wishing to make independent expenditures to set up a political committee and comply with perpetual reporting and organizational requirements. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75, 877 (8th Cir. 2012) (en banc).

treasury funds, while ignoring the portion of *Citizens United* upholding disclosure and disclaimer requirements for such communications). Plaintiffs entirely disregard the holding of *Citizens United* that disclosure serves the important "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," 558 U.S. at 367, and thereby "permits citizens . . . to react to the speech . . . in a proper way." *Id.* at 371 (brackets in original). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* Plaintiffs likewise disregard the fact that eight Justices agreed that even a ten-second movie advertisement that merely mentioned a candidate was constitutionally subject to disclosure requirements. *Id.* at 367-70. The Court explained, "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369.

Plaintiffs concede, Prelim. Inj. Mem. at 17, that the Supreme Court in *Citizens United* upheld "some disclosure requirements placed on the *speakers* of election-related speech," but then wrongly suggest that such requirements are a constitutional ceiling on disclosure laws, *id.* at 17. Nothing in *Citizens United* or any of the numerous other decisions upholding disclosure requirements suggests that such laws are constitutional only when applied directly to the source of the speech, as opposed to a third-party platform that is paid to convey the speech to the public, as plaintiffs are here. Plaintiffs' argument amounts to an unsupported interpretation of the First Amendment as affording greater protection to "suppl[iers of] the forum for the [paid] speech" of others," *id.* at 14, than it does to the actual speakers. Plaintiffs offer no legal (or logical) basis for this Court to find that they have *greater* First Amendment rights in their advertisers' speech than the advertisers do themselves. And finally, all of the reasons why courts have found disclosure

requirements to be constitutional, *see infra* pp. 14-18, apply with equal force, regardless of who is making the disclosure.

C. The Act easily satisfies the "lower level of scrutiny" that applies here.

To survive intermediate or "exacting" scrutiny, the Act's disclosure requirements must be "substantially related" to a "sufficiently important" government interest. They are.

The Supreme Court has repeatedly recognized that disclosure laws further multiple important government interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66-68. Nevertheless, the public's informational interest "alone is sufficient to justify" such requirements. *Citizens United*, 558 U.S. at 369.

Plaintiffs appear to concede that the Act serves at least one important—indeed compelling—government interest: responding to proven attempts by Russian actors to influence United States elections through digital political communications. Prelim. Inj. Mem. at 4. And plaintiffs are correct; the Act was passed in part as a response to efforts by foreign actors to use online advertising as a means to infiltrate the American political process and attempt to influence American voters without detection.[8] *See generally* Opp'n at 6-7. As Maryland's opposition

[8] Plaintiffs suggest that the only government interest supporting the Act is a concern about Russian ads on social-media and search-engine platforms like Facebook, Twitter, and Google. But there is already evidence of other foreign actors attempting to influence the 2018 elections. *See, e.g.*, Anne Gearan & Felicia Sonmez, *Trump Issues New Order Authorizing Additional Sanctions for Interfering in Upcoming U.S. Elections*, Wash. Post (Sept. 12, 2018), https://wapo.st/2xsIdZW(citing recent national security warnings that Russian efforts to undermine American elections continue, along with potential threats from China, Iran, and North Korea); Editorial Board, *Russia and Iran Are Already Trying to Influence the 2018 Elections. Congress Must Act Now*, S.F. Chron. (Aug. 24, 2018), https://bit.ly/2PY8bLP. There is no reason to suppose that these renewed efforts will avoid use of ads on plaintiffs' online platforms. Indeed, as Maryland's opposition notes, at 7 & nn.10-11, Google's affected platforms in 2016 included its

explains, *id.* at 7, some reports indicate that Maryland was one of the three states most targeted by foreign efforts to place undisclosed political ads during the run-up to the 2016 election.

But preventing interference by foreign actors was not the only interest underlying the Act. As Maryland's opposition details, *see id.* at 5-9, the Act serves a broader purpose of updating Maryland's regulatory scheme to address the dramatic shift to online political advertising in recent years and respond to the availability of sophisticated new targeting tools that "had not been seen before with regard to traditional advertising media." *See* Opp'n at 5 (citing the "eightfold increase" in spending on online political in 2016 compared to 2012). Because Maryland's (and other states') existing disclosure rules "'were written when campaign material was primarily in print form,'" they left large loopholes for materials and advertisements distributed online. Opp'n at 8 (quoting testimony by Presidents of the League of Women Voters of Maryland).[9] These loopholes deprived the public of important information regarding online political advertising, while also "undermining the traditional enforcement tools available to regulators." *Id.* at 5.

As *Citizens United* makes clear, Maryland's interest in increasing and improving the availability of public information about online political ads is an independently sufficient basis for

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DoubleClick ad network, which places advertisements on the websites of many of the plaintiffs in this action.

[9] Plaintiffs themselves acknowledge that other states have also taken steps to modernize their campaign finance rules to account for the increase of online political advertising. *See* Prelim. Inj. Mem. at 21 n.14 (discussing new disclosure rules in New York and Washington). The Federal Election Commission is similarly in the process of revising its disclaimer rules to account for online advertisements. *See* FEC, Notice of Proposed Rulemaking Regarding Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12864, 12864 (Mar. 26, 2018) (proposing amendments to update existing disclaimer rules regarding certain political communications distributed on the internet). These other efforts to address the internet loophole in political disclosure requirements only confirm the importance of Maryland's interest in updating its own regulations. At the same time, plaintiffs' preference for any of these other approaches, *e.g.*, Prelim. Inj. Mem. at 21 n.14, is irrelevant; the only constitutional question properly raised here is whether Maryland's disclosure requirements are substantially related to an important government interest. They are.

upholding the Act's disclosure provisions. 558 U.S. at 369. That the Act further seeks to advance the state's indisputably important interest in preventing foreign actors from surreptitiously influencing American elections "simply reinforces the constitutionality of the Act's application" to the online political ads distributed to the public on plaintiffs' websites. *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three-judge court) (upholding federal disclosure requirements for pre-election political advertisements that mention candidates, and relying in part on the fact that such requirements "ensure that foreign nationals or foreign governments do not seek to influence United States' elections"), *aff'd*, 137 S. Ct. 1204 (2017).[10]

Requiring online platforms that accept paid political advertising to post on their websites and retain in their records information that identifies the sources, costs, information about the candidate or ballot issue to which the ad relates, and information about the distribution of the ad, *see* Md. Code Ann. Elec. Law § 13-405(b), (c), is substantially related to the informational and

[10] The precise extent to which undisclosed foreign political ads may already have been placed on plaintiffs' websites is not material. *Compare* Prelim. Inj. Mem. at 6 (suggesting a lack of evidence regarding "any efforts to place deceptive foreign advertising on any newspaper's website or on any platform other than Facebook, Google or Twitter"), *with* Opp'n at 7 & nn.10-11 (explaining that "some of Google's impacted platforms included its DoubleClick ad network, which Plaintiffs concede places advertisements on the websites of many of the plaintiffs in this action"). Setting aside that Maryland's informational interest is independently sufficient to demonstrate the Act's constitutionality, the legislative and public record is also sufficient to support Maryland's interest in preventing foreign interference, including through advertising on plaintiffs' websites. *See generally* Opp'n at 7-9. Even if there are no documented attempts to place such ads on plaintiffs' websites yet, Maryland clearly was not required to wait for the clear risk of foreign interference to spread before it could take legislative steps to protect its citizens. *See supra* n.8 (discussing anticipated interference by multiple foreign governments in the upcoming elections). Indeed, even in the context of the strict scrutiny standard that applies to more intrusive speech regulations, the Supreme Court has recognized that "most problems arise in greater and lesser gradations, and the First Amendment does not confine a state to addressing evils in their most acute form." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (explaining, in the distinct context of a state law that limited the amount individuals may contribute to candidates, that the "quantum of empirical evidence needed" to satisfy First Amendment scrutiny "will vary up or down with the novelty and plausibility of the justification raised").

democracy-protecting interests underlying the Act. Plaintiffs argue that the Act is unconstitutional because it compels disclosure "based on the State of Maryland's assessment of what information about online political ads the public should know." Prelim. Inj. Mem. at 16. But all disclosure laws necessarily are premised on a government determination about the type of information that should be disclosed for the public's benefit. That has never been seen as a constitutional problem undercutting the strong public interest being served. *See, e.g.*, *Citizens United*, 558 U.S. at 369 (explaining that disclosure and disclaimer requirements are constitutional because they "'provid[e] the electorate with information,' and 'insure that voters are fully informed' about the person or group who is speaking" (quoting *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 76) (citation omitted)); *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Real Truth About Abortion*, 681 F.3d at 548-49, 551-52 (recognizing that "mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy," and quoting the Supreme Court's observation that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist") (quoting *Buckley*, 424 U.S. at 68)); *Ctr. for Individual Freedom*, 697 F.3d at 490 ("The need for an effective and comprehensive disclosure system is especially valuable after *Citizens United*, since individuals and outside business entities may engage in unlimited political advertising so long as they do not coordinate tactics with a political campaign or political party."); *Nat'l Org. for Marriage*, 649 F.3d at 57 (recognizing the government's "compelling interest in identifying the speakers behind politically oriented messages," and explaining that "[i]n an age characterized by the rapid

multiplication of media outlets and the rise of internet reporting," "[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin").

D. Plaintiffs' arguments about their compliance burdens are factually and legally flawed.

The Act requires that the person "who directly or indirectly requests placement of a qualifying paid digital communication on an online platform" must simultaneously notify the platform that the communication is covered by the Act. Md. Code Ann. Elec. Law. § 13-405(a)(1). It further requires the purchaser of such communications to "provide the online platform that disseminates the qualifying paid digital communication with the information necessary for the online platform to comply with" the disclosure and recordkeeping requirements that the Act imposes on online platforms. *Id.* § 13-405(d)(1). And the Act explicitly entitles online platforms to "rely in good faith on the information provided by a purchaser of a qualifying paid digital communication to comply with" such requirements. *Id.* § 13-405(d)(2). In other words, the Act does *not* require online platforms to determine which advertisements are subject to disclosure, nor does it require them to independently ascertain the information they are required to disclose, or to independently verify the information provided by the ad purchaser.

Plaintiffs ignore these provisions and insist that the Act imposes "burdensome" and "onerous" obligations that will require their newspapers to "divert resources from their normal activities" to obtain information that they have not previously sought and kept in the normal course of business. Prelim. Inj. Mem. at 10, 14, 21. As described above, the Act's actual provisions make clear that plaintiffs' characterizations of their obligations under the Act are exaggerated.

But even setting aside these factual problems, plaintiffs' burden claims are also legally deficient for at least two independent reasons. First, plaintiffs rely on these claims as purported support for their misplaced strict scrutiny arguments. *See* Prelim. Inj. Mem. at 2 (arguing that the

Act "cannot withstand strict scrutiny . . . because it burdens both substantially more speech and substantially more speakers than is necessary to pursue the aims of the Act"). As explained *supra* at pp. 10-14, strict scrutiny is the wrong framework for evaluating the disclosure requirements challenged here, and the Act thus need not be narrowly tailored or the least restrictive means of achieving Maryland's important interests. And while plaintiffs may incur some financial costs to comply with their disclosure and recordkeeping duties under the Act, "[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [the law] upon freedom of expression." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring). Courts have found in various circumstances that a law does not violate the First Amendment merely because it imposes a financial cost on a party engaged in expressive activity. *See, e.g.*, *Univ. of Pa. v. Equal Emp't Opportunity Comm'n*, 493 U.S. 182, 199-200 (1990); *AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. P'ship*, 6 F.3d 867, 871 (2d Cir. 1993); *Warner Cable Commc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 637-38 (11th Cir. 1990); *P.A.M. News Corp.*, 514 F.2d at 277-78; *see also Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 46 n.27 (D.D.C. 2012) ("[C]ourts have consistently upheld the [Federal Election Campaign Act's] organizational, reporting, and disclosure requirements . . . despite the fact that compliance with such requirements imposes costs that necessarily divert organizational resources away from" the organization's principal activity), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014). Indeed, "*Buckley* itself upheld the Act's reporting requirements, despite the Court's recognition that these requirements would financially burden campaigns by deterring some donors from contributing." *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 410 (D.C. Cir. 1996).[11]

[11] The D.C. Circuit has further held that where a law does not infringe on a First Amendment interest of the party challenging it, a court "need not balance the governmental interest behind the innovation against the alleged unconstitutional abridgement." *P.A.M. News Corp.*, 514 F.2d at 278.

Second, plaintiffs' argument that the Act "subjects [ ] core political speech to a series of onerous—and ultimately unconstitutional——regulations," Prelim. Inj. Mem. at 14, reveals that plaintiffs are attempting to claim a First Amendment harm *to themselves* from regulations that apply to *other people's speech*. In addition to raising fundamental standing questions,[12] that claim is at odds with plaintiffs' simultaneous statements distancing themselves from the advertisers whose speech is at issue. *See id.* at 16, 17 (distinguishing a "*speaker*" from the "forum in which the speech appears" and arguing that disclosure requirements may "properly [be] imposed" on the former but not the latter). Indeed, plaintiffs attempt to distinguish as inapplicable the disclosure holding in *Citizen United* on the basis that it only concerned "disclosure requirements placed on the *speakers* of election-related speech." *Id.* at 17. Plaintiffs' simultaneous claims that the Act violates their own First Amendment free speech rights and that the disclosure holding in *Citizens United* does not apply to them because the Act does not regulate their *own* speech are irreconcilable.[13]

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[12] To demonstrate Article III standing, a plaintiff must have suffered a concrete and particularized "injury in fact," there must be a "causal connection between that injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant,'" and it must be "likely" that a favorable decision will redress the plaintiffs' injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (brackets in original). Plaintiffs do not purport to be asserting third-party standing on behalf of their advertisers, nor do they identify any authority for their supposed First Amendment injury resulting from disclosure requirements that apply to another party's speech. For similar reasons, *amici* agree with and adopt Maryland's argument, Opp'n at 23-26, that plaintiffs lack standing to challenge the Act's definition of "qualifying paid digital communication," because the Act does not impose any legal obligations on plaintiffs that require them to interpret or apply the definition.

[13] Maryland suggests, Opp'n at 17, that the Court may construe plaintiffs' acceptance and distribution of political advertisements as engaging in affirmative speech that may be permissibly regulated in accordance with the Supreme Court's disclosure decisions. But the Court need not reach that question because, as explained *supra* p. 13, there is no basis for concluding that those decisions, or any of the numerous other decisions upholding disclosure requirements for political communications, *see supra* pp. 11-12 & n.7, are only binding insofar as a challenged disclosure law applies to the sources of such communications.

E. The Act does not impose any prior restraints on plaintiffs' speech.

Plaintiffs' prior restraint arguments are also fatally flawed. As a preliminary matter, plaintiffs fail to explain how an injunction requiring the removal of a third party's advertisement from one of plaintiffs' websites would amount to a prior restraint of *plaintiffs'* speech. As discussed above, plaintiffs themselves emphasize that they are not the *speakers* here.

But setting aside that fundamental problem, plaintiffs are simply wrong in characterizing the Act's injunction provisions as a "prior restraint" on any speech. It is true that the First Amendment affords "special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *see Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'"). But "[n]ot all injunctions that may incidentally affect expression [ ] are 'prior restraints.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994).

The Act itself does not prohibit any online platform from posting ads that fail to comply with its disclosure requirements, and thus does not "prohibit the publication or broadcast of particular information." *Neb. Press Ass'n*, 425 U.S. at 556. Further, although the Act permits the Attorney General to seek an injunction for removal of a noncompliant ad, this may only occur *after* the ad has been posted on an online platform and determined to violate the Act's disclosure requirements. Md. Code Ann. Elec. Law § 13-405.1(b). In other words, the Act does not authorize an action for an injunction until after the speech has been communicated. Finally, the removal of a noncompliant advertisement does not prevent either the advertiser or the online platform from communicating the same message, views, information, or commentary in the future; it merely

prevents continued noncompliance with the Act's disclosure requirements. It is thus plain from the Act's terms that neither its provisions nor the relief it authorizes amounts to a prior restraint on anyone's speech. *See Madsen*, 512 U.S. at 763 n.2 (declining to find that an injunction was a prior restraint where it was issued "not because of the content of petitioners' expression . . . but because of their prior unlawful conduct").

As plaintiffs recognize, "the special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.*, 413 U.S. at 390. As discussed above, however, the injunctive relief authorized under the Act does not suppress any speech; it merely enforces disclosure. And in any event, the Act provides substantial procedural protections before any injunction may issue. Md. Code Ann. Elec. Law § 13-405.1(b)(2)-(3). Plaintiffs baselessly suggest that such procedures do not allow for a determination whether the disclosure requirements are constitutional either on their face or as applied to a particular advertisement, Prelim. Inj. Mem. at 26, but nothing in the Act supports that conclusion. Indeed, there is no reason why such an argument could not be raised either in the administrative proceedings provided for under the statute, or in any judicial action seeking an injunction. These procedural protections are more than "adequate," *Pittsburgh Press Co.*, 413 U.S. at 390, and they are plainly sufficient to protect any possible First Amendment interests of the supplier of the online forum that hosts a potentially noncompliant ad.

CONCLUSION

Plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

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