No. 19-1132

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

THE WASHINGTON POST, et al.,

Plaintiffs-Appellees,

v.

DAVID MCMANUS, JR., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02527 (Grimm, J.)

BRIEF FOR AMICI CURIAE CAMPAIGN LEGAL CENTER AND COMMON CAUSE MARYLAND IN SUPPORT OF DEFENDANTS-APPELLANTS

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April 19, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, amici curiae Campaign Legal Center and Common Cause Maryland make the following disclosure regarding their corporate status:

Campaign Legal Center ("CLC") is a nonprofit, nonpartisan corporation organized under Section 501(c)(3) of the Internal Revenue Code. CLC neither has a parent corporation nor issues stock, and no publicly held corporation has any form of ownership interest in CLC.

Common Cause Maryland is a nonprofit, nonpartisan corporation dedicated to ensuring fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. Common Cause Maryland has no parent corporation and no publicly held corporation has any form of ownership interest in Common Cause Maryland.

Dated: April 19, 2019

CAMPAIGN LEGAL CENTER

/s/ Erin Chlopak
Erin Chlopak

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Act Is Not Subject to Strict Scrutiny. 4

A. Political disclosure laws receive less demanding constitutional scrutiny than other laws affecting speech. 5

1. Since *Citizens United*, federal circuit courts have uniformly reviewed political disclosure laws under exacting scrutiny 7

2. The district court's departure from this overwhelming authority was reversible error 11

3. The district court's reliance on court decisions that do not address political disclosure laws was misplaced 15

II. The District Court's Alternative Holding Misapplies Exacting Scrutiny. 19

A. The district court improperly constricted its consideration of the important interests advanced by the Act. 20

B. Disclosure laws need not be "narrowly tailored." 27

III. The Act *Advances* First Amendment Rights of Maryland Citizens. 29

CONCLUSION 32

TABLE OF AUTHORITIES

Cases **Page(s)**

Buckley v. American Constitutional Law Found., Inc. ("*ACLF*"),
525 U.S. 182 (1999) 6, 10, 13

Buckley v. Valeo,
424 U.S. 1 (1976) 5, 6, 31

Cahaly v. LaRosa,
796 F.3d 399 (4th Cir. 2015) 16, 17

Cent. Radio Co., Inc. v. City of Norfolk,
811 F.3d 625 (4th Cir. 2016) 19

Citizens United v. FEC,
558 U.S. 310, 366 (2010) .... *passim*

Ctr. for Individual Freedom v. Madigan,
697 F.3d 464 (7th Cir. 2012) 8, 9, 21, 22, 27

Ctr. for Individual Freedom, Inc. v. Tennant ("*CFIF*"),
706 F.3d 270 (4th Cir. 2013) 10, 11

Del. Strong Families v. Attorney Gen. of Del.,
793 F.3d 304 (3d Cir. 2015) 7, 9

Family PAC v. McKenna,
685 F.3d 800 (9th Cir. 2012) 9, 27

Free Speech v. FEC,
720 F.3d 788 (10th Cir. 2013) 8, 27

Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.,
721 F.3d 264 (4th Cir. 2013) 19

Human Life of Wash., Inc. v. Brumsickle,
624 F.3d 990 (9th Cir. 2010) 8, 27, 31

Indep. Inst. v. Williams,
812 F. 3d 787 (10th Cir. 2016) 7

John Doe No. 1 v. Reed,
561 U.S. 186 (2010) 6, 12

Justice v. Hosemann,
771 F.3d 285 (5th Cir. 2014) 7-8, 9, 21-22, 27

McConnell v. FEC,
540 U.S. 93 (2003) 5, 6, 13, 14, 31

Minn. Citizens Concerned for Life, Inc. v. Swanson,
692 F.3d 864 (8th Cir. 2012) 8

Nat'l Inst. of Family & Life Advocates v. Becerra ("*NIFLA*"),
138 S. Ct. 2361 (2018) 15, 17, 18

Nat'l Org. for Marriage v. McKee,
649 F.3d 34 (1st Cir. 2011) 8, 27

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 30

Ognibene v. Parkes,
671 F.3d 174 (2d Cir. 2011) 26

P.A.M. News Corp. v. Butz,
514 F.2d 272 (D.C. Cir. 1975) 32

Pursuing America's Greatness v. FEC,
831 F.3d 500 (D.C. Cir. 2016) 17

Randall v. Sorrell,
548 U.S. 230 (2006) 29

Real Truth About Abortion, Inc. v. FEC,
681 F.3d 544 (4th Cir. 2012) 2, 7, 8

Reed v. Town of Gilbert,
135 S. Ct. 2218 (2015) 15, 16

Reynolds v. Sims,
377 U.S. 533 (1964) 30

Rodriguez de Quijas v. Shearson,
490 U.S. 477 (1989) 15-16

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 8, 27

United States v. Harriss,
347 U.S. 612 (1954) 31-32

Vt. Right to Life Comm., Inc. v. Sorrell,
758 F.3d 118 (2d Cir. 2014) 7, 27

Williams-Yulee v. Fla. Bar,
135 S. Ct. 1656 (2015) 26

Worley v. Fla. Sec'y of State,
717 F.3d 1238 (11th Cir. 2013) 7, 27, 29

Yamada v. Snipes,
786 F.3d 1182 (9th Cir. 2015) 29

Statutes

2018 Md. Laws ch. 833 2

47 U.S.C. § 315(e) 13

Other Authorities

Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 So. Cal. L. Rev. 1223 (2018) 22

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Hearing on Online Electioneering Transparency and Accountability Act Before the Md. S. Comm. on Educ., Health, & Envtl. Affairs, 2018 Sess., at 1:31:15-50, http://mgahouse.maryland.gov/mga/play/0f183b99-dfef-4eb4-8dbe-b1f6369a3d56/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c 23

STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that works to strengthen and defend campaign finance law. 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).

Amicus Common Cause Maryland is a nonpartisan grassroots organization with over 20,000 members and supporters. 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 and to empower all people to make their voices heard in the political process.

Amici were strong supporters of Maryland's Online Electioneering Transparency and Accountability Act and participated in the preliminary injunction proceedings below.

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1 All parties have consented to the filing of this brief. No party's counsel or any other person except amici and their counsel authored this brief or contributed money to fund its preparation or submission. Amici do not request oral argument.

SUMMARY OF ARGUMENT

In April 2018, the Maryland General Assembly passed legislation to address serious gaps in the state's campaign finance disclosure regime. Although Maryland law already required public disclosures in connection with certain campaign advertising, the Online Electioneering Transparency and Accountability Act, 2018 Md. Laws ch. 833 ("Act"), includes updates that require disclosures about paid digital political advertisements by the platforms that distribute them. The Act responds to the dramatic migration of political advertising to digital platforms and accounts for unique features that make digital platforms particularly appealing to those seeking to influence voters without detection.

As the district court correctly acknowledged, the Supreme Court and twelve federal appellate circuits, including this one, have consistently held that "record-keeping, reporting, or disclosure provisions of a campaign finance law" are analyzed under a "less stringent 'exacting scrutiny' standard," *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012), which requires the law to be "'substantially related' to an 'important' government interest." J.A. 433. The district court dismissed that overwhelming authority, however, and

misconstrued the Act's digital disclosure requirements as restrictions on political speech that must satisfy the more demanding "strict scrutiny" standard. J.A. 443. Under strict scrutiny, a law must be "narrowly tailored" to achieve a "compelling" government interest. J.A. 443. The district court's erroneous conclusion that the Act's disclosure requirements are subject to strict scrutiny should be reversed.

But the district court's alternative conclusion—that the provisions are unlikely to survive exacting scrutiny—is equally flawed. The court imported strict scrutiny elements into its exacting scrutiny analysis and compounded that error by giving short shrift to the important informational interest the Act advances. The court's dismissive treatment of that interest is particularly troubling because informing the public about who is behind electoral messages is the most frequently invoked and well-accepted justification for political disclosure requirements.

By closing Maryland's digital disclosure loophole, the General Assembly advanced the state's important interest in ensuring that Maryland citizens have prompt, direct, and easy access to information about the sources and financing of digital political ads. The Act also

facilitates detection and enforcement of other campaign finance violations by ensuring that online platforms preserve information about the digital political ads they disseminate after the ads disappear from their websites. Maryland's interests in promoting an informed electorate and identifying and preventing violations of other campaign finance rules are each important and substantially related to the Act's disclosure provisions.

The fundamental flaws in the district court's constitutional analysis require reversal of the decision below. At a minimum, this case should be remanded with instructions regarding the proper application of exacting scrutiny to the Act's disclosure requirements.

ARGUMENT

I. The Act Is Not Subject to Strict Scrutiny.

The district court's principal holding—that the Act's disclosure provisions are subject to strict scrutiny—is wrong. The Supreme Court, this Court, and eleven sister circuits have unanimously held that political disclosure laws are reviewed under the more relaxed "exacting scrutiny" standard. Disclosure laws do not prevent anyone from speaking and they *promote* important First Amendment interests by enabling citizens to

make informed choices in the political marketplace. The decision below improperly relies on decisions that have nothing to do with political disclosure. The district court's strict scrutiny determination should be reversed.

A. Political disclosure laws receive less demanding constitutional scrutiny than other laws affecting speech.

The Supreme Court has long recognized that disclosure requirements are "a less restrictive alternative to more comprehensive regulations of speech," and while disclosure rules "may burden the ability to speak," they "do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366, 369 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McConnell*, 540 U.S. at 201, *overruled in part on other grounds by Citizens United*, 558 U.S. 310 (2010)). As discussed in greater detail *infra* Part III, disclosure laws also *further* First Amendment interests by enabling citizens "to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197. Thus, for over 40 years, the Supreme Court has repeatedly held that political disclosure requirements, including reporting and recordkeeping rules, are properly reviewed under an

intermediate, "exacting" level of constitutional scrutiny.[2] *Citizens United*, 558 U.S. at 336; *McConnell*, 540 U.S. at 231-32; *Buckley*, 424 U.S. at 64, 66; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases); *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 202 (1999) ("*ACLF*") (explaining that *Buckley v. Valeo* upheld federal campaign finance recordkeeping, reporting, and disclosure provisions under exacting scrutiny). A disclosure law satisfies exacting scrutiny if it is "substantial[ly] relat[ed]" to a "sufficiently important" government interest. *Citizens United*, 558 U.S. at 366. Exacting scrutiny is less demanding than strict scrutiny, which requires a law to be "narrowly tailored" to achieve a "compelling" government interest. *Id.* at 340.

In *Citizens United*, eight Justices emphasized the importance of a "campaign finance system . . . with effective disclosure" and upheld federal disclosure requirements, including on-ad disclaimers, for certain pre-election broadcast ads that mention federal candidates. *Id.* at 370. The Court reaffirmed that disclosure requirements need not be narrowly tailored and are constitutional if they are substantially related to the

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[2] For simplicity and because the Act's disclosure and recordkeeping requirements are both subject to exacting scrutiny, amici refer to the challenged provisions collectively as "disclosure requirements."

government's interest in informing the electorate about the financing of political ads. *Id.* at 369 ("Because the informational interest alone is sufficient . . . it is not necessary to consider the Government's other asserted interests."). The Court explained that "[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," and embraced political disclosure requirements as the antidote to unlimited corporate election spending. *Id.* at 369.

1. Since *Citizens United*, federal circuit courts have uniformly reviewed political disclosure laws under exacting scrutiny.

"[E]very one of [the twelve] Circuits who have considered the question" since *Citizens United*—including this Court—"have applied exacting scrutiny to disclosure schemes." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013) (collecting cases); *see Real Truth About Abortion*, 681 F.3d at 549.[3]

[3] Since *Worley* was decided, the Second, Third, and Fifth Circuits have joined this Court and the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuit Courts of Appeals in upholding various state and federal disclosure regimes under exacting scrutiny. *See, e.g.*, *Indep. Inst. v. Williams*, 812 F. 3d 787, 795 (10th Cir. 2016); *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 310-12 (3d Cir. 2015); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 131 (2d Cir. 2014); *Justice v.*

Lower courts have routinely invoked *Citizens United* in upholding a broad range of federal and state disclosure laws, confirming the universal understanding that exacting scrutiny applies to disclosure requirements and rejecting suggestions that *Citizens United* established a constitutional ceiling for permissible disclosure rules. For example, in *Real Truth About Abortion*, this Court upheld a federal regulation used to determine whether an organization must comply with administrative and reporting requirements for federal political committees. The Court rejected the plaintiff-appellant's argument that such obligations are "onerous" and subject to strict scrutiny, explaining that those requirements "neither prevent [plaintiff] from speaking nor 'impose [a] ceiling on campaign-related activities.'" 681 F.3d at 548, 549 (quoting *Buckley*, 424 U.S. at 64).

Hosemann, 771 F.3d 285, 301 (5th Cir. 2014); *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 477-78 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1016 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). The Eighth Circuit also applied exacting scrutiny to political disclosure requirements, but invalidated certain aspects of a Minnesota law imposing perpetual reporting requirements on every association wishing to make independent expenditures. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75, 877 (8th Cir. 2012) (en banc).

Likewise, in *Center for Individual Freedom v. Madigan*, the Seventh Circuit upheld an Illinois statute that imposed disclosure requirements in connection with digital ads, concluding that "voters have just as much a stake in knowing who is behind such messages as when they are broadcast in traditional media." 697 F.3d 464, 492-93 (7th Cir. 2012); *id.* at 470, 480-99 (describing additional ways in which Illinois's political disclosure laws are broader than federal parallels but still within constitutional bounds); *see also Del. Strong Families*, *supra* note 3, 793 F.3d at 307, 310, 311 (upholding requirement to disclose certain contributors to those spending more than $500 on "third-party advertisements"; holding that low thresholds were appropriate for a "small state" with a "unique election landscape"); *Justice v. Hosemann*, *supra* note 3, 771 F.3d at 299-301 (upholding state reporting requirements for political committees and individuals spending more than $200 to support or oppose state constitutional amendments); *Family PAC v. McKenna*, 685 F.3d 800, 804, 809-11 (9th Cir. 2012) (upholding requirements that ballot measure committees disclose names and addresses of contributors who give more than $25 and occupations and employers of contributors of more than $100).

In the vast majority of political disclosure cases, courts have upheld the challenged laws. *See supra* note 3. But even in the rare cases where courts found particular political disclosure requirements to be unconstitutional, those courts still recognized that Supreme Court precedent mandates exacting scrutiny. For example, in *Buckley v. American Constitutional Law Foundation, Inc.*, the Supreme Court distinguished between requiring disclosure of the names and amounts spent by proponents of a referendum petition and disclosure of the names and income of individuals paid to circulate the petition. *ACLF*, 525 U.S. at 203. The Court held that exacting scrutiny applied to both types of disclosure, but found the latter requirements to be "no more than tenuously related to the substantial interests disclosure serves." *Id.* at 204.

In another case, this Court applied exacting scrutiny to a West Virginia law defining and requiring disclosure of "electioneering communications," but found the law to be fatally *under*inclusive. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270 (4th Cir. 2013) ("*CFIF*"). The Court concluded that West Virginia had a sufficiently important interest in informing the electorate about who is paying for

electioneering communications in print media, and that the state's evidentiary burden was low because that informational interest is "a well-accepted rationale." *Id.* at 283. But the Court struck down the statute because it "regulate[d] periodicals to the exclusion of other non-broadcast media." *Id.* at 285.[4]

The district court cited these decisions and even described *ACLF* as "particularly instructive," J.A. 452, but it ignored that the decisions all confirm that the Act's disclosure requirements are subject to exacting, not strict, scrutiny.

2. The district court's departure from this overwhelming authority was reversible error.

Rather than follow the overwhelming weight of authority, including binding decisions from the Supreme Court and this Court, the district court concluded that "*Buckley* is not the starting point" and "the general rule [is] that compelled disclosure laws, like all content-based

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[4] The district court here inexplicably cited *CFIF* as support for applying strict scrutiny "because the Maryland statute regulates electioneering communications—indisputably a form of political speech." J.A. 425; *see* J.A. 422-23, 425 (suggesting the Act's disclosure provisions "plainly implicate[]" the principle that "laws burdening political speech are subject to strict scrutiny"). In fact, this Court in *CFIF* broadly recognized that "*all* campaign finance-related disclosure requirements" are "subject to exacting scrutiny." 706 F.3d at 291 (emphasis added).

regulations, must overcome strict scrutiny." J.A. 439. That conclusion is wrong. *Buckley* is part of the Supreme Court's "series of precedents considering First Amendment challenges to disclosure requirements in the electoral context," *all* of which apply exacting scrutiny. *John Doe No. 1*, 561 U.S. at 196 (collecting cases).

The district court attempted to distinguish this case from all of the other decisions reviewing political disclosure laws under exacting scrutiny. J.A. 434-35. But it wrongly claimed that "each of those cases" concerned disclosure requirements that applied to the sources of electoral advocacy, *i.e.*, the "individuals or groups seeking to influence an election or ballot question," and not "ostensibly neutral third parties." J.A. 434-35. The Supreme Court has clearly held otherwise.

Most recently, in *John Doe No. 1*, the Court invoked its "series of precedents" applying exacting scrutiny to "disclosure requirements in the electoral context" to uphold a public records law requiring the State of Washington to publicly disclose referendum petitions, including information about those who sign the petitions. 561 U.S. at 196. Washington, of course, was a neutral third party.

In *ACLF*, the Supreme Court applied exacting scrutiny to a law

requiring disclosure of the names, addresses, and amounts paid to individuals who were employed by proponents of a referendum petition to circulate the petition. 525 U.S. at 202-04. Although the duty to disclose fell on the referendum proponents, the *information* subject to disclosure concerned petition circulators—"ostensibly neutral third parties." The court nevertheless analyzed the disclosure requirement under exacting scrutiny. *Id.* at 203.[5]

The Supreme Court's decision in *McConnell* also undercuts the decision below. In *McConnell*, the Court upheld a provision in the Bipartisan Campaign Reform Act ("BCRA"), 47 U.S.C. § 315(e), requiring broadcasters to maintain and disclose records of ad purchases relating to, *inter alia*, candidates, elections, and "any political matter of national importance." 540 U.S. at 246. Although the Court did not declare which standard of scrutiny it was applying when it upheld the broadcaster

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[5] The Court's substantive determination in *ACLF*—that revealing information about those paid to circulate the petition was not substantially related to "the substantial interests disclosure serves," 525 U.S. at 203—does not control the outcome here. Unlike the law at issue in *ACLF*, the Act does not require online platforms to reveal information about *their own* identities but rather it requires them to provide information about paid political advertisements the platforms disseminate on their websites.

disclosure requirements, it invoked the same government interests courts consider when analyzing other political disclosure requirements under exacting scrutiny. *See id.* at 237, 239 (explaining that broadcaster disclosure requirements will help the public "determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate" and will help police "compliance with the disclosure requirements and source limitations of BCRA and the Federal Election Campaign Act"). Moreover, the underlying three-judge district court decision explicitly applied exacting scrutiny to BCRA's broadcaster requirements in light of the Supreme Court's "insist[ence] that any law compelling disclosure of campaign information must be reviewed under 'exacting scrutiny.'" *McConnell v. FEC*, 251 F. Supp. 2d 176, 811 (D.D.C. 2003) (Leon, J.); *id.* at 375 (Henderson, J.).[6]

[6] At a minimum, *McConnell* provides an example of the Supreme Court approving of disclosure requirements for "ostensibly neutral third parties" that facilitate advocacy by "individuals or groups seeking to influence an election or ballot question." J.A. 434-35.

3. The district court's reliance on court decisions that do not address political disclosure laws was misplaced.

To support its strict scrutiny determination, the district court relied on cases from outside the political disclosure context, including two Supreme Court decisions that the district court interpreted to "strongly suggest" that *Buckley*'s exacting scrutiny standard "should [be] view[ed] . . . narrowly." J.A. 439-40. But neither *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), nor *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), even mentions *Buckley* or otherwise cites a single one of the Supreme Court's political disclosure holdings, let alone purports to narrow the scope of those holdings.[7] The district court's inference thus violated the well-settled principle that if a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts

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[7] *Reed* and *NIFLA* cite the part of *Citizens United* invalidating the former ban on corporations and unions directly financing independent expenditures. *NIFLA*, 138 S. Ct. at 2378 (citing *Citizens United*, 558 U.S. at 340); *Reed*, 135 S. Ct. at 2230, 2231 (same). Those explicit discussions of *the other part* of *Citizens United* undermine the district court's inference that the Supreme Court in *Reed* and *NIFLA* separately intended to limit the scope of *Citizens United*'s disclosure holding despite nowhere mentioning that part of the decision.

"should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989). More importantly, neither *Reed* nor *NIFLA* even implicitly rejects the rationale underlying *Buckley* and its progeny.

In *Reed*, the Supreme Court applied strict scrutiny and struck down a local ordinance imposing restrictions on the permissible size, location, and duration of outdoor signs that varied based on the sign's message. 135 S. Ct. at 2230. The law invalidated in *Reed* was not a disclosure requirement and there was no suggestion that it promoted any of the competing First Amendment interests that political disclosure rules promote, *see infra* Part III. Subsequent decisions from this Court and the D.C. Circuit underscore the fundamental difference between political disclosure rules and the speech restrictions invalidated in *Reed*.

For instance, in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), which the district court cited, *see* J.A. 423, this Court invalidated a state law that *banned* certain categories of robocalls, including robocalls "of a political nature." 796 F.3d at 402, 405-06. The Court relied on *Reed* and found the anti-robocall statute to be a content-based restriction subject

to strict scrutiny. *Id.* at 402. Importantly, in concluding that the ban was not narrowly tailored, the Court suggested "mandatory disclosure of the caller's identity" as one "[p]lausible less restrictive alternative[]" means of achieving the government's asserted interests. *Id.* at 405.

The D.C. Circuit took a similar approach in *Pursuing America's Greatness v. FEC*, where it relied on *Reed* to enjoin a law prohibiting certain political committees from using candidate names in the committees' own names, and suggested the Federal Election Commission could impose *broader disclosure requirements* as a less restrictive alternative. 831 F.3d 500, 510-11 (D.C. Cir. 2016).

Cahaly and *Pursuing America's Greatness* both undermine the district court's view that *Reed* requires political disclosure requirements to be scrutinized in the same manner as other types of laws affecting speech.

NIFLA also does not support the decision below. In that case, the Supreme Court applied strict scrutiny and struck down a law requiring pregnancy-related clinics to disseminate certain information, including material about state-sponsored family-planning services available elsewhere. 138 S. Ct. at 2368, 2370. The Court emphasized that unlike

other disclosure requirements it had upheld, the law at issue in *NIFLA* was "not limited to 'purely factual and uncontroversial information'" and "in no way relate[d] to the services that licensed clinics provide." *Id.* at 2372 (citation omitted) (explaining that the law required clinics to disclose information about abortion services available elsewhere, which was "anything but an 'uncontroversial' topic").

The Act bears no resemblance to the provision invalidated in *NIFLA*. Its disclosure provisions *are* limited to "purely factual and uncontroversial information" and that information *directly* "relates to the services that [online platforms] provide." *Id.* Moreover, although the Supreme Court in *NIFLA* reversed the Ninth Circuit's determination that a "'lower level of scrutiny' . . . applies to regulations of 'professional speech,'" it acknowledged that Supreme Court precedents apply "a lower level of scrutiny to laws that compel disclosures in certain contexts." *Id.* at 2370, 2372 (citation omitted). As discussed *supra* in Part I.A.1, political disclosure requirements are one such context, as both this Court and the Supreme Court have repeatedly reaffirmed.

Neither *Reed* nor *NIFLA* purports to overrule the Supreme Court's holdings that political disclosure requirements are subject to exacting

scrutiny and neither case supports the district court's application of strict scrutiny here.[8]

II. The District Court's Alternative Holding Misapplies Exacting Scrutiny.

The alternative holding below—that the Act's disclosure requirements fail to satisfy exacting scrutiny—is also fatally flawed, for at least two reasons. First, the district court focused almost exclusively on Maryland's interest in preventing foreign election interference, barely acknowledging Maryland's important interests in informing its citizens and preventing campaign finance violations by domestic actors. Second, the court improperly imported strict scrutiny's "narrow tailoring" requirement into its exacting scrutiny analysis.

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[8] This Court's decisions in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264 (4th Cir. 2013), and *Central Radio Co., Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016), which respectively involve laws similar to those challenged in *NIFLA* and *Reed*, also do not suggest strict scrutiny is appropriate here. Neither decision even mentions *Buckley*, *Citizens United*, *Real Truth About Abortion*, or any other case concerning political disclosure requirements.

The district court's reliance on various other cases outside the political disclosure context, J.A. 422-24, is misplaced for the same reasons.

A. The district court improperly constricted its consideration of the important interests advanced by the Act.

The district court correctly recognized that Maryland's interest in promoting electoral transparency is "sufficiently important" and even "compelling," but it dismissed that interest as "secondary" and ignored how the Act's disclosure provisions advance Maryland's transparency goals. *See* J.A. 445, 451.[9] Indeed, two of the three listed reasons for finding the Act "ill suited" to Maryland's mission identify that mission exclusively as "rooting out foreign attempts to interfere in its elections." J.A. 453, 454 (describing two of the Act's "most critical defects" as failing to "target the deceptive practices" that foreign operatives used during the 2016 election and being "poorly calibrated to prevent foreign operatives from evading detection"). And the third reason identified for concluding the Act fails exacting scrutiny—that it is duplicative, although "not entirely duplicative," J.A. 453—is both factually incorrect and more

[9] In contrast, the decision extensively details the state's interest in preventing foreign interference. J.A. 411-15, 444-45, 448-49, 451, 454-55.

The decision's strict scrutiny analysis similarly focuses on foreign interference while barely mentioning Maryland's other interests. *See, e.g.*, J.A. 449 (criticizing the Act for applying to platforms that may not have featured "foreign-sourced paid political ad[s]").

consistent with strict scrutiny's "narrow tailoring" requirement than the "substantially related" requirement under exacting scrutiny. *See infra* at 25-26, 28-29.

The court failed to consider Maryland's need to update its disclosure requirements to account for the massive increase of digital political advertising. *See* Appellants' Br. 5-6, 7; J.A. 117-18, 129, 131, 136, 138; *Madigan*, 697 F.3d a 492-93 (recognizing that "a large and growing proportion of electioneering has been occurring online," "[c]ampaigns, parties, and advocacy groups have increasingly turned to the Internet to reach the electorate with campaign messages," and "voters have just as much a stake in knowing who is behind such messages as when they are broadcast in traditional media"); *Justice*, 771 F.3d at 298 ("In an age characterized by . . . the rise of internet reporting, the 'marketplace of ideas' has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for

reliability and a barometer of political spin.") (quoting *Nat'l Org. for Marriage*, 649 F.3d at 57).[10]

It likewise ignored that the Act's disclosure requirements account for unique features of advertising on digital platforms—including the opportunity to target digital ads to specific audiences and the ephemeral nature of digital content—which make digital ads a particularly attractive tool for influencing voters without detection. *See* Appellants' Br. 5, 43; J.A. 117-18, 133; *Madigan*, 697 F.3d at 492 ("Thanks to advanced Internet marketing strategies, campaigns and other political actors have now 'acquired the technical capacity to target Web ads with the precision of mail or a door-to-door canvass.'").[11]

Amicus Common Cause Maryland's Executive Director Damon Effingham described the unique concerns presented by digital

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[10] *See also* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 So. Cal. L. Rev. 1223, 1249 (2018) (explaining that "[o]nline political advertising differs from older forms of political advertising in important ways," including that "it is more likely to be untraceable by the public or candidates hoping to speak to the same audience," and arguing in favor of "a regulatory framework that accounts for the differences").

[11] *See also* Wood & Ravel, *supra* note 10, at 1225 (discussing the difficulties of tracing the financing of digital political ads that are "'micro-

advertising at a March 1, 2018 hearing before the Maryland Senate Committee on Education, Health, and Environmental Affairs. Effingham explained that requiring online platforms to keep records of digital ads is "really important" to ensuring that candidates are able to "call[ ] foul" on other campaigns that violate the law through targeted ads.[12] "If your opponent never sees the ad and can't because it's targeted to people completely outside of you, you have much less ability to cry foul when someone is putting out an ad that violates Maryland's law."[13] As Effingham emphasized, targeted ads do not merely implicate concerns about foreign interference; Maryland candidates and other domestic actors also use ad targeting to limit the intended audience of their political communications. Nor is ad targeting limited to "social media giants," J.A. 449. As the Maryland-Delaware-D.C. Press Association's

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targeted' at narrow segments of the electorate, based on their narrow political views or biases").

[12] *Hearing on Online Electioneering Transparency and Accountability Act Before the Md. S. Comm. on Educ., Health, & Envtl. Affairs*, 2018 Sess., at 1:31:15-50, http://mgahouse.maryland.gov/mga/play/0f183b99-dfef-4eb4-8dbe-b1f6369a3d56/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c.

[13] *Hearing on Online Electioneering Transparency*, *supra* note 12, at 1:31:50-1:32:00.

legislative testimony confirms, news media organizations also "use [ad] targeting offered by industry software platforms." J.A. 133.

The decision below also misperceives the value that disclosure requirements provide even when ad buyers disclose false or no information. Far from rendering the Act ineffective, J.A. 455, missing or false disclosures can provide a starting point for journalists, watchdog groups, and law enforcement agencies to investigate and detect efforts by foreign *or* domestic actors to promote political ads without disclosing their true identity. Amicus CLC recently illustrated this very point, using ad archives to detect efforts by national super PACs to influence 2018 congressional races in a variety of states through digital ads that concealed who was actually financing the ads.[14]

The district court's superficial assessments that the Act's requirements for online platforms are "duplicative" and provide no

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[14] *See* Brendan Fischer & Maggie Christ, *Digital Deception: How a Major Democratic Dark Money Group Exploited Digital Ad Loopholes in the 2018 Election*, CLC (2019), https://campaignlegal.org/sites/default/files/2019-03/FINAL%20Majority%20Forward%20Issue%20Brief.pdf; Brendan Fischer & Maggie Christ, *Dodging Disclosure: How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms* 13-14, CLC (2018), https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf.

"useful insights" to voters are also unfounded. J.A. 453, 454; *see* Appellants' Br. 43-45. The court cited existing disclosure requirements for political committees and people who spend at least $10,000 on independent expenditures or pre-election political ads, J.A. 447-48, but the Act's disclosure requirements apply more broadly to any qualifying paid digital communication disseminated on an online platform, J.A. 102 (Md. Code Ann., Elec. Law § 13-405(a)(1)).

And even to the extent these disclosure requirements partially overlap, they still are not duplicative, as appellees' counsel demonstrated during the district court proceedings. *See* J.A. 258:16-17, 259:4-6 (acknowledging that attempting to identify a particular ad expenditure by navigating through "rows and rows and rows of data" on state election board's website can be "cumbersome," particularly if "you were actually trying to be a member of the public understanding where ads come from"). The Act's disclosure requirements are unique in their facilitation of simple, direct, point-of-contact access to information about paid digital political ads; the requirements *do* provide "useful insights" to voters. J.A. 454; *see Citizens United*, 558 U.S. at 370 ("[M]odern technology makes disclosures rapid and informative."); Appellants' Br. 45-46.

The district court's failure to seriously consider how the Act's disclosure requirements are related to Maryland's informational interest was an error, even if the legislative record "primarily" emphasized Maryland's goal of thwarting foreign election interference. J.A. 445-46.[15] The existence and importance of the government's interest in providing voters with information necessary to make informed choices at the ballot box are so well-established that courts routinely accept that interest as self-evident, without requiring the legislature to have expressly detailed the interest in enacting the disclosure requirements. *E.g.*, *Vt. Right to*

[15] The court's conclusion that the Act is not substantially related to preventing foreign election interference was also misguided. Even if "available evidence" suggests that foreign actors directed their 2016 election interference activities "to Facebook, Instagram, and other global social media platforms," J.A. 454, the First Amendment does not require Maryland to give foreign actors "at least one chance" to interfere on other platforms "before anything can be done." *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011) ("There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures."); *see* Appellants' Br. 47 (explaining that "the extent to which [Russian] activity affected other platforms—including those of plaintiffs—is unknown"). Even in the context of *strict* scrutiny, 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).

Life Comm., 758 F.3d at 133, 138; *Justice*, 771 F.3d at 297-99; *Free Speech*, 720 F.3d at 798; *Worley*, 717 F.3d at 1238; *Madigan*, 697 F.3d at 477-78; *Family PAC*, 685 F.3d at 806, 809; *Nat'l Org. for Marriage,* 649 F.3d at 39-40; *Human Life of Wash.*, 624 F.3d at 1006-08; *SpeechNow.org*, 599 F.3d at 696-97.

Moreover, under exacting scrutiny, "the government may point to *any* 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." *SpeechNow.org*, 599 F.3d at 696 (emphasis added); *see Citizens United*, 558 U.S. at 369 (declining to consider government's other asserted interests "[b]ecause the informational interest alone is sufficient"). A court may not ignore some of the interests underlying a law merely because they could be construed as "secondary." J.A. 451.

Because the district court did not fully consider Maryland's informational interest or its interest in preventing violations of state laws by *domestic* actors, the court's constitutional analysis was deficient.

A. Disclosure laws need not be "narrowly tailored."

Even when it invoked "exacting scrutiny," the district court imposed a stringent level of review tantamount to strict scrutiny,

erroneously requiring the government to employ "a means *narrowly tailored* to achieve the desired objective." J.A. 451 (emphasis added). Indeed, the court's strict and exacting scrutiny analyses both fault the Act for failing to focus on the precise manner in which, and specific platforms where, foreign actors are known to have interfered during the 2016 election, and both rely on the existence of other provisions requiring information about some (but not all) of the ads covered by the Act to be disclosed elsewhere. *Compare* J.A. 446-50, *with* J.A. 453-55. As the strict scrutiny portion of the decision illustrates, these are narrow-tailoring inquiries, not a review of whether the Act's disclosure requirements are "substantially related" to Maryland's multiple objectives.[16]

[16] The district court concluded that Maryland could have accomplished "the Act's goal of neutralizing foreign influence" in Maryland elections through "a more narrowly tailored regulation," such as by setting a lower threshold for which "online platforms" are subject to the Act. J.A. 449. Beyond requiring narrow tailoring and disregarding Maryland's informational interests, that conclusion improperly dismissed the General Assembly's legislative judgment about what threshold is best for Maryland. *See Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006) (plurality opinion) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments."); *Yamada v. Snipes*, 786 F.3d 1182, 1200 (9th Cir. 2015) ("Although we carefully scrutinize the constitutionality of a legislature's chosen threshold for imposing registration and reporting

III. The Act *Advances* First Amendment Rights of Maryland Citizens.

Finally, the district court ignored that the Act *promotes* the First Amendment interests of self-government and democratic accountability. The decision itself acknowledges that the freedom of speech guaranteed by the First Amendment serves "to ensure 'that government remains responsive to the will of the people.'" J.A. 422 (citation omitted). The court erred, however, in ignoring that disclosure rules like the Act *promote* these First Amendment interests.

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

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requirements, . . . the precise 'line is . . . best left in the context of this complex legislation to [legislative] discretion.'" (alteration in original) (citation omitted)); *Worley*, 717 F.3d at 1253 ("Challengers are free to petition the legislature to reset the reporting requirements . . . but we declined to do so here.").

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. More generally, a key purpose of the First Amendment is to preserve "uninhibited, robust, and wide-open" public debate. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). By providing the public with information that is crucial to self-governance, disclosure laws expand robust debate and advance First Amendment interests. This is why "disclosure requirements have become an important part of our First Amendment tradition." *Human Life of Wash.*, 624 F.3d at 1022.

The decision below fundamentally misperceives the Act's disclosure requirements and disregards how political disclosure rules promote First Amendment interests. The Supreme Court has already criticized parties 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. Far from denouncing the targeted nature of political disclosure laws, the Supreme Court has repeatedly upheld them precisely *because* disclosing

the sources of election-related spending advances the public's "interest in knowing who is speaking about a candidate" and the government's important interest in ensuring "'that the people will be able to evaluate the arguments to which they are being subjected.'" *Citizens United*, 558 U.S. at 368, 369; *see McConnell*, 540 U.S. at 197; *Buckley*, 424 U.S. at 66-67 (noting that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive"); *cf. United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding disclosure requirements for lobbyists, which "merely" require "a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose").

The Act advances the First Amendment rights of Maryland citizens by "increasing, not limiting, the flow of information. The [F]irst [A]mendment profits from this sort of governmental activity." *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: April 19, 2019

CERTIFICATE OF COMPLIANCE

I, Erin Chlopak, hereby certify:

1. I am a member of the bar of this Court.

2. The electronic version of this Brief of Amici Curiae in Support of Appellants is identical to the text of the paper copies.

3. A virus detection program was run on the file and no virus was detected.

4. The brief contains 6077 words within the meaning of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. In making this certification, I have relied on the word count of the word-processing system used to prepare the brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated: April 19, 2019

/s/ Erin Chlopak
Erin Chlopak

CERTIFICATE OF CONCURRENCE TO FILE BRIEF

I certify that all parties have consented to the filing of this Brief by *Amici Curiae*.

Dated: April 19, 2019

/s/ Erin Chlopak
Erin Chlopak

CERTIFICATE OF SERVICE

I certify that on April 19, 2019, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

Dated: April 19, 2019

/s/ Erin Chlopak
Erin Chlopak