No. 19-1132

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE WASHINGTON POST, *ET AL.*,

Plaintiffs-Appellees,

v.

DAVID J. MCMANUS, JR., *ET AL.*,

Defendants-Appellants.

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

Amicus Curiae Brief of the Institute for Free Speech in Support of Plaintiffs-Appellees

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June 7, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Allen Dickerson Date: June 7, 2019

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Interest of *Amicus Curiae*[1]

Founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission, the Institute for Free Speech is a § 501(c)(3) nonpartisan, nonprofit organization that defends the rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society groups, *pro bono,* in cases raising First Amendment objections to the regulation of core political activity.

Summary of Argument

This case concerns a sweeping regulation of political speech undertaken in the name of national security. JA 409; Op. Br. at 5-7; Ans. Br. 7-9. The Parties' arguments focus, in large part, upon the correct standard of scrutiny. Should Maryland's law by evaluated under "strict" or "exacting" scrutiny? But that question is not dispositive. The law fails under either standard.

Maryland's law requires press entities and Internet advertisers to amass vast amounts of information—every buyer of advertisements and their underlying donors—in order to *possibly* find a Russian spy posing as an American. Maryland bears the burden of proof on this score, and even under exacting scrutiny, it failed to

[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the Institute's participation as *Amicus Curiae*.

carry that burden. In fact, Maryland's law is both overbroad and underinclusive. It regulates virtually all paid online political activity, but does not concern itself with the primary weapon used by the Russian Federation in 2016: free online content.

Ultimately, Maryland's asserted interest in attacking foreign interference cannot survive serious scrutiny. Its law will do little to advance that cause while chilling political speech and association at the core of the First Amendment's protections. Accordingly, regardless of the standard of First Amendment scrutiny, Maryland's law cannot survive this Court's review—either as a misguided national security measure or as a poorly constructed campaign finance law.

Argument

I. Maryland bears the burden of proving both a suitable governmental interest and the proper tailoring of its law to that interest.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,'" which "of course includ[es] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Mills v. Ala.*, 384 U.S. 214, 218 (1966)). When state governments regulate precisely that form of speech, they do not receive the benefit of the doubt. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that purpose") (quotation marks and citation omitted).

Nevertheless, Maryland contends that its novel and comprehensive regulation of online political speech need not be reviewed under strict judicial scrutiny. Op. Br. at 25; JA 427; JA 443. *Amicus* disagrees. But even if Maryland is correct, and this appeal is decided under exacting scrutiny, the district court should be affirmed. Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). It is instead a "strict test," *Buckley*, 424 U.S. at 66, requiring an analysis of the burdens imposed, and whether those burdens advance the state's interest. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling opinion) ("In the First Amendment context, fit matters."). Moreover, because Maryland's law is a novel and expansive one, and not merely a retread of some longstanding legislative approach, it must provide substantial, concrete, and empirical evidence that its law will actually accomplish its end. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

The Parties and the district court all agree that Md. Code Ann., Elec. Law § 13-405 was initiated in response to revelations that "Russia exploited social media in a campaign to sway public opinion" both before and during the 2016 election. JA 410 (district court opinion); *see also* JA 17-19 ¶¶ 37-40 (complaint describing

legislative history); Op. Br. at 5-7. Maryland correctly identifies the actors as "Russian operatives"[2] that fraudulently presented themselves as American citizens in order to distribute propaganda online, mostly via social media posts. Op. Br. at 6. As the district court correctly observed, this interest in countering foreign influence, "Russia, in particular," JA 415, is "the Act's primary purpose." JA 445.

Under exacting scrutiny, however, Maryland cannot simply point to a problem and boldly claim that its speech regulation will address it. The Supreme Court has rejected "mere conjecture as adequate to carry a First Amendment burden." *Shrink Mo.*, 528 U.S. at 392; *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural") (citation and punctuation omitted, ellipses added). And here, where the State acts in a novel fashion, it must make its case. *Shrink Mo. Gov't PAC*, 528 U.S. at 391. Exacting scrutiny is, after all, called that for a reason. This heightened form of review is necessary because "[d]isclosure chills speech," *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016). It ensures that

[2] "Operative" is a term of art to describe individuals conducting espionage on behalf of a foreign power. *See, e.g., United States v. Squillacote*, 221 F.3d 542, 548 (4th Cir. 2000) (describing an East German "operative," who was "performing intelligence work on behalf of East Germany and other socialist countries").

laws do not "cover[] so much speech" that they undermine "the values protected by the First Amendment." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion").

II. Maryland has not demonstrated that its law is properly tailored to deter foreign expenditures, which is unsurprising because the law instead targets Americans.

Amicus concedes "that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court) *summ. aff'd* 565 U.S. 1104 (2012). And *Amicus* "applaud[s] and support[s] the investigation and prosecution of foreign nationals who impersonate Americans to interfere in U.S. elections." Inst. for Free Speech, "Statement on Indictments of 13 Russians for Interfering in 2016 Election" (Feb. 16, 2018) ("Statement on Indictments").[3]

But it is for this Court to determine if Maryland's reaction is appropriately tailored to that end. This "inquiry of whether the interest (the end) is 'important

[3] https://www.ifs.org/news/institute-for-free-speech-statement-on-indictments-of-13-russians-for-interfering-in-2016-election/

enough' . . . is informed by an examination of the regulation (the means) purportedly addressing that end." *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th Cir. 2005) (en banc). If "the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest" is insufficient or illusory. *Id.* Under exacting scrutiny, "the strength of the governmental interest must reflect the seriousness" of the burden imposed. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008); *Doe v. Reed*, 561 U.S. 186, 196 (2008) (citing same). This Court has required no less. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288 (4th Cir. 2008) ("Narrowly construing the definition of political committee . . . ensures that the burdens of political committee designation only fall on entities whose primary, or only, activities are within the 'core' of Congress's power to regulate elections") (citation omitted).[4]

What would such a showing look like? The Supreme Court's decisions in

[4] The Fourth Circuit is not alone. Sister Circuits also demand a proper balance between a law's burdens and the information gained. The Tenth Circuit held Colorado's campaign finance requirements impermissibly burdened the organization's First Amendment rights, when it balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal." *Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010); *cf. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275, 1281 (10th Cir. 2016) (applying *Sampson* to a larger, more formal entity, and holding the donor disclosure of $3,500 in expenditures did not justify violating First Amendment privacy); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1029-30 (9th Cir. 2009) (finding that a campaign finance disclosure statute could "not be applied to…conduct [that] neither causes an economic detriment to the [entity] nor carries an ascertainable market value").

Nixon v. Shrink Missouri Government PAC and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), are instructive. In *Shrink*, Missouri, in the interest of fighting corruption, had essentially cloned the federal contribution limits upheld by the Supreme Court in *Buckley v. Valeo*. *Shrink Mo.*, 528 U.S. at 394. As the anticorruption interest was precisely the interest identified in *Buckley*, Missouri was able to prove its interest on the basis of a rather modest record. By contrast, in *McConnell*, the government was doing something unprecedented: regulating "candidate advertisements masquerading as issue ads" that aired shortly before an election. *McConnell*, 540 U.S. at 132 (citation and quotation marks omitted). Applying exacting scrutiny, that innovation[5] required a significant showing, and the government needed to build a 100,000-page record in order to demonstrate that, at least facially, its law was appropriately tailored to a real and concrete problem. *McConnell*, 540 U.S. at 127 ("[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election").

Maryland, unlike Missouri, is not following the well-tread path of federal campaign finance laws. Instead, it is striking out on its own, intending to fight foreign expenditures by imposing broad disclosure burdens on social media and

[5] As opposed to the public file requirement imposed upon broadcasters by 47 U.S.C. § 315(e).

newsgathering organizations. Op. Br. at 9-11. In such circumstances, more is required than the State has provided.

Maryland asserts that its law is necessary "[i]n light of the evidence that Russian operatives infiltrated ad networks." *Id.* at 47. Yet, for all its reliance on revealing foreign misbehavior, Op. Br. at 42, *id.* at 46-48; *id.* at 50, Maryland does little to carry this burden. Its evidentiary support is limited to fleeting citations to legislative testimony or news articles. Op. Br. 47 (citing JA 119-20; *id.* at 133); *compare McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam) (100,000 page record of experts, affidavits, and evidence); *with* JA 117-38 (21 pages of legislative testimony); Op. Br. at 7 (news article). For case law, it invokes stray dicta from *Independence Institute v. Federal Election Commission,* a case involving a Colorado nonprofit lacking even a whiff of foreign entanglement. Op. Br. at 42 (citing 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three-judge court) *summ. aff'd* 580 U.S. ___, 137 S. Ct. 1204 (2017)). And the state generally notes that *Buckley* blessed donor disclosure. *Id.*

The State's slender showing (call it *Shrink*-like) is troubling, because it suggests that Maryland's law may not be targeting hostile foreign powers at all. This would not be terribly surprising—Maryland is a poorly positioned to conduct foreign policy, a fact reflected in the Supreme Court's repeated decisions rebuffing other

states attempts to do just that.[6] As nefarious as the Soviet Union was, states could not undermine executive agreements permitting the Soviets to seize property in state-based banks, *United States v. Belmont*, 301 U.S. 324 (1937), or use their probate powers to prevent East German nationals from collecting inheritances during the Cold War. *Zschernig v. Miller*, 389 U.S. 429 (1968).

Put differently, the judiciary is required to assess whether a state's asserted interest lies is an area of "traditional competence." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003). There is reason to believe Maryland's national security concerns do not qualify, in part because it has failed to explain *why* its Board of Elections, as opposed to Congress and the President, is appropriately positioned to deter future political expenditures undertaken by hostile foreign powers.[7]

This failure is especially pernicious where the State claims to be "limiting the participation of foreign citizens in activities of American democratic self-government," but its law will principally fall upon American citizens and media

[6] After all, Congress holds the powers to, *inter alia*, "provide for the common Defence," U.S. Const., art. I, § 8, cl. 1, and to "declare War," *id*. cl. 11. The President is Commander-in-Chief of the Armed Forces, *id*., art. II, § 2, and "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

[7] Russian operatives have shown that they will "brazenly violate[] multiple campaign finance laws already on the books, including prohibitions on expenditures by foreign citizens, disclaimer rules, and mandatory reporting requirements." Statement on Indictments. The State must explain why its approach will nevertheless be effective.

corporations participating in "activities of democratic self-government." *Bluman*, 800 F. Supp. 2d at 288. While this case involves established media corporations like the *Washington Post* and the *Baltimore Sun*, Maryland's law applies to every American wishing to get their message out, for a relatively low cost, on the Internet. Indeed, Maryland's law requires press entities and Internet advertisers to amass vast amounts of information—every buyer of advertisements and their underlying donors—in order to *possibly* find a Russian spy posing as an American. Md. Code Ann., Elec. Law § 13-405; Op. Br. at 47. The obvious costs imposed on speakers and press entities alike will only be compounded when other states adopt similar laws mandating similar dragnets—a near-certain occurence if Maryland's law is given constitutional sanction by this Court. Already, Washington has adopted a similar, though less onerous, law in response to Russian interference, and advertising networks like Google responded by simply refusing to run political ads.[8]

By contrast, Russian online advertising spending *in the entirety of the United States* appears to have been modest, especially as Moscow was attempting to tilt the national election. Special Counsel Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election: Volume I of II*, U.S. Dep't of Justice at 25, https://ig.ft.com/files/mueller_report.pdf

[8] Google, Update to Political content policy (June 2018) https://support.google.com/adspolicy/answer/9039396?hl=en&ref_topic=29265.

("Mueller Report") ("According to Facebook, the IRA purchased over 3,500 advertisements, and the expenditures totaled approximately $100,000"). Maryland's response to this spending, however, has been to regulate virtually all social media and online advertising activity—a massive overreaction. The Internet "is the new soapbox; it is the new town square." *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014). Maryland's law is aimed squarely at the Internet's boundless opportunity for Americans "discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324.

Yet, despite this sweep, Maryland's law is also underinclusive. The Russian threat was the "primary purpose" behind the law, JA 445, yet Russian online activity appears to have been conducted predominantly via *free* social media networks, where "the [operatives] created social media accounts that pretended to be the personal accounts of U.S. persons" or "created accounts that mimicked real U.S. organizations." Mueller Report at 22. But since Maryland's law focuses squarely on *paid* advertisements, not disclosure of foreign propaganda via free activity (like a Twitter post), the new law will miss most similar activity in the future.[9] "Maryland's

[9] The state argues that having everyone else register would highlight the "*absence* of the required disclosure information for a non-compliant ad," and therefore trigger an investigation. Op. Br. at 50 (emphasis in original). The state does not further clarify how this would work—or how Russians, who are already committing fraud, would not simply also lie in their disclosure made pursuant to Md. Code Ann., Elec. Law § 13-405.

statute . . . regulates substantially more speech than it needs to while, at the same time, neglecting to regulate the primary tools that foreign operatives exploited." JA 446. While "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech . . . [u]nderinclusiveness can also reveal that a law does not actually advance a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656, 1668 (2015) (emphasis removed). Here, sweeping in so much data on Americans speaking about politics and policy, while simultaneously failing to detect Russian imposters, suggests that this law will be a poor counterespionage tool.

Such a "substantial mismatch," *McCutcheon*, 572 U.S. at 199, between ends and means cries out for more than the news stories, anecdotes from office holders, and bits of legislative testimony proffered here.

This gap is all the more evident because less restrictive means of attacking foreign campaigning are readily available. For example, the Foreign Agents Registration Act ("FARA") requires *foreign principals and their American agents* to comply with ongoing registration and reporting requirements. 22 U.S.C. § 614(a) and (d). The Attorney General is tasked with making the resulting files open for public inspection. 22 U.S.C. §§ 614(c), 616(a). Perhaps enactment of a "mini-FARA" to deter foreign expenditures would more properly serve Maryland's needs.

Too often, in times of greater risk than these, Americans have abandoned

liberty in favor of illusory security. When the courts have gone along with these efforts, it has often been to their chagrin.[10] In *Schenck v. United States*, the Supreme Court approved the government's theory that antiwar protestors could "create a clear and present danger" to national security. 249 U.S. 47, 49, 52 (1919). Upon reflection (and with some embarrassment), *Schenck* was narrowed decades later in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). This Court need not repeat the error.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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[10] Judicial ratification of these efforts creates "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting); *cf. Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Id*. (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

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