

Federal Court Enjoins Maryland Internet Disclosure Law

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A U.S. District Court has preliminarily enjoined Maryland's implementation of the Maryland Online Electioneering Transparency and Accountability Act. The law, enacted in May 2018, requires social media and press websites that carry online advertising to collect information about the sponsors of political ads and to publish that information for state and public inspection. The law would impose burdens on websites such as *The Washington Post*, *The New York Times*, Facebook, Twitter, and similar websites that sell online advertising space.

"All compelled disclosure laws implicate the Free Speech Clause," the court wrote, "but laws imposing those burdens on the media implicate a separate First Amendment right as well: the freedom of the press." (Slip op. at p. 31). After noting the lack of clarity in case law over whether disclosure in the campaign finance area triggers "strict scrutiny" or "exacting scrutiny," the court applied "strict scrutiny," demanding Maryland to prove its law directly advanced a "compelling" governmental interest that could not be achieved by a lesser restricted means.

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

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

The case is *Washington Post, et al. v. David J. McManus, Jr., et al.* (Case No. PWG-18-2527) and is pending in the U.S. District Court for the District of Maryland. The judge is federal District Court Judge Paul Grimm.

The court decision has important implications for legislative efforts, like the Honest Ads Act in Congress and other state laws, that attempt to regulate Internet-based advertising platforms. In several respects the Maryland law is less burdensome than the burdens (including civil and criminal liability) proposed for web and press platforms in the Honest Ads Act. The court decision will likely introduce caution in Congress.

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