

Appeals Court Says First Amendment Limits Regulation of Online Political Advertising: Implications for Congress

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The proliferation of online political advertising has sparked a [national](#) conversation about its perceived harms. Some have argued that online political ads are [more likely](#) than their offline counterparts to include [false claims and facilitate foreign influence in U.S. elections](#). These criticisms have led to calls for more government regulation of online political advertising, and some government officials have responded to that call. For example, in June, the chair of the Federal Election Commission (FEC), the federal entity that generally regulates political campaign communications, [advanced](#) a rule proposal that would require certain online political advertisements to contain attribution statements, known as *disclaimers*. Another example is the Honest Ads Act, which would extend federal campaign finance law disclosure and disclaimer requirements to online platforms for paid internet and paid digital communications and would require online platforms to maintain a publicly available file of requests to purchase certain political advertising. That bill was incorporated into [H.R. 1 \(116th Cong.\)](#), which passed the House in March 2019, and has been reintroduced as a stand-alone bill in both the [House](#) and the [Senate](#). While there have been few, if any, enacted federal laws focusing on online political advertisements, a number of states have [passed legislation](#) on this front.

However, regulation of political speech can raise free speech concerns, and laws regulating online political advertising may be susceptible to constitutional challenges. On December 6, 2019, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) [ruled](#) in *Washington Post v. McManus* that parts of a Maryland law regulating online political advertising violated the First Amendment because they impermissibly burdened political speech, as applied to certain online publications. This Sidebar discusses the *McManus* decision and what it suggests about possible constitutional limitations on Congress's ability to regulate in this area.

Background

Maryland enacted the [Online Electioneering Transparency and Accountability Act](#) (OETA or the Act) in May 2018. The Act extends the state's campaign finance disclosure requirements for television, radio, and print advertisements to online political advertisements, requiring *ad purchasers* to make specific

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The Constitution of the United States
The Bill of Rights
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disclosures about their identity and how much they spent. These requirements were not challenged in *McManus*. But the Act also imposes disclosure and recordkeeping requirements on *online platforms* that host paid political advertisements. Specifically, for federal and state elections, covered platforms must publish certain information about the political advertisements they host, including “the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad.” The Act also imposes recordkeeping obligations, *compelling* platforms to collect and retain certain records about the purchasers and make them available for inspection by the state. Under the Act, “online platform” means “any public-facing website, web application, or digital application . . . that: (1) has 100,000 or more unique monthly United States visitors or users . . . ; and (2) receives payment for qualifying paid digital communications.”

The *Washington Post* and other newspapers that qualified as online platforms subject to OETA *challenged* the Act’s disclosure and recordkeeping requirements in court, arguing that these provisions violated constitutional protections for free speech and free press. The *trial court* sided with the plaintiffs and granted a preliminary injunction preventing the state from enforcing the Act against the plaintiffs while litigation proceeds. On appeal, the Fourth Circuit *affirmed* this decision.

The Supreme Court has outlined a wide variety of tests that courts should use to evaluate First Amendment challenges to laws, depending on the particular circumstances. If a law targets speech because of its content or compels someone to speak, it will generally be subject to an analysis known as “*strict scrutiny*” and will be presumed unconstitutional unless the government proves that the law is “narrowly tailored to serve compelling state interests.” On the other hand, the Court has said that some disclaimer and disclosure requirements targeting *political* or *commercial* speech can, at times, be subject to a lower level of scrutiny, meaning that they will be more likely—but not guaranteed—to be upheld as constitutional. Thus, for example, in *Citizens United v. FEC*, the Supreme Court said that certain *disclaimer and disclosure requirements* in the Federal Election Campaign Act (FECA) survived “*exacting scrutiny*,” a standard of review requiring the regulation to be substantially related to “a ‘sufficiently important’ governmental interest.” The Court has *stated* that in certain circumstances, disclaimer and disclosure requirements may be more constitutionally permissible because, in contrast to a ban or limitation on certain types of speech, they “impose no ceiling on campaign-related activities,” and “do not prevent anyone from speaking.” Thus, disclosures are generally less restrictive of speech. But only certain types of disclosure requirements will qualify for this more lenient standard.

Fourth Circuit Decision in *Washington Post v. McManus*

In *McManus*, the Fourth Circuit *suggested*, but did not squarely hold, that OETA should be subject to strict scrutiny because it contained “a compendium of traditional First Amendment infirmities.” The court *ruled* that the Act targeted “one particular topic of speech—campaign-related speech,” making the Act “a content-based regulation.” Further, the type of speech targeted was “political speech,” which *courts* generally regard as especially important and worthy of heightened protection. The court also *emphasized* that the Act compelled speech, which would generally also trigger strict scrutiny.

According to the Fourth Circuit, the state had a higher burden of proof because the law applied to online platforms. Unlike *other campaign finance regulations* that have survived judicial scrutiny, the court *observed*, OETA “burdens *platforms* rather than political actors.” The court *said* that OETA’s requirements made it more expensive for the newspapers to host political advertisements due to compliance costs and potential penalties. The court *expressed* concern that platforms, whose primary motivation for hosting advertisements is raising revenue, would be unlikely to host political advertisements if they were subject to disclosure and recordkeeping requirements: as the Fourth Circuit *noted*, at least one online platform had already stopped hosting political advertisements in Maryland, citing the new requirements. By contrast, in the view of the court, these types of requirements are less likely to deter political actors, who have non-financial motivations for placing political advertisements—

such as winning elections or raising awareness about certain issues. Consequently, the court believed that imposing disclosure and recordkeeping requirements on platforms raised more significant concerns about chilling speech.

The Fourth Circuit also suggested that OETA's requirements should be subject to heightened scrutiny because they were being imposed on newspapers. While recognizing that the Supreme Court has approved of similar disclosure obligations imposed on *broadcasters*, the Fourth Circuit concluded that these cases should not necessarily govern its consideration of requirements imposed on newspapers' websites. The court **emphasized** that the Supreme Court has allowed greater regulation of the broadcast industry, as compared to other types of media. The Fourth Circuit referenced a 1997 decision in which the Supreme Court **ruled** that the special factors allowing the government to more freely regulate broadcast—namely, the history of regulation of the industry, the scarcity of broadcast frequencies, and its invasive nature—were “not present in cyberspace.” Additionally, the Fourth Circuit **said** the Constitution also provides more protection for “news products.” Citing Supreme Court cases recognizing that editors have a First Amendment right to select what material goes into their newspapers, the court **suggested** that OETA raised significant constitutional concerns by forcing news outlets to publish certain information, and brought “the state into an unhealthy entanglement with news outlets.”

Ultimately, however, the Fourth Circuit **said** that it was unnecessary to decide whether strict or exacting scrutiny applied because the state failed “even the more forgiving standard of exacting scrutiny.” The appeals court **noted** that the state's primary justification for the law was that it would “help deter foreign interference in its elections.” But in the court's view, OETA was not appropriately tailored to achieve this interest. The Fourth Circuit **concluded** that by focusing on *paid* content supporting specific candidates or ballot initiatives, the Act did not regulate the type of *unpaid* issue advertising that foreign nationals had primarily used in the past to attempt to influence the electorate. According to the court, OETA was too narrow in this respect. The Fourth Circuit also **said** that the Act was too broad in other respects: namely, in which online platforms it included. After noting that most foreign interference had occurred on larger social media sites, the court **held** that the state had not sufficiently demonstrated, based on “facts on the ground,” that it needed to apply the law to news sites or smaller platforms.

Implications for Congress

The Fourth Circuit's ruling in *McManus* limits Maryland's enforcement of the challenged portions of the OETA for the time being and does not appear to directly affect any federal laws. However, the decision may provide some insight into how federal courts would review any federal laws imposing disclosure requirements on online platforms that host political advertisements.

First, should Congress decide to impose disclosure and recordkeeping requirements on *online platforms*, instead of regulating only the political speakers placing the advertisements, *McManus* suggests that such legislation may raise more serious First Amendment concerns. As the Fourth Circuit observed, the Supreme Court has **upheld** “customary” campaign finance laws requiring disclosure and disclaimers by political actors who purchase ads because such requirements, although they may burden speech, do not limit or prevent speech. In contrast, as discussed above, the Fourth Circuit determined that imposing costly disclosure and recordkeeping requirements on online platforms, who are motivated primarily by financial interests, is more likely to deter speech. In the case of foreign or anonymous actors, it may be difficult to enforce disclosure requirements on those individuals' content without regulating the platforms.

Second, the *McManus* decision suggests that courts will apply a heightened level of constitutional scrutiny to laws that apply outside broadcast media. The Supreme Court has **held** that in general, government regulation of online content would be subject to ordinary levels of scrutiny, meaning that as compared to broadcast regulation, regulation of internet media is more likely to be unconstitutional. Further, as the *McManus* court pointed out, courts have been particularly skeptical of laws that interfere

with newspapers' ability to exercise [editorial control](#) over their content. Because newspapers brought the *McManus* challenge, the Fourth Circuit expressly [stated](#) that it was not addressing "the wide world of social media." However, some commentators have [suggested](#) that other online platforms should be viewed as analogous to newspaper editors, in the sense that they also exercise editorial discretion in deciding what content to host and should therefore receive similar First Amendment protection. If courts were to agree with this view, then any regulation requiring other types of online platforms to host or take down content or make disclosures about that content could be subject to heightened constitutional review.

Therefore, should Congress decide to impose disclosure and recordkeeping requirements on online platforms comparable to OETA's, courts may require a robust justification for such regulation under a heightened standard of review before finding them constitutional. Moreover, even if the disclosure requirements qualify for review under one of the more lenient standards that sometimes apply to political or commercial disclosure requirements, the Supreme Court may have [signaled in one recent decision](#) that courts should apply those lower standards more rigorously. Although the Supreme Court has upheld FECA's current disclosure and disclaimer requirements under exacting scrutiny as discussed above, to the extent that any new requirements serve other government interests or address the problem in an alternative way, courts might evaluate these regulations differently. Congress would likely have to explain what interest the law serves and why this law is appropriately tailored to address this concern. In particular, *McManus* suggests that Congress may want to carefully justify any decisions to impose disclosure or recordkeeping requirements on the platforms themselves, as opposed to ad purchasers, and explain why the covered platforms should be subject to such requirements, perhaps considering whether to exempt news sites or smaller platforms. Finally, should Congress decide to impose disclosure and recordkeeping requirements that have a lower regulatory burden and lesser penalties, as compared with OETA, courts may be more likely to uphold them.

The legal landscape is likely to evolve further on this issue. [Other states](#) beyond Maryland have imposed disclosure requirements on online platforms. Challenges to those laws could generate more case law evaluating the constitutionality of these types of requirements. Further, if Maryland appeals the Fourth Circuit's decision, the Supreme Court [could](#) weigh in on the issue. Finally, in deciding whether and how to regulate political advertising on online platforms, Congress may want to consider the facts on the ground. Platforms are changing their policies about hosting political advertisements in response to [public pressure](#), [state laws](#), and [international](#) regulation. For example, Facebook [requires](#) political advertisers to complete an authorization process and [maintains](#) a library of political advertisements. By contrast, Twitter has [decided](#) to ban some political advertising altogether. For discussion of some of the policy considerations that may go into regulating online political advertising, see [this In Focus](#).

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