FIRST AMENDMENT — CAMPAIGN FINANCE — FOURTH CIRCUIT INVALIDATES MARYLAND'S ONLINE CAMPAIGN ADVERTISING DISCLOSURE LAW. — *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).

Congress passed § 230 of the Communications Decency Act of 1996[1] to reduce internet intermediaries' liability for third-party content.[2] In the first appellate case to interpret the scope of § 230's protections, the Fourth Circuit read the statute broadly by invoking the collateral censorship theory.[3] Collateral censorship is a form of indirect censorship that occurs when the imposition of liability on a private intermediary incentivizes it to censor another private party's speech.[4] Although the theory looms large in § 230 precedent, the Supreme Court has not extended it to First Amendment cases involving internet services.[5] Recently, in *Washington Post v. McManus*,[6] the Fourth Circuit relied on the logic of collateral censorship to invalidate a Maryland campaign finance disclosure law aimed at online campaign advertising.[7] It did so under an exclusively First Amendment inquiry, despite the fact that plaintiffs had also claimed relief under § 230.[8] By deciding the case on constitutional as opposed to statutory grounds, the Fourth Circuit took a step toward the constitutionalization of collateral censorship as a First Amendment basis for exempting internet intermediaries from otherwise applicable laws.

The 2016 U.S. presidential election revealed an online electioneering landscape that had far outpaced its regulatory counterpart.[9] This revelation, coupled with partisan gridlock at the federal level,[10] prompted several state efforts to extend campaign disclosure requirements to online advertising.[11] Maryland's Online Electioneering Transparency and Accountability Act[12] was one such effort, and it imposed disclosure obligations on websites that reached a certain circulation and received

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[1] 47 U.S.C. § 230.

[2] *See* Eric Goldman, Essay, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 33, 36 (2019).

[3] *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 317 (2011) (noting that *Zeran* relied on "collateral censorship, although the court did not use that term").

[4] *See* Wu, *supra* note 3, at 295–96.

[5] Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2312–13 (2014).

[6] 944 F.3d 506 (4th Cir. 2019).

[7] *See id.* at 516.

[8] *See id.* at 510; Wash. Post v. McManus, 355 F. Supp. 3d 272, 284 (D. Md. 2019).

[9] *See* Brian Beyersdorf, Note, *Regulating the "Most Accessible Marketplace of Ideas in History": Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1063–64 (2019).

[10] *Id.* at 1065.

[11] *See McManus*, 944 F.3d at 510.

[12] Ch. 834, 2018 Md. Laws 4220 (codified in scattered sections of MD. CODE ANN., ELEC. LAW).

payment for qualifying ads.[13] First, platforms had to disclose on their websites "the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad" (the "publication requirement").[14] Second, platforms had to collect and maintain a more extensive record for inspection by the Maryland Board of Elections upon state request (the "inspection requirement").[15] Shortly after the law took effect, a group of news outlets filed for a preliminary injunction, alleging facial and as-applied violations of the First Amendment, among other issues.[16]

The district court granted the news outlets' motion.[17] The court limited itself to the outlets' First Amendment claim, finding that the law was a content-based regulation of political speech and therefore subject to strict scrutiny.[18] While the court acknowledged that "First Amendment case law is fertile with exceptions to the various fundamental rules,"[19] it maintained that this case did not fit within any of those exceptions.[20] Specifically, the court rejected the State's argument that the Act fell under the campaign finance disclosure exception articulated by the Supreme Court in *Buckley v. Valeo*,[21] and that it should thus be viewed under the less burdensome "exacting scrutiny" standard.[22] Still, the court found that the Act would fail even under the less stringent standard of exacting scrutiny.[23] Maryland appealed to the Fourth Circuit.[24]

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13 *McManus*, 944 F.3d at 511–12 (citing MD. CODE ANN., ELEC. LAW §§ 1-101(dd-1), 13-405(b)–(c) (Michie, LEXIS through legislation effective Nov. 6, 2020)).

14 *Id.* at 511 (citing MD. CODE ANN., ELEC. LAW § 13-405(b) (LEXIS)). The information had to be posted within forty-eight hours of the purchase and kept on the website for at least a year following the relevant election. *Id.* at 511–12.

15 *See id.* at 512, 514 (citing MD. CODE ANN., ELEC. LAW § 13-405(c) (LEXIS)). The inspection record included additional information such as "the candidate or ballot issue" addressed by the ad, the dates of first and last dissemination, a digital copy of the ad's content, the approximate geographic location of dissemination, a description of the audience targeted or receiving the ad, and "the total number of impressions generated." *Id.* at 514.

16 *See* Wash. Post v. McManus, 355 F. Supp. 3d 272, 284 (D. Md. 2019). The publishers also argued that the provision was "unconstitutionally vague, . . . authorize[d] an unconstitutional seizure . . . in violation of the Fourth Amendment," and was preempted by § 230. *Id.* The district court found the First Amendment claim sufficient for the plaintiffs to succeed in obtaining a preliminary injunction. *Id.* at 285.

17 *Id.* at 306.

18 *Id.* at 287, 297.

19 *Id.* at 287.

20 *Id.* at 297.

21 424 U.S. 1 (1976) (per curiam).

22 *McManus*, 355 F. Supp. 3d at 297; *see id.* at 288–97.

23 *Id.* at 302. Although the court found it evident that the State had compelling interests in preventing foreign meddling in elections, informing voters, and deterring corruption, the Act was overinclusive and underinclusive because, among other reasons, it was duplicative of advertisers' disclosure obligations, did not target fake websites and free social media posts, applied to a wide range of platforms, and was triggered only by ad buyers' disclosure that the law applied to their ads. *Id.* at 298–305.

24 *See McManus*, 944 F.3d at 513.

The Fourth Circuit affirmed on largely the same grounds.[25] Writing for a unanimous panel, Judge Wilkinson[26] detailed the "compendium of traditional First Amendment infirmities" afflicting the law.[27] "First, the Act [wa]s a content-based regulation [of] speech" because it applied to "campaign-related speech" only.[28] Second, the Act targeted political speech.[29] And last, the court held that the law compelled speech by forcing the outlets to disclose on their websites information that they otherwise would not disclose.[30] Moreover, the panel concluded that the Act's inspection requirement also compelled speech by requiring platforms to "collect and retain" details on campaign ads "to be disclosed to state regulators upon request."[31]

The State's characterization of the law as a campaign finance regulation was unavailing. The court recognized that under *Buckley* and its progeny, content-based regulations of political speech through campaign finance disclosures are permissible, because although they "may burden the ability to speak," they "do not prevent anyone from speaking."[32] But that logic is limited to regulations aimed at "*direct participants* in the political process," not "neutral third-party platforms" whose primary interest is not political substance, but revenue.[33] It reasoned that the Act's disclosure obligations and their attendant compliance costs made hosting political ads financially more burdensome, deterring profit-oriented platforms from hosting political ads.[34] The court found that this deterrence would "*necessarily* reduce[] the quantity of [political] expression," and held that such a law was outside the scope of *Buckley*.[35] The panel added that the Act's application to the press was especially troublesome. Because media outlets' advertising choices receive First Amendment protections, the publication requirement was an intrusion into the editorial discretion of the press.[36] The inspection requirement was similarly problematic because it created an "unhealthy entanglement" between the state and news outlets.[37]

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[25] *Id.* at 510.

[26] Judge Wilkinson was joined by Judges Motz and Floyd.

[27] *McManus*, 944 F.3d at 513.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 514.

[31] *Id.*

[32] *Id.* at 516 (quoting Citizens United v. FEC, 558 U.S. 310, 366 (2010)).

[33] *Id.* The court reasoned that political actors' ambition to succeed at the ballot box "generally offsets, at least in part, whatever burdens are posed by disclosure obligations." *Id.*

[34] *Id.*

[35] *Id.* at 517 (first alteration in original) (emphasis added) (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam)).

[36] *Id.* at 518.

[37] *Id.*

While the court declined to declare an exact standard of review for a disclosure law like Maryland's,[38] it held that the law failed even under the less demanding "exacting scrutiny,"[39] which requires a "substantial relation" between an "important" state interest and the regulation.[40] The court found that the law was underinclusive because it failed to address unpaid social media posts, the primary mechanism of foreign interference.[41] And while the law applied to ads for specific candidates or ballot initiatives, it did not reach those focused on general, divisive issues, leaving the "vast majority" of foreign-placed ads untouched.[42] The law was also overinclusive. The court reasoned that Maryland failed to provide evidence of foreign-sourced ads on news sites, and the Act did not properly distinguish among platforms based on size, susceptibility to foreign meddling, or electoral influence.[43]

Sometimes "the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case."[44] That may be the case with *McManus*'s collateral censorship argument for exempting online intermediaries from the application of standard First Amendment doctrine. Although the Supreme Court has not extended collateral censorship to its First Amendment jurisprudence involving internet intermediaries, collateral censorship plays a significant role in statutory interpretations of § 230, including the Fourth Circuit's.[45] Given that the publishers had claimed preemption under § 230,[46] the court could have reached the same substantive conclusion using the collateral censorship logic of its § 230 precedent. Instead, the court applied that logic under an exclusively First Amendment analysis. By so deciding, the Fourth Circuit took a step toward the constitutionalization of collateral censorship as a First Amendment basis for exempting internet intermediaries from otherwise applicable laws.

The court's argument for exempting online platforms from the *Buckley* framework relied on the logic of the so-called collateral censorship phenomenon[47]: when the imposition of liability and compliance costs on private intermediary *A* incentivizes it to use its power to censor the

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[38] *Id.* at 520.

[39] *Id.*

[40] *Id.* (first quoting *Buckley*, 424 U.S. at 64; and then quoting *id.* at 66).

[41] *Id.* at 521.

[42] *Id.* The court also rejected Maryland's argument that the law, though underinclusive, was the least restrictive means available to the State because of Maryland's concern about the First Amendment difficulties attendant in the regulation of unpaid speech. *Id.*

[43] *Id.* at 521–22. The Act painted with too "broad [a] brush" because giant social media websites like Facebook and Instagram were the primary playground for foreign interference. *Id.* at 522.

[44] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 112 (1977).

[45] *See, e.g.*, Wu, *supra* note 3, at 317.

[46] Wash. Post v. McManus, 355 F. Supp. 3d 272, 284 (D. Md. 2019).

[47] *See* Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 116–18 (1995).

speech of private speaker *B*.[48] The Fourth Circuit reasoned that the Act's compliance costs would disincentivize platforms from hosting political ads because, unlike primary speakers, intermediaries have a primarily financial rather than expressive interest.[49] This concern aligns with collateral censorship theory, which argues that because of their "economic and instrumental" interests, online intermediaries are particularly susceptible to chilling effects[50] and should therefore be overprotected from otherwise constitutional speech regulations.[51] This theory is often used in arguments for shielding online platforms from liabilities that apply to traditional speakers or listeners.[52] Moreover, collateral censorship can be characterized as a particular application of the speculative "chilling effects" inquiry,[53] which considers the incidental effect of legitimate regulation on protected speech[54] and, as in *McManus*, can result in "a constitutionally mandated exception to a general doctrinal rule."[55] But "chilling effects" is not a discrete doctrine,[56] and given collateral censorship's doctrinal hurdles, its invocation does not refute the novelty of *McManus*'s collateral censorship analysis.

One difficulty with *McManus* stems from the Supreme Court's increasing aversion to speaker-based distinctions in the context of campaign finance regulations.[57] *McManus* distinguished between direct political speakers and "neutral third-party platforms"[58] by arguing that *Citizens United* limited the exacting scrutiny standard to disclosure requirements that "do not prevent anyone from speaking."[59] But the

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[48] J.M. Balkin, Essay, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 & n.14 (1999) (crediting Professor Michael Meyerson for coining the term); *see also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27–33 (2006) (using the term "proxy censorship" instead).

[49] *See McManus*, 944 F.3d at 516.

[50] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379 (2010); *see also* Wu, *supra* note 3, at 304–08.

[51] *See, e.g.*, Kreimer, *supra* note 48, at 77 ("[E]fforts to recruit intermediaries as proxy censors should generally be viewed as 'more intrusive' for First Amendment purposes than efforts to regulate speakers or listeners directly.").

[52] *See, e.g.*, Wu, *supra* note 3, at 304 ("[T]he chilling effects on intermediaries are even greater, and the law ought to account for that difference.").

[53] *Id.*

[54] Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649 (2013).

[55] Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1483 (2013).

[56] *Id.*

[57] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340–41 (2010); Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 781–82 (2015); Asaf Wiener, *A Speaker-Based Approach to Speech Moderation and First Amendment Analysis*, 31 STAN. L. & POL'Y REV. 187, 209–10, 215 (2020).

[58] *McManus*, 944 F.3d at 516; *see id.* at 515–16.

[59] *Id.* at 516 (quoting *Citizens United*, 558 U.S. at 366).

court's interpretation is incompatible with *Buckley*'s analysis of disclosure requirements, which was endorsed by *Citizens United*.[60] The Court in *Buckley* considered a facial attack seeking to exempt minority parties and independent candidates from such requirements.[61] The Court foreclosed such facial attacks and rejected blanket speaker-based exemptions.[62] It reasoned that although disclosures would "undoubtedly . . . deter some individuals,"[63] the state's substantial interests foreclosed challenges based on "highly speculative"[64] or "generally alleged" harms.[65] The Court found testimonies similar to ones in *McManus* too speculative to outweigh the state interest.[66] Most importantly, the Court conceded that minor parties are *generally* more susceptible to chilling effects,[67] but it did not carve out an exception to its exacting scrutiny standard as the court did in *McManus*. *Citizens United* upheld *Buckley*'s framework, so its statement that disclosure requirements "do not prevent anyone from speaking" could not reasonably be construed to limit the application of exacting scrutiny based on such generally alleged and speculative harms as those asserted in *McManus*.[68] Rather, the statement should be understood as drawing a comparison between disclosure requirements and *direct* restrictions on speech — namely corporate campaign spending — not *indirect* chilling effects resulting from *private* censorship.[69]

The doctrinal difficulties of *McManus* extend beyond the Court's campaign finance case law. As Professor Jack Balkin has noted, the "closest the Supreme Court has come to recognizing collateral censorship as a First Amendment issue"[70] was in *Smith v. California*,[71] which invalidated a municipal ordinance that imposed strict liability on booksellers for possession of obscene books, citing the risk that the penalty would incentivize booksellers to censor their wares.[72] But the Court

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60 *Citizens United*, 558 U.S. at 366–67.

61 Buckley v. Valeo, 424 U.S. 1, 68–69 (1976) (per curiam).

62 *Id.* at 71, 74.

63 *Id.* at 68.

64 *Id.* at 70.

65 *Id.* at 72.

66 *Compare id.* at 71–72 ("At best [the plaintiffs] offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure."), *with McManus*, 944 F.3d at 517 ("[A] candidate for Maryland's House of Delegates has alleged that Google's dropoff from political advertising harmed his campaign . . . .").

67 *Buckley*, 424 U.S. at 71.

68 Citizens United v. FEC, 558 U.S. 310, 366 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003) (alteration omitted)).

69 *See id.* at 483 (Thomas, J., concurring in part and dissenting in part) (rejecting as a "fallacy" the Court's conclusion that disclosure requirements do not prevent anyone from speaking).

70 Balkin, *supra* note 5, at 2312.

71 361 U.S. 147 (1959).

72 Balkin, *supra* note 5, at 2312; *see Smith*, 361 U.S. at 153–54.

has not extended *Smith*-type protections to online platforms,[73] which may explain *Smith*'s absence from the *McManus* opinion. As of now, there is general scholarly consensus that collateral censorship theory has not been widely adopted into the Court's First Amendment analysis of state regulations,[74] including cases involving election-speech intermediaries.[75] Although the theory appears in cases involving private causes of action,[76] challenges asserting the First Amendment rights of third parties are still typically subject to the traditional vagueness and overbreadth doctrines.[77]

Unlike the Court's First Amendment jurisprudence, § 230 case law and scholarship have taken special notice of collateral censorship.[78] The Fourth Circuit is no stranger to this trend. Indeed, Judge Wilkinson wrote the opinion in *Zeran v. America Online, Inc.*,[79] "the seminal case that read [§] 230 broadly"[80] by relying on the logic of collateral censorship.[81] Section 230 preempts any state law cause of action or liability that is inconsistent with its grant of immunity.[82] The Fourth Circuit interpreted this immunity to apply to "*any cause of action* that would make service providers liable for information originating with a third-party user of the service."[83] Although the language of § 230(c)(1) grants immunity only against claims seeking to treat platforms as publishers,[84] courts have generally followed the Fourth Circuit in barring any claim arising from third-party content, regardless of the actual cause of action.[85]

Given collateral censorship's relative force in § 230 precedent, the *McManus* court would have stood on firmer ground by resolving the case under § 230. Under Fourth Circuit precedent, § 230 bars liability on the basis of a service provider's exercise of "traditional editorial functions," which include decisions about "whether to publish, withdraw,

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[73] *See* Balkin, *supra* note 5, at 2313; *see also* Wu, *supra* note 3, at 312.

[74] *See, e.g.*, Balkin, *supra* note 5, at 2313; Meyerson, *supra* note 47, at 117 (lamenting the inconsistencies in courts' grants of intermediary immunity); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1008 & n.95 (2008) (discussing how before § 230, "the assumption in the law reviews tended to be that the . . . standard [invoked in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),] was the best to be hoped for as a constitutional matter," Tushnet, *supra*, at 1008 n.95).

[75] Samuel S. Sadeghi, Comment, *Election Speech and Collateral Censorship at the Slightest Whiff of Legal Trouble*, 63 UCLA L. REV. 1472, 1474, 1487–89 (2016).

[76] *See* Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 639 (2020).

[77] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.2.2, at 1388, 1391–92 (5th ed. 2015).

[78] *See, e.g.*, Wu, *supra* note 3, at 317–18, 339.

[79] 129 F.3d 327 (4th Cir. 1997).

[80] Goldman, *supra* note 2, at 36.

[81] Wu, *supra* note 3, at 317; *see Zeran*, 129 F.3d at 331 (discussing how intermediary tort liability would lead to "an obvious chilling effect").

[82] 47 U.S.C. § 230(e)(3).

[83] *Zeran*, 129 F.3d at 330 (emphasis added).

[84] 47 U.S.C. § 230(c)(1).

[85] Goldman, *supra* note 2, at 36–37.

postpone or alter content."[86] As the *McManus* plaintiffs rightly pointed out, Maryland's law provided "for the removal of political ads on pain of contempt or criminal sanctions."[87] Therefore, the Act created liabilities for what amounts to publishers' exercise of traditional editorial functions, which would have allowed the court to remand or affirm the case on statutory grounds.

Read broadly, *McManus* suggests that established First Amendment rules may be inapplicable to speech intermediaries whose business models refuse to internalize the harms of their practices, irrespective of the availability of alternative business models. But as Professor Mark Tushnet notes, it is not so clear whether the First Amendment should treat speech intermediaries' business practices as inevitable, which is what the *McManus* court seems to assume.[88] To the contrary, current copyright and defamation doctrines reject blanket intermediary exemptions despite the laws' collateral censorship effects.[89] A collateral censorship doctrine would need to address not only doctrinal implications for various areas of the law but also the extent to which its logic is limited to internet intermediaries. Insofar as collateral censorship theory demands a medium-specific approach, it may be to the internet what scarcity was to broadcasting: a distinctive feature resulting in "a distinctive place in First Amendment law."[90]

Read narrowly, *McManus* avoids applying established First Amendment rules to a novel context while refusing to articulate a new rule.[91] Given the novelty and significance of challenges like online election interference, the court's hands-off approach demands an active legislative counterpart that can respond to the novelty that *McManus* recognizes.[92] But legislatures act against a backdrop of established rules, and uncertainty about applicable doctrines may hamper legislative action. Under such conditions of legal uncertainty, legislatures will find it difficult — if not impossible — to address issues of online campaign advertising while respecting the Fourth Circuit's undefined conception of the First Amendment's reach.

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[86] *Zeran*, 129 F.3d at 330.

[87] Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Preliminary Injunction at 30, Wash. Post v. McManus, 355 F. Supp. 3d 272 (D. Md. 2019) (No. 18-cv-02527).

[88] Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1660–61 (2015).

[89] On the defamation front, scholars often cite to *New York Times Co. v. Sullivan* as an example of the Court's recognition of collateral censorship by intermediaries. *See, e.g.*, Kreimer, *supra* note 48, at 54. But *Sullivan* rejected *underprotection* of an intermediary hosting a paid political ad, rather than standing for *overprotection* of the intermediary. *See* New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (holding that otherwise-protected statements "do not forfeit that protection because they were published in the form of a paid advertisement"). For an example on the copyright front, see generally JENNIFER M. URBAN ET AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE (2d ed. 2017).

[90] *McManus*, 944 F.3d at 519.

[91] *Id.* at 520.

[92] *Id.*