STATE OF MARYLAND	*	**IN THE CIRCUIT COURT**
v.	*	**FOR**
DENNIS FUSARO	*	**ANNE ARUNDEL COUNTY**
Defendant	*	**CASE NO. C-02-CR-17-000351**

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STATE OF MARYLAND	*	**IN THE CIRCUIT COURT**
v.	*	**FOR**
STEPHEN WATERS	*	**ANNE ARUNDEL COUNTY**
Defendant	*	**CASE NO. C-02-CR-17-000352**

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DEFENDANTS' CONSOLIDATED REPLY TO STATE'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTION AND MEMORANDA IN SUPPORT OF MOTION TO DISMISS

Introduction

A prosecutor may not simply walk into court, say "disclosure," and send two men to jail. Yet that is what the State expects to do in this case. The law must be precise when it regulates political speech, no matter the lofty platitudes of political purity proclaimed by legislators and regulators. *See* U.S. CONST. amend. I. Ironically, under the State's theory, free speech that is much less important than political engagement is subject to more protection under the First Amendment. *See, e.g.*, *U.S. v. Stevens*, 559 U.S. 460, 474–77, 482 (2010) (sustaining an overbreadth challenge to a law prohibiting the display of a "depiction of animal cruelty"). The Defendants simply ask that the State be held to proper constitutional standards and that serious scrutiny be applied to laws that implicate freedom of speech.

I. *Citizens United* Did Not Abrogate the Necessity of First Amendment Scrutiny of Disclosure and Disclaimer Provisions

Citizens United did not erase the Supreme Court's longstanding line of vagueness and overbreadth jurisprudence. Election law standards matter—real ones that citizens can read on the face of the statute. Without standards, government possesses the frightening power to imprison people based on the exercise of their political free speech rights. Although *Citizens United* upheld limited disclosure requirements, it did so because Congress specifically drafted the Bipartisan Campaign Reform Act ("BCRA") to apply to limited forms of communications that were easily identifiable and only when high-dollar thresholds had been met.

The State argues that the decisions upholding the disclosure and disclaimer provisions of electioneering communications under federal law justify the uninhibited regulation of any political speech under Maryland law, subject only to an exception for handbills distributed on the town square. State's Opp. at 6–8, 12. A few states have, disturbingly, indulged this fantasy, and this Court should not allow Maryland to join them. *See, e.g.*, *Bailey v. Maine Com'n on Governmental Ethics & Election Practices*, 900 F.Supp.2d 75 (D. Me. 2012) (upholding a fine for political blogging without a disclaimer); *but see Van Hollen, Jr. v. Fed. Elec. Com'n* ("FEC"), 811 F.3d 486, 501 (D.C. Cir. 2016) ("[T]he Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents. But 'the centre cannot hold.'").

When the U.S. Supreme Court ruled in *Citizens United* that electioneering communications could be regulated, it did not bless all-encompassing disclosure and disclaimers for any political speech not covered by *McIntyre v. Ohio Elections Commission*. *Citizens United v. FEC*, 558 U.S. 310, 366–71 (2010); *McIntyre v. Ohio Elec. Com'n*, 514 U.S. 334 (1995). *McIntyre* is the general

rule, not the exception. There are other important distinctions between electioneering communications and "campaign material" under Maryland law:

	Electioneering Communication (52 U.S.C. § 30104(f)(3)(A):	**Campaign Material (EL § 1-101(k)(1)):**
Medium:	Broadcast, cable, or satellite communications.	Any medium.[1]
Content:	Refers to a clearly identified candidate for federal office.	Relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question.
Timing:	60 days before a general election, 30 days before a primary.	Published or distributed at any time.
Geography:	Targeted to the relevant electorate.	Published or distributed anywhere in the State of Maryland.

These distinctions could not be starker; "campaign material" is problematic even absent any discussion of express advocacy versus issue advocacy. Importantly, although a spending threshold is not included in the electioneering communication definition before a disclaimer is required, a reasonable threshold is implied because of the expense of advertising on television or radio. The breadth of media covered by "campaign material" offers nothing of the sort. Express advocacy versus issue advocacy is an important part of campaign finance history that served—and still serves, in some respects[2]—as one method to prevent vagueness and overbreadth. Thus, courts still face an obligation to ensure that vague and overbroad laws do not chill speech. The express advocacy and functional equivalent of express advocacy standards are simply ways to go about

[1] This is based on the State's interpretation. *See* State's Opp. at 14–15. Defendants renew their argument that a plain understanding of the law would require <u>any</u> campaign material to contain "Text, graphics, or other images." EL § 1-101(k)(1)(i); Def. Mem. at 10–11.

[2] For example, a "public communication," broadly defined under federal law, must contain express advocacy before a disclaimer is required. *See* 11 CFR 110.11(a)(2).

that function. Developments in case law do not excuse a definition like section 1-101(k)(1), which contains just short of no boundaries whatsoever.

Because the Election Law Article's disclaimer requirements are so broad, it is not a campaign finance regulation, but a political speech regime. Because it is not tied to money spent on election campaigns and forces political actors to speak, it is a content-based restriction that must be subjected to strict scrutiny. *See* Def's Memo at 3–4. Even under intermediate scrutiny, the law is facially unconstitutional because it fails to contain any of the contours that would accomplish the State's interest less intrusively. *See McCullen v. Coakley*, 134 S.Ct. 2518, 2535 (2014). This is not to say the definition of "campaign material" must contain all of the facets of electioneering communications (or an express advocacy requirement) to pass muster, but it must contain something besides "relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question[.]" EL § 1-101(k)(1)(ii).

The state presents *Citizens United* as an edict that overturned the myriad cases addressing the confines of disclosure. It may be convenient for the State to justify its overbroad and ill-defined regime with a case upholding the most precise campaign finance definition ever codified, but the analysis is inapposite. *Citizens United* did not overturn cases such as *ACLU of Nevada*, which actually addressed a law that parallels Maryland's current regime. *Compare* Def's Mem. at 7 *with* State's Opp. at 12 ("[*McIntyre* and *ACLU of Nevada*], however, were decided prior to *Citizens United*."); 378 F.3d 979 (9th Cir. 2004). The State concedes that "[w]hat *McIntyre* did establish was that **all** individual political speech could not be burdened by the requirement that it disclose the identity of its source." State's Opp. at 12. On this, the Defendants agree. The only question is why, with this understanding, the State believes "campaign material" is constitutional.

II. Even Under the State's Narrowing Construction, the Definition of "Campaign Material" is Unconstitutionally Vague and Overbroad

The laws at issue implicate speech, thus they are subject to the strictest tests of vagueness and overbreadth. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Stevens*, 559 U.S. at 473.[3] Although the State makes much of the distinction between scrutiny of prohibitions on speech and disclaimer requirements, this is irrelevant for purposes of vagueness and overbreadth. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (emphasis added)). "Campaign material" subjects a wide array of political speech to regulation, and is too vague for persons of ordinary intelligence to determine when the disclaimer provisions of section 13-401 might be required. The State's effort to apply a narrowing construction to the statute provides no remedy.

"[T]he meaning and scope of [§ 1-101(k)] is informed both by the words and the context and statutory purpose in which those words are used." State's Opp. at 14. The State continues:

> Giving due regard to the context and purpose, the words "any material" in the statute refer to "any material" used for the purpose of supporting or impeding the election campaign for a candidate or a question submitted to the voters. It does not does extend to the rather absurd examples listed by defendants unless

[3] The State notes that in *Buckley*, the U.S. Supreme Court determined that "the disclosure provisions of BCRA [sic] are part of '... Congress' effort to achieve "total disclosure" by reaching "every kind of political activity" in order to insure that voters are fully informed . . .'" State's Opp. at 13 n. 5 (quoting *Buckley*, 424 U.S. at 76). The State neglects to note the calamity of this: "In its effort to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." *Buckley*, 424 U.S. at 76–77. Notably, the *Buckley* Court did not interpret the BCRA given that this law did not exist until 2002.

> the material was for the purpose of advancing or impeding the election campaign of the candidate to whom it relates.

State's Opp. at 15 (emphasis added). This narrowing construction (or, more accurately, redefinition) borders on parody. The State does not explain how this excludes political posts on social media, e-mails, or dozens of other forms of speech that each occur thousands of times a day in Maryland and cannot be required to include disclaimers. *See* Def's Mem. at 10–11. The State acknowledges that "the rather absurd examples listed by defendants" *can* actually be subjected to the regulation. One wonders if this is to be determined not by the words of the communication itself, but an even broader "purpose," or intent, standard that would bless investigations of speakers for the barest mention of a candidate, election or question. *See* Def's Mem. at 6 (the bake sale scenario); *see also Fed. Elec. Com'n v. Wisconsin Right to Life*, 551 U.S. 449, 468 (2007) ("Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the law], on the theory that the speaker actually intended to affect an election . . . .").

"So construed, the definition of 'campaign material' is neither vague nor overbroad on its face." State's Opp. at 16. The State can cite nothing to support this contention, except for careless citations to *Buckley*, specifically, the portion where the Court concluded that a statute regulating ads "'for the purpose of . . . influencing' an election or nomination . . . shares the same potential for encompassing both issue discussion and advocacy of a political result." 424 U.S. at 79.

It is precisely because Fusaro and Waters are in the midst of a prosecution that the doctrines of vagueness and overbreadth must afford a swift remedy. These doctrines are designed specifically to ensure that fair warning is given to speakers about the reach of a law ahead of time—not through the opining of a prosecutor during a criminal hearing. *Grayned*, 408 U.S. at 108–09. In addition to Fusaro and Waters, under the overbreadth doctrine it is recognized that the

Defendants carry with them third-party standing to represent anyone else in Maryland wishing to engaged in protected speech, but who is chilled by the operation of this law. *Id.* at 114–15.

Standards matter. Without standards, people can be sent to jail under the rubric of "disclosure." Without standards, prosecutors can invent the language of the law and punish the politically provocative. Without standards, the First Amendment right to speak your political mind is meaningless. Dismissal should be granted in this case, allowing the State of Maryland to later amend its laws to provide fair warning to prospective speakers.

III. Under Maryland Law, a Combination of Two or More People with the Major Purpose of Promoting the Success or Defeat of a Candidate Must Disclaim as a Political Committee or Campaign Finance Entity, and Neither Fusaro Nor Waters Could Do This Because of the Law's Prior Restraint

After its exercise in ostensibly narrowing the statute "'within the context of the statutory scheme to which it belongs'", the State tries to excise the only disclaimer that the Election Law Article plausibly requires for two or more people to include with campaign material. *See* EL §§ 1-101(h), (gg), 13-207(b), 13-401(a)(1)(i). "Defendants treat the terms 'political committee' and 'campaign finance entity' as if they are synonymous. They are not. A 'campaign finance entity' is a political committee that 'has been established under Title 13 of this article.'" State's Opp. at 16. The implications of this argument, anemic as it is, are absurd and categorically undermine the State's disclosure discussion in the 15 pages preceding this flippant declaration.

The law at issue requires campaign material to contain a specific type of disclaimer from a "campaign finance entity," which includes certain characteristics of the entity, such as its treasurer. EL § 13-401(a)(1)(i), (b). A campaign finance entity is a "political committee established under Title 13 of this article." EL § 1-101(h). The State implies that if a campaign finance entity has *not* been established as a political committee under Title 13, then (perhaps?) it is not required to disclaim as a campaign finance entity and speakers should instead disclaim as an individual (or

several individuals?) under section 13-401(a)(1)(ii). But this argument disregards the context of the statutory scheme. Any "combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate" is a political committee and "may not receive or disburse money or any other thing of value unless the political committee is established in accordance with the requirements of this section." EL §§ 1-101(gg); 13-207(b) (emphasis added). The definition of "campaign finance entity" does not sever the Election Law Article's political committee registration requirements from the law's disclaimer requirements.[4] As discussed in the Defendants' opening memorandum, because the political committee registration requirements contain unconstitutional prior restraints, and because they could not legally comply with the disclaimer requirements of section 13-401, Fusaro and Waters may not be punished under this scheme. *See* Def. Mem. at 13–18.

Because the State implies that "a combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate" might not have to register and disclose under Title 13 at all, but could, instead, merely disclaim as "the person responsible for the campaign material[,]" its commitment to disclosure is strikingly precarious. EL §§ 1-101(gg); 13-401(a)(1)(ii) (emphasis added). The limited disclaimer might be Fusaro, perhaps Waters, or any one person working on behalf of dozens. This would certainly save a lot of paperwork. *See* EL § 13-304. But it would leave the Election Law Article even further from """a consistent and harmonious body of law""" than its current maladies, and require the State to sacrifice disclosure to save a disclaimer prosecution. *See* State's Opp. at 15 (quoting *CashCall, Inc. v. Md. Comm'r of Fin. Regulation*, 448 Md. 412, 431 (2016) (quoting *Gardner v. State*, 420 Md. 1, 8–9 (2011))).

[4] The State's decision to not charge Fusaro or Waters with failure to register as a political committee also does not sever registration requirements from the disclaimer statute at issue.

"Were they charged with failing to register as a 'campaign finance entity,' the constitutionality of any requirement that they do so would be relevant to the issues." State's Opp. at 16. The State cannot have it both ways. The definition of "campaign finance entity" is not only relevant, but a required component of the disclaimer provisions throughout section 13-401. Because Fusaro and Waters could not register as a political committee, they could not disclaim as a campaign finance entity, and ignoring these prior restraints will only bolster the First Amendment problems throughout the Election Law Article.

Conclusion

If the law is constitutional, the State should provide the Defendants and their counsel exactly what disclaimer, word for word, the robocall at issue should have contained. Given the specificity of the disclaimer laws—the unconstitutional definitions of "campaign material" and "campaign finance entity" notwithstanding—the State Prosecutor ought to let anyone participating in Maryland politics know just what, exactly, should have been said to avoid criminal charges. But the unconstitutional provisions of the Election Law Article cannot be severed, and leaves the State Prosecutor in a powerful, and wholly unconstitutional, position that allows prosecuting political speech for lack of disclaimers on an "I know it when I see it" basis. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This is the very danger of unconstitutional vagueness and overbreadth. *See Stevens*, 559 U.S. at 480 ("This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint.")

The charges against Fusaro and Waters are based upon unsupportable political speech standards and should be dismissed.

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