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

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MOTION AND MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

The Office of Special Prosecutor contends that two citizens illegally shared their views about a controversial issue with the citizens of Maryland. To support the Special Prosecutor's determination, its prosecutors drew up charging instruments which alleged violations of Section 13-602 and 13-401 of the Election Law Article. The Special Prosecutor has not stated whether he is proceeding under subsection (a) or (b) in the Circuit Court, although when pressed below he stated he is proceeding under (b). Notwithstanding, as the charging instruments read, both charges arise out of publishing and distributing "campaign material"—speech that the Supreme Court has deemed at the core of First Amendment protection. *Boos v. Barry*, 485 U.S. 312, 318 (1988).

The prosecutorial theory here is best summed up in one word: unbelievable. It asks this Court to validate speech standards that courts nationwide—including Maryland—routinely invalidate. It unblushingly suggests that citizens must carefully follow impossible-to-comply-with laws if they wish to speak. And it seeks affirmation that the Office of Special Prosecutor has power to jail the politically provocative according to prosecutorial whim. For all these reasons, granting dismissal in a timely manner will serve to protect important First Amendment rights and end this inquisition.

Laws that regulate political participation must be carefully circumscribed. Otherwise, these laws chill free speech rights and injure the public interest in an uninhibited marketplace of ideas. *Elrod v. Burns*, 427 U.S. 347, 357 (1976). As the Supreme Court explained in *Citizens United v. Federal Election Commission*, the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." 558 U.S. 310, 323 (2010).[1] Thus, complicated, vague, overly broad laws that shut individual voices out of the political fray are wholly unsupportable under the First Amendment.

Because of a profound national commitment to free speech, the Supreme Court has delineated narrow, precise standards for regulating it. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Without these boundaries, petty bureaucrats and prosecutors are free to run roughshod over political speech they disagree with or find controversial. As a result, election law jurisprudence has built in specific safeguards to protect against these abuses. They include requirements that political speech be objectively identifiable to remove confusion and chill for speakers along with other tailoring requirements. *See, e.g., Citizens United*, 558 U.S. at 324–25 (discussing necessary narrowing constructions to preserve constitutionality of political speech regulations); *Fed. Elec. Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468–76 (2007) (describing the need to interpret political speech in favor of speakers, not censors, and applicable narrowing constructions). In the case at hand, the campaign finance provisions of Maryland's

[1] Some campaign finance advocates continue to argue that *Citizens United* upheld disclosure requirements. This prosecution, however, is a case about on-publication identification (disclaimer requirements) and not about after-the-fact reporting (disclosure requirements). This is a constitutionally determinative distinction. *See, e.g., Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

Election Law Article are completely devoid of the protections deemed necessary by the Supreme Court in this area, rendering the charges in question legally and constitutionally void.

Where courts have been faced with overbroad laws that penalize protected speech, they have carefully provided for efficient ways to dispose of burdensome litigation. As recognized by the U.S. Supreme Court in the *Wisconsin Right to Life* case, such procedures must be streamlined, entail minimal discovery, and "allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." 551 U.S. at 469. Otherwise, laws that would send people to prison simply for speaking will deter people from speaking in the first place:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (internal citations omitted). Thus, judicial procedures must quickly eliminate the burdens of protracted litigation and expensive judicial review when sensitive political speech rights hang in the balance.

Along with these considerations, the scrutiny this Court applies to the law matters. In the context of election law and First Amendment jurisprudence, the only governmental interest the Supreme Court has recognized as sufficiently important to justify the regulation of political speech and association is the prevention of *quid pro quo* corruption or its appearance. *See McCutcheon v. Fed. Elec. Com'n*, 134 S. Ct. 1434, 1441 (2014). Because this case involves burdensome on-publication disclaimer requirements (with criminal penalties) as opposed to after-the-fact disclosure requirements, strict scrutiny is appropriate. As both the Supreme Court recognized in *McIntyre v. Ohio Elections Com'n*, and the Ninth Circuit recognized in *ACLU of Nevada v. Heller*, whenever mandatory self-identification requirements are imposed, strict scrutiny is called for. 514 U.S. 334 (1995); 378 F.3d 979 (9th Cir. 2004). This is because, unlike disclosure regimes like

those considered in *Citizens United*, on-publication, self-identification requirements are "considerably more intrusive than simply requiring [a speaker] to report to a government agency for later publication how she spent her money." 378 F.3d at 992. These are serious content-based proscriptions of political speech—if an "authority line" is included under Maryland law, speech is legal, but if that content is absent, it is illegal. These restrictions will survive strict scrutiny only if they are "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 357. And government restriction of speech that is content based is presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226-27 (2015).[2]

It is in this way that a motion to dismiss must provide Fusaro and Waters this opportunity to efficiently defend First Amendment rights. An examination of the legal and constitutional frailties in Sections 13-602 and 13-401 of the Election Law Article demonstrates that the criminal charges before this Court are unsupportable and invalid as a matter of law.

In Maryland, a motion to dismiss filed in the Circuit or District Court is governed by Maryland Rule 4-252. *State v. Taylor*, 371 Md. 617, 644–45 (Md.App. 2002). Notably, the purpose of a motion to dismiss is not to test the sufficiency of the evidence before the court, but to test the legal sufficiency of the indictment on its face. *Id.* at 645. Where there is a substantial defect on the face of the indictment or "in the indictment procedure," a motion to dismiss may be granted. *Id.*

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[2] Any interest Maryland may claim in providing the electorate relevant information about political spending is met through its comprehensive campaign finance disclosure laws. Disclosure requirements, as opposed to on-publication disclaimer requirements, are routinely upheld because they represent less intrusive and burdensome ways to provide relevant information to the electorate about political spending. *See, e.g., California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1008, 1104 (9th Cir. 2003) (upholding simple after-the-fact disclosure); *Iowa Right to Life Cmte., Inc. v. Tooker*, 717 F.3d 576, 589–601 (8th Cir. 2013) (explaining how easily-completed, after-the-fact disclosure was constitutionally supportable). Because on-publication disclaimer requirements do not provide relevant information to the electorate, they cannot be said to advance an informational interest. *See Heller*, 378 F.3d at 996.

Here, the charges against Fusaro and Waters are legally and constitutionally unsupportable under governing First Amendment jurisprudence, which necessitates the entry of dismissal in this matter.

1. Maryland's Definition of "Campaign Material" is Facially Unconstitutional Under the Doctrines of Vagueness and Overbreadth

To understand the constitutional defects in the State's case, it is helpful to examine three definitions found in Maryland election law. First, the ubiquitous term "campaign material":

> (1) "Campaign material" means any material that:
> (i) contains text, graphics, or other images;
> (ii) relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question; and
> (iii) is published or distributed.
> (2) "Campaign material" includes:
> (i) material transmitted by or appearing on the Internet or other electronic medium; and
> (ii) an oral commercial campaign advertisement.

Md. Ann. Code, Election Law §1-101(k). Maryland law then requires the inclusion of an "authority line" if the speech in question constitutes "campaign material." Md. Ann. Code, Election Law §13-401. The law includes a sweeping criminal penalty for persons who fail to include such an "authority line." Md. Ann. Code, Election Law §13-602(9).

a. Overbreadth

Problematically, nearly all political speech in Maryland, including political satire, might constitute "campaign material." Under the law, communications that "relate to" candidates or referenda questions—real or "prospective"—are regulated. As the Supreme Court and courts nationwide have recognized, every issue from environmentalism to gun control to LGBT rights may "relate to" a candidate or ballot question. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating "relative to" standard); *Fed. Elec. Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S.

449 (2007) (invalidating the Federal Election Commission's use of subjective speech factors). "Relate to" is a standardless standard. It offers no objective guidelines about what sort of speech it regulates and is amazingly sweeping in its reach.

Suppose a student at Richard Montgomery High School in Rockville wanted to awaken the public to help support an end to homelessness. The student in question decides that low cost, high volume technology will help spread his message. He uses Snapchat, Facebook, and employs a few hundred "robocalls" by cell phones. His script is pretty basic and reads "Senator Kagan and Delegate Barve supported the Richard Montgomery High School Bake-a-Thon to End Homelessness. Won't you consider supporting our students in this cause?" Under Maryland law, this student would face jail time if he did not include proper disclaimers in this messaging. Under the First Amendment doctrine of overbreadth, this is not acceptable.

Where a law sweeps in actions that are protected under the First Amendment, it suffers from facial overbreadth. *See, e.g., NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).[3] In the First Amendment context, the Supreme Court recognizes special type of "facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 473 (2010) (internal citations and quotations omitted). Because Maryland's "relate to" standard reaches an astonishing amount of speech that does not implicate any governmental interest in regulation, the law must be invalidated on its face, and the motion to dismiss granted.

[3] Likewise, Maryland courts have recognized a right to anonymous speech in some instances. *See, e.g., Independent Newspapers, Inc. v. Brodie*, 407 Md. 415 (Md.App. 2009); *Lubin v. Agora, Inc.*, 389 Md. 1 (Md.App. 2005).

Maryland is not the only state that can lay claim to employing overbroad definitions of regulated political speech. Nevada attempted a similar approach instructive to this case. The state enacted a law that required persons either paying for or "responsible for paying for" the publication of "any material or information relating to an election, candidate or any question on a ballot" to identify their names and address on "any printed or written matter or any photograph." *Heller*, 378 F.3d at 981. In many ways, Maryland's law mirrors the Nevada unconstitutional approach.

In *Heller*, the Ninth Circuit compiled a laundry list of constitutional defects that attach to regulatory regimes triggered by the "relate to" standard. Particularly problematic is that the compelled self-identification regime would apply anytime during the year and "can be far removed from the thrust and parry of election campaigns." *Id.* at 996. Because "relate to" is an inherently clumsy term, the Ninth Circuit found it "substantively ill-adapted"; it applies to speakers who have no intent to influence an election, and speech that would not be understood to have such intent, such as the hypothetical bake-a-thon discussed above. *Id.* Whatever interest a state may have in preventing electoral fraud or corruption simply is not served by a law that applies to any speech that could hypothetically "relate to" a candidate or election.

In *National Right to Work Defense Foundation v. Herbert*, Utah's laws defining "corporation" and "political issues expenditure" were ruled unconstitutional. 581 F.Supp.2d 1132, 1151 (D. Utah 2008). Rather than regulate specific "election-related activities, the plain language of [the law] attempts to reach every kind of political activity. Such a broadly worded statute cannot regulate the functional equivalent of express advocacy beyond that articulated by the Supreme Court." *Id.* To do so would violate notions of fairness and due process because "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Buckley*, 424 U.S. at 77 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

Naturally, employing such an overbroad standard would lead to the chilling of political speech and self-censorship, which is prohibited under the First Amendment.

It is also important to note instances where compelled self-identification has been upheld. In *Montanans for Community Development v. Motl*, the court explained that narrowly-focused laws requiring identification may survive judicial review. 2016 WL 6469886 (D. Mont. 2016). Montana employs a self-identification standard that "only applies to a handful of specifically designated communications." *Id.* at *18. Because Montana uses a precise instrument to narrowly target speech implicating governmental interests, its system passed First Amendment scrutiny.

This canvas of cases concerning the regulation of political speech nationwide demonstrates that proper tailoring is of utmost importance. The holdings of *Heller*, *Herbert*, and *Motl* are all the progeny of *Buckley v. Valeo*—the Supreme Court's seminal election law case. In *Anderson v. Spear*, the Sixth Circuit concisely explained why *Buckley* remains relevant today when courts confront overbroad or vague statutory definitions that regulate political speech. 356 F.3d 651, 663 (6th Cir. 2004). In *Buckley*, the Court faced a definition that triggered compliance requirements for speech "relative to a clearly identified candidate." 424 U.S. at 39–42. As recognized by the Sixth Circuit, "[i]f the Court did not circumscribe the term 'relative to,' the regulation could apply to broad categories of issue-related speech, which may or may not have any relation to the election or defeat of specific candidates." *Spear*, 356 F.3d at 663. As a result, the Supreme Court employed the "express advocacy" test as a narrowing construction to provide objective guidance about what sort of speech was captured under the law. *Buckley*, 424 U.S. at 43–44. Although the express advocacy test is now a functional equivalent of express advocacy test in some instances, both the Ninth and Sixth Circuits have recognized its continued relevance. In short, *Buckley*

> left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness

> and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.

Spear, 356 F.3d at 664–65.[4]

A plain reading of Section 1-101(k) of the Election Law Article illustrates a regulation of alarming breadth. It applies not to defined classes of communications, but captures "any material." It is invoked whenever speech may simply "relate to" a candidate or pending question. Most fatal, it covers a wide spectrum of speech that government has no interest in regulating—like bake-a-thons to end homelessness. As the Second Circuit recognized even before *Buckley*, adopting a regulatory standard like "relate to" is the very definition of overbreadth. In *United States v. National Committee. for Impeachment*, the Department of Justice argued that a group's communications about the Vietnam War was a "principal campaign issue" that triggered regulation under the Federal Election Campaign Act. 469 F.2d 1135, 1142 (2d. Cir. 1972). But "[o]n this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and [people] would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with." *Id.* Based upon such a standard, a senior citizens' club promoting elder rights would be captured under the law, as would a Boy Scout troop trying to combat juvenile delinquency. Indeed, that is precisely the position Maryland's Office of Special Prosecutor asks this Court to advance here.

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[4] Here, the robo-call script in question discusses the issue of transgenders' rights, speaks to a legislative issue, and asks the audience to thank candidate Armstrong. Listeners do not know if it is serious or parody. By any reading of *Buckley*, this does not constitute express advocacy. Under the functional equivalent of express advocacy standard, as discussed in *WRTL* and *Citizens United*, the script cannot be regulable, either. Specifically, *WRTL* invalidated the FEC's attempt to regulate political speech based on contextual factors—the character, qualifications, or fitness of a candidate for office. 551 U.S. at 468-474. Even in a close case, the *WRTL* Court instructed lower courts to err on the side of free speech in interpreting political phrases such as the one implicated here. *Id.* at 457.

Maryland's law sweeps in an abundance of speech that is not remotely connected to any interest Maryland could have in regulation. This is precisely the harm *Buckley*, *WRTL*, *Citizens United*, *Anderson*, *Heller*, and other courts have sought to avoid. By sweeping too broadly and by including criminal penalties—for the utterance of political speech—Maryland's system must be stricken as facially overbroad and the motion to dismiss granted.

b. Vagueness

A statute is void for vagueness when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Moreover,

> where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (internal citations omitted). Vagueness concerns do not just arise in laws that prohibit activity, but in laws that place duties on citizens. *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)). Maryland's definition of "campaign material," which triggers myriad requirements under the state's campaign finance law, including disclaimers under Section 13-401, is facially unconstitutional under the vagueness doctrine. *See* Md. Ann. Code, Election Law § 1-101(k).

A person of ordinary intelligence cannot determine what constitutes "campaign material" or various definitions within and relating to the term. Beginning with Section 1-101(k)(1)(i), it is plain that campaign material must "contain[] text, graphics, or other images[.]" The next provision

requires that the material "relates to a candidate, a prospective candidate, or the approval or rejection of a question or prospective question[.]" Md. Ann. Code, Election Law 1-101(k)(1)(ii). For reasons similar to those discussed in the previous subsection regarding overbreadth, to regulate speech that merely "relates to" candidates or questions is to beg arbitrary enforcement. Given the absence of any monetary thresholds, and considering the remaining provision of Section 1-101(k)(1)(iii) (material is "published or distributed"), this might be a post on social media criticizing a candidate for his or her position on an issue, from a simple "tweet" on Twitter to a post on Facebook. Such speech need not even relate to a candidate: "campaign material" also includes "prospective" candidates and questions. Since there are no temporal boundaries in the law, criticism of a Marylander's business practices on a review website such as Yelp could become campaign material years after the fact if the business owner runs for office, as he could argue that before he was a candidate, he was a "prospective" candidate. He might not even need to run for office to punish the reviewer for lack of a disclaimer; with no definition in the law, one is presumably a "prospective candidate" so long as he or she is considering "fil[ing] a certificate of candidacy for a public or party office." Md. Ann. Code, Election Law § 1-101(l)(1).

With such breadth, it is undeniable that campaign material is published throughout Maryland every day on a variety of platforms that do not include the required disclaimers under Section 13-401. The State knows this, and anyone reading the law in question knows it, but no one can draw a line as to where unregulated speech ends and "campaign material" begins. Since absurd prosecutions of these violations are only prevented by prosecutorial discretion and resources, the definition of "campaign material" is irredeemably vague, and this prosecution is, in fact, arbitrary and discriminatory.

Following Section 1-101(k)(1), the vagueness only gets vaguer. Campaign material also includes "material transmitted by or appearing on the Internet or other electronic medium" and "an oral commercial campaign advertisement." Md. Ann. Code, Election Law § 1-101(k)(2). The first of these provisions cannot be defined on its own, or else it would constitute literally all material "transmitted by or appearing on the Internet[.]" The same must be true of "an oral commercial campaign advertisement," lest television commercials for cereal or Saturday Night Live skits become campaign material. Both of these must, under any reasonable reading, refer back to the elements of Section 1-101(k)(1). But those elements remain unconstitutionally vague, and these latter definitions do not nothing to redeem them.

In the context of this case, the State contends that a robocall constitutes "campaign material." It is likely, but not certain, that it will argue that a robocall is "an oral commercial campaign advertisement." But this must refer back to Section 1-101(k)(1), which includes the requirement that campaign material "contain[] text, graphics, or other images[.]" A robocall contains none of these elements, and although this final definition introduces the word "oral," it makes no mention of negating Section 1-101(k)(1)(i). The State's case here is vague and it also provides a most stunning example that the boundaries of "campaign material" are not provided in law, but by prosecutorial whim.[5]

[5] In a recently convenient (if otherwise wholly arbitrary) bit of executive legislating after the first trial in this case, the State Board of Elections added this line to its latest version of the Elections Summary Guide following the commencement of this prosecution: "Robocalls may be considered campaign material and require an authority line." *Summary Guide: Maryland Candidacy & Campaign Finance Laws,* MARYLAND BOARD OF ELECTIONS, Mar. 2017, *available at* http://www.elections.state.md.us/campaign_finance/documents/Summary_Guide_2017_final.pdf . This guidance was not present in any previous version of the Summary Guide, including the one in affect at the time of the speech in question.

Because the definition of "campaign material" captures any political speech that "relates to" a candidate, it is unconstitutionally overbroad on its face. Similarly, but separately, because political speakers cannot determine what speech constitutes "campaign material" under the law that is subject to disclaimer requirements, it is unconstitutionally vague on its face. Given these constitutional infirmities, the charges against Fusaro and Waters must be dismissed.

2. Maryland's Definition of "Campaign Entity" is an Unconstitutional Prior Restraint with which Neither Fusaro or Waters Could Comply

The unconstitutionality of the State's charges against Fusaro and Waters does not end with the nebulous meaning of "campaign material." The disclaimer provisions under Section 13-401 implicate requirements for a "campaign finance entity" under the law, which also violates the First Amendment in distinct ways. The State's charging document alleges that the robocall in question "did not contain the information required by Section 13-401 of the Election Law Article regarding the identity of the person authorizing and paying for the calls and whether the calls were authorized by any candidate" (emphasis added). Given that both Dennis Fusaro and Stephen Waters are charged with the same misdemeanors, the State's theory plainly alleges that both of them paid for the call, or at least played a role in publishing or distributing it. *See* Md. Ann. Code, Election Law § 13-401(a)(1)(i).

But if Fusaro and Waters worked together to publish or distribute campaign material, the Election Law Article classifies Fusaro and Waters as a campaign finance entity, or political committee (often referred to as a "PAC"). Md. Ann. Code, Election Law § 1-101(h) ("'Campaign finance entity' means a political committee established under Title 13 of this article."); § 1-101(gg) ("'Political committee' means a combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate, political party, question, or prospective question submitted to a vote at any election" (emphasis added)). Thus, Fusaro and Waters would

be required to provide information for campaign finance entities in Section 13-401(a)(1)(i) ("the name and address of the treasurer of each campaign finance entity responsible for the campaign material" (emphasis added)) on any campaign material, as well as the disclaimer in Section 13-401(b):

> Campaign material that is published or distributed in support of or in opposition to a candidate, but is not authorized by the candidate, shall include the following statement: "This message has been authorized and paid for by (name of payor or any organization affiliated with the payor), (name and title of treasurer or president). This message has not been authorized or approved by any candidate" (emphasis added).[6]

Because the registration requirements for a "campaign finance entity" are unconstitutional, Fusaro and Waters cannot be charged with forgoing a disclaimer for campaign finance entity. Moreover, it was legally impossible under Maryland law for Fusaro or Waters to disclaim as a campaign finance entity.

Political committee registration in Maryland broadly prohibits associational political speech without registration. "A political committee 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." Md. Ann. Code, Election Law § 13-207(b). The law provides no threshold for receiving or disbursing money or any other thing of value, capturing any political

[6] Because the charging document alleges that this additional disclaimer was required, the State must argue that the robocall was "published or distributed in support of or in opposition to a candidate[.]" Md. Ann. Code, Election Law § 13-401(b). Unless the State simultaneously (bewilderingly) argues that Fusaro and Waters did not have the "major purpose promoting the success or defeat of a candidate," the charges require them to be a political committee under the law. But if the State elects to make this case it would only lend further support to dismissing the charges for vagueness, as both Fusaro and Waters would be expected to provide "the name and address of the person responsible for the campaign material" as two people under the State's theory. Md. Ann. Code, Election Law § 13-401(a)(1)(ii).

speech to which the State might assign a value. This makes the law akin to the ordinance struck down by the United States Supreme Court in *Watchtower Bible and Tract Society. of New York, v. Village of Stratton*. 536 U.S. 150 (2002). The ordinance in that case prohibited "'canvassers' and others from 'going in and upon' private residential property for the purpose of promoting any 'cause' without first having obtained a permit[.]" *Id.* at 154. The Court drew on a long tradition of cases protecting public speech such as door-to-door evangelism, but also noted concerns that arise in the present case:

> [T]here is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit.

Id. at 167. Likewise, because "two or more individuals" with the "major purpose [of] promoting the success or defeat of a candidate" "may not receive or disburse [any amount of] money or any other thing of value unless the political committee is established," which requires filing a registration form with the State Board of Elections, a significant amount of spontaneous speech is banned by the law. Md. Ann. Code, Election Law §§ 1-101(gg); 13-207(b), (c)(2). Today, the necessity of spontaneity in politics is as apparent as ever, as unpredictable controversies ebb and flow in campaigns and American politics. Requiring Americans to register with the government before banding together to speak out is wholly antithetical to free speech, and unconstitutional under the First Amendment.[7]

The Fifth Circuit Court of Appeals addressed and upheld certain political committee registration requirements under Texas law and distinguished *Village of Stratton*, specifically because the law included a monetary threshold:

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[7] The vagueness and overbreadth of "campaign material" exacerbate the prior restraint of "campaign finance entity" requirements. *See supra* part 1.

> In contrast, the treasurer-appointment requirement does not similarly regulate speech. Not only are individuals in Texas entirely free to engage in whatever political speech they wish, but also a group of citizens interested in forming a general-purpose committee need only register and appoint a campaign treasurer before political contributions or expenditures exceed $500. . . . As such, many of the limitations on spontaneous speech that the Court has found constitutionally repugnant in *Village of Stratton* simply are not present here—no one has to comply with the treasurer-appointment requirement to give a speech or pass out a simple handbill to their neighbors.

Catholic Leadership Coalition of Texas v. Reisman, 764 F.3d 409, 438 (5th Cir. 2014) (emphasis added). Because there are no thresholds for contributions or spending prior to political committee registration in Maryland, the law is indistinguishable from *Village of Stratton* and a facially unconstitutional prior restraint.[8] Fusaro and Waters could not be required to comply with this, nor to disclose this unconstitutional campaign finance entity on campaign material under Section 13-401.[9]

The prior restraint of political committee status is exacerbated by another unconstitutional provision, one that wholly censors Fusaro and Waters absent wholesale violation of their associational rights: "Each chairman, treasurer, and campaign manager shall be a registered voter of the State." Md. Ann. Code, Election Law § 13-215(a).[10] Neither Fusaro or Waters could register

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[8] Under the State's theory, Fusaro and Waters could not constitute an out-of-state political committee under Maryland law, given the alleged amount of spending. *See* Md. Ann. Code, Election Law § 13-301 ("An out-of-state political committee shall register with the State Board on a form that the State Board prescribes within 48 hours after directly or indirectly making transfers in a cumulative amount of $6,000 or more in an election cycle to one or more campaign finance entities organized under Subtitle 2, Part II of this title." (emphasis added)).

[9] Fusaro and Waters renew their argument that the definition "campaign material" is unconstitutional and that robocalls could not be understood to meet the definition under the law. *See supra* part 1.

[10] The State alleges that Fusaro was a "campaign manager" in the charging document. For the reasons presented here, any charges that might arise from serving in this capacity without being a registered Maryland voter would be similarly unconstitutional.

to vote in Maryland, because they were not Maryland residents. Md. Ann. Code, Election Law § 3-102(a)(3) (2014).[11] They could not speak without state-mandated association, that is, joining with a Maryland resident to form a PAC: "A political committee may not receive or disburse money or any other thing of value if there is a vacancy in the office of chairman or the office of treasurer." Md. Ann. Code, Election Law § 13-207(d)(3). Residency requirements for political speech and engagement have been almost universally struck down, because they are not properly tailored to serve a compelling or important governmental interest that can justify such censorship.

Courts that have upheld residency requirements have done so for political committee laws that, again, featured some sort of contributions or spending threshold. *See Natl. Right To Life Political Action Comm. v. Lamb*, 202 F. Supp. 2d 995, 1019 (W.D. Mo. 2002), *aff'd sub nom. Natl. Right to Life Political Action Comm. v. Connor*, 323 F.3d 684 (8th Cir. 2003) ("[A]ny political committee domiciled outside of Missouri must appoint a Missouri resident as treasurer if its independent expenditures in Missouri exceed $1,500." (emphasis added)). Because there is no monetary threshold for Maryland campaign finance entity registration, the residency requirement is more comparable to a Virginia law recently struck down by the Fourth Circuit Court of Appeals in *Libertarian Party of Virginia v. Judd*. 718 F.3d 308, 311 (4th Cir. 2013). There, the court addressed a law that required "signatures on nominating petitions [to] be witnessed either by the candidate personally, or by a person who is a 'resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored[.]'" *Id.* at 311. Noting a less intrusive alternative to serve the state's interest in combatting fraud or otherwise enforcing election law—requiring nonresident witnesses "to enter into a binding legal agreement with the Commonwealth

[11] Following amendment in 2016, this law is now found at Md. Ann. Code, Election Law § 3-102(a)(1)(iii).

to comply with any civil or criminal subpoena that may issue"—the court struck down the law. *Id.* at 318–19. Notably, this reasoning indicates that even if Maryland law had a monetary threshold such as Missouri's, the Fourth Circuit would not consider *Lamb* to be persuasive. *See also Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (ban on out-of-state circulators for ballot measures unconstitutional).

Maryland requires Fusaro and Waters to form a PAC to speak. The law simultaneously prohibits Fusaro and Waters from forming a PAC without complying with unconstitutional registration requirements and unconstitutional officer requirements. Finally, for purposes of the State's case, it was impossible for Fusaro and Waters to include the proper disclaimer on the alleged campaign material without submitting to this unconstitutional scheme, because they must identify the treasurer of their PAC in the first part of the disclaimer and, in the second part, the treasurer or "president." Md. Ann. Code, Election Law § 13-401(a)(1)(i), (b).[12] Even if a robocall can be considered campaign material under Maryland law, and it cannot, the disclaimer provisions are constitutionally estopped due to the law's unconstitutional PAC registration requirements.

3. The Motion to Dismiss Must be Granted

With a bluster fit for the Old West, the State Prosecutor recently declared in this case that "[i]f you want to come into Maryland, obey the laws or stay the hell out of Maryland." Rick Ritter, *Anne Arundel Co. Political Operatives Found Guilty For Robocalls*, CBS BALTIMORE, Feb. 21, 2017, http://baltimore.cbslocal.com/2017/02/21/anne-arundel-co-political-operatives-found-

[12] "President" only appears in this single instance within Title 13 of the Election Law Article, and is otherwise undefined. *See also* Md. Ann. Code, Election Law § 1-101 (definitions). Perhaps it is a synonym for "chairman." Perhaps, like so many other nebulous provisions of Maryland campaign finance law, we will know it after the State Prosecutor sees it and brings charges. Such careless drafting of laws that implicate the core of the First Amendment should be subject to the strongest judicial rebuke.

guilty-for-robocalls/ (quote drawn from video segment). Politically engaged citizens will, indeed, stay out of Maryland, and Marylanders will, indeed, stay out of politics if the campaign finance provisions of the Election Law Article discussed herein are upheld and the charges against Fusaro and Waters are allowed to proceed. Marylanders, and anyone of ordinary intelligence, cannot readily determine what constitutes "campaign material" until the State Prosecutor brings charges. Out-of-staters who band together to speak may only obey the law by either not speaking at all or complying with blatantly unconstitutional "campaign finance entity" requirements. The State cannot defend the campaign finance provisions of the Election Law Article against the vagueness and overbreadth doctrines, prior restraint, or traditional First Amendment scrutiny. This Court should remind the State that its laws answer to the Constitution. Following this, in keeping with his bravado, the State Prosecutor might deposit his hard copies of the Election Law Article in an out-of-state landfill.

For the reasons discussed herein, this Court should grant the defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed; postage prepaid, this 15th day of May, 2017 to the State's Attorney, 251 Rowe Blvd, Annapolis, MD 21401 and Thomas McDonough, Suite 410 Hampton Plaza, 300 E Joppa Road, Towson, MD 21287.

__/s/_____
John R. Garza