20-1944

United States Court of Appeals
for the First Circuit

GASPEE PROJECT;
ILLINOIS OPPORTUNITY PROJECT

Plaintiffs-Appellants,

v.

DIANE C. MEDEROS, in her official capacity as member of the Rhode Island State Board of Elections; STEPHEN P. ERICKSON, in his official capacity as member of the Rhode Island State Board of Elections; JENNIFER L. JOHNSON, in her official capacity as member of the Rhode Island State Board of Elections; RICHARD H. PIERCE, in his official capacity as member of the Rhode Island State Board of Elections; ISADORE S. RAMOS, in her official capacity as member of the Rhode Island State Board of Elections; DAVID H. SHOLES, in his official capacity as member of the Rhode Island State Board of Elections; WILLIAM E. WEST, in his official capacity as member of the Rhode Island State Board of Elections,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Rhode Island
Case No. 1:19-cv-00609
Honorable Mary S. McElroy

APPENDIX

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Pursuant to F.R.A.P. 30(a)(1), Local R. 30.0(c), and the *Notice Regarding Contents of the Appendix,* Appellants respectfully submit the following for the Court's review:

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CERTIFICATE OF SERVICE

I certify that on December 18, 2020, I electronically filed the foregoing Appendix with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel R. Suhr
Daniel R. Suhr

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

The Gaspee Project and **Illinois Opportunity Project**, Plaintiffs, v. **Diane C. Mederos, et al.**, Defendants.	Case No. 1:19-cv-00609-MSM-LDA

Pursuant to Fed. Rule of Civ. Pro. 15(a)(1)(B), Plaintiffs file this first amended complaint as of right within the window of time provided by the Rule.

INTRODUCTION

1. Stretching back to the founding era and *The Federalist Papers*, freedom of speech has included the right to engage in anonymous issue advocacy concerning important public issues. *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Election Comm.*, 514 U.S. 334 (1995). *See The Federalist Papers* (Charles R. Kesler and Clinton Rossiter, eds., 2003).

2. Similarly, the freedom of association includes the right of private individuals to band together for common purposes without government prying into those associations' membership or donor lists. *NAACP v. Alabama ex rel. Patterson*,

357 U.S. 449 (1958); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963).

3. During certain time periods proximate to elections, Rhode Island statutes require organizations engaged in issue advocacy to disclose the identity of their members and supporters to the Defendant members of the State Board of Elections and the general public. Collectively, Defendants are referred to as the "Board."

4. The statutes also require that organizations engaged in issue advocacy identify themselves to the Board and disclose certain information on the face of an issue ad.

5. Plaintiffs, the Gaspee Project and Illinois Opportunity Project, intend to engage in issue advocacy in Rhode Island concerning referenda and legislators up for votes in fall 2020. If Plaintiffs were to engage in their planned issue advocacy, they would be required to report their sponsorship and disclose their donors to the Board.

6. To protect their privacy and that of their donors, Plaintiffs bring this suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief to protect their core First Amendment rights to free speech and association.

PARTIES

7. Plaintiff the Gaspee Project is a 501(c)(4) social-welfare organization based in Cranston, Rhode Island.

8. Plaintiff Illinois Opportunity Project is a 501(c)(4) social-welfare organization based in Chicago, Illinois.

9. Defendant Diane C. Mederos is sued in her official capacity as the Chairwoman of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

10. Defendant Stephen P. Erickson is sued in his official capacity as the Vice-Chairman of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

11. Defendant Jennifer L. Johnson is sued in her official capacity as a member of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

12. Defendant Richard H. Pierce is sued in his official capacity as a member of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

13. Defendant Dr. Isadore S. Ramos is sued in her official capacity as a member of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

14. Defendant David H. Sholes is sued in his official capacity as a member of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

15. Defendant William E. West is sued in his official capacity as a member of the Rhode Island State Board of Elections, which has its offices in Providence, Rhode Island.

JURISDICTION AND VENUE

16. This case raises claims under the First and Fourteenth Amendments of the United States Constitution and under 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

17. Venue is appropriate under 28 U.S.C. § 1391(b) because the Defendants reside in and the events giving rise to the claim took place in the District of Rhode Island.

FACTUAL ALLEGATIONS

18. Persons, business entities, or political action committees which engage in "independent expenditures" and "electioneering communications" are subject to a number of regulations under Rhode Island law. *See* 17 R.I.G.L. 25.3-1.

19. Independent expenditure entities "shall report all such campaign finance expenditures and expenses to the board of elections, provided the total of the money so expended exceeds one thousand dollars ($ 1000) within a calendar year, to the board of elections within seven (7) days of making the expenditure." *Id*. at (b). Such reports "shall contain the name, street address, city, state, zip code, occupation, employer (if self-employed, the name and place of business), of the person responsible for the expenditure. . . ." *Id*. at (f).

20. "The report shall also include a statement identifying the candidate or referendum that the independent expenditure or electioneering communication is intended to promote the success or defeat, and affirm under penalty of false statement that the expenditure is not coordinated with the campaign in question. . ." *Id*. at (g).

21. The report must also "disclose the identity of all donors of an aggregate of one thousand dollars ($ 1000) or more to such person, business entity or committee within the current election cycle. . . ." *Id*. at (h).

22. When an independent expenditure entity publishes an electioneering communication, it must include in the communication its name, the name and title of its chief executive, and a list of its "'Top Five Donors' followed by a list of the five (5) persons or entities making the largest aggregate donations to such person, business entity or political action committee during the twelve (12) month period .

. . .” 17 R.I.G.L. 25.3-3(a) (printed materials), (c) (television advertisements), (d) (radio advertisements), and (e) (robocalls).

23. Failure to comply with any section of the independent expenditure statute is punishable by a civil penalty levied by the Board. 17 R.I.G.L. 25.3-4 (b). Knowing and willful violations are a criminal misdemeanor. *Id*. at (a).

24. An independent expenditure entity is subject to these rules when it publishes an “electioneering communication,” which is defined as “any print, broadcast, cable, satellite, or electronic media communication . . . that unambiguously identifies a candidate or referendum and is made either within sixty (60) days before a general or special election or town meeting for the office sought by the candidate or referendum; or thirty (30) days before a primary election, for the office sought by the candidate; and is targeted to the relevant electorate.” 17 R.I.G.L. 25-3(16).

25. The effect of this definition is to classify issue advocacy communications that mention a candidate or referendum as an independent expenditure if they are made within the windows of time proximate to an election.

26. The Gaspee Project is a state-focused 501(c)(4) organization that engages in issue advocacy communications around its mission to return government to the people. It supports market-based solutions that can transform

lives through economic competitiveness, educational opportunity, and individual freedom.

27. The Illinois Opportunity Project (IOP) engages in issue advocacy in states across the country on issues that relate to its mission, which is to promote the social welfare and common good by supporting policies founded on the principles of liberty and free enterprise. It feels strongly that issue advocacy is a protected right under the First Amendment, and it has sought to vindicate that right with legal action. *See IOP v. Bullock*, 6:19-cv-00056-CCL (D.Mont.), and *IOP v. Holden*, 3:19-cv-17912-BRM-LHG (D.N.J.).

28. Plaintiff the Gaspee Project wishes to communicate its views on upcoming referenda to Rhode Island voters. In particular, it plans to spend over $1,000 on paid issue-advocacy communications by mail to thousands of Rhode Island voters in advance of the fall 2020 elections. These mailings will include information about pending local referenda that will affect property taxes. The mailings will inform voters of the impact of the referenda on taxes. The communications will not include any express ballot-advocacy as to the referenda.

29. Plaintiff Illinois Opportunity Project plans to spend over $1,000 on paid issue-advocacy communications by mail to thousands of Rhode Island voters in advance of the fall 2020 legislative elections. These mailings will provide

information to voters about how their legislators voted on a bill expanding the power of government unions (2019 Senate Bill 712).

30. Plaintiffs intend to engage in substantially similar speech in Rhode Island in the future.

31. Plaintiffs both have received donations over $1,000 in the past and intend to solicit and accept donations over $1,000 in the future.

32. If Plaintiffs engage in their planned issue advocacy in Rhode Island, then any individual or organization that supports either with $1,000 or more in donations will have to be disclosed to the Board.

33. If Plaintiffs engage in their planned issue advocacy, they will be required to file reports with the Board and to include state-mandated information and disclaimers on all their materials.

34. If Plaintiffs engage in their planned issue advocacy in Rhode Island, they will be required to list their top five donors on their materials.

35. Plaintiffs are concerned that compelled disclosure of their members and supporters could lead to substantial personal and economic repercussions. Across the country, individual and corporate donors and staff of political candidates and issue causes are being subject to harassment, career damage, and even death threats for engaging and expressing their views in the public square. Plaintiffs reasonably fear that their members, supporters, and leaders may also

encounter similar reprisals from certain activists if their association with Plaintiffs are made public. This fear is especially pronounced for those donors whose names will be directly printed on the issue-advocacy materials.

36. Plaintiffs also believe that disclosure of their donors will lead to declines in their membership and fundraising, impacting their organizations' bottom lines and ability to carry out their missions.

37. Plaintiffs, therefore, bring this pre-enforcement challenge on behalf of themselves and their donors to vindicate their First Amendment rights. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (setting the standard for pre-enforcement challenges). Plaintiffs intend to engage in a course of conduct affected with constitutional interest (namely, issue advocacy). If they were to move forward with their course of conduct, their sponsorship of issue advocacy and their members' and supporters' contributions to their work would be subject to reporting and disclosure.

38. Because of these potential harms, these sections of the Rhode Island statutes will chill Plaintiffs' own speech and cause them not to engage in their desired communications, so long as these statutes remain enforceable law.

39. Plaintiffs have no remedy at law.

COUNT I

By requiring Plaintiffs to disclose their members and supporters, the Board violates the First and Fourteenth Amendments.

40. The allegations contained in all preceding paragraphs are incorporated herein by reference.

41. Plaintiffs and their donors enjoy a right to privacy in their association for free speech about issues. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963). This right to privacy in association for free speech is protected by the First Amendment as incorporated against the states. *Id*. The statute violates that right by requiring disclosure of donations, ending the privacy of the speech-oriented association.

42. The statute cannot survive the most exacting standards of strict scrutiny. The U.S. Supreme Court has found a compelling interest in membership-disclosure regulations only when the association was engaged in or advocating for illegal activity. *Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980). Plaintiffs have no track record of illicit conduct nor have they ever embraced plainly unlawful means and ends; they are legitimate, social-welfare organizations engaged in issue advocacy. The government lacks a compelling interest in forcing them to disclose their members and supporters.

43. Plaintiffs and their members and supporters are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of 17

R.I.G.L. 35.3-1(h) as applied to themselves and to other organizations engaged in issue advocacy.

COUNT II

By requiring Plaintiffs to disclose their sponsorship of issue advocacy, the Board violates the First and Fourteenth Amendments.

44. The allegations contained in all preceding paragraphs are incorporated herein by reference.

45. Plaintiffs enjoy a right to anonymity in their free speech about public-interest issues, a right protected by the First Amendment as incorporated against the states. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Blakeslee v. St. Sauveur*, 51 F. Supp. 3d 210 (D.R.I. 2014). The statutes in question violate that right by requiring Plaintiffs to report to the Board when engaging in issue speech and to put a detailed disclaimer announcing their sponsorship on all of their issue-advocacy materials.

46. As applied to Plaintiffs' planned activities, this statute affects genuine issue speech, not express advocacy concerning candidates or ballot measures. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (government does not have "a green light to impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate.").

47. Plaintiffs are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of 17 R.I.G.L. 25.3-3 as applied to them and to other persons or organizations engaged solely in issue advocacy.

48. Plaintiffs are entitled to an injunction under 42 U.S.C. 1983 enjoining the continued enforcement of 17 R.I.G.L. 25.3-1 as applied to them and to other persons or organizations engaged solely in issue advocacy.

COUNT III

By requiring Plaintiffs to disclose their top donors on their materials, the Board violates the First and Fourteenth Amendments.

49. The allegations contained in all preceding paragraphs are incorporated herein by reference.

50. Forcing Plaintiffs to list their top donors on their advertisements (17 R.I.G.L. 25.3-3(a) (printed materials), (c) (television advertisements), (d) (radio advertisements), and (e) (robocalls)) is compelled speech. *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("By compelling individuals to speak a particular message, such notices alter the content of their speech."). Because compelled speech is content-altering, such regulations are "presumptively unconstitutional" and subject to strict scrutiny. *Id*. The government cannot prove a compelling interest or narrow tailoring here.

51. Even if the compelled in-ad disclosure is analyzed under exacting scrutiny and the campaign-finance precedents rather than *NIFLA*, the government lacks a

sufficient interest or a substantial nexus to justify this particular requirement. This type of disclosure substantially heightens the chilling effect on Plaintiffs and their members and contributors, while making a poor fit to any supposed government interest. *Cal. Republican Party v. Fair Political Practices Comm'n*, No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS 22160, at *16-20 (E.D. Cal. Oct. 27, 2004) (granting injunctive relief against a similar statute in California).

52. Plaintiffs are entitled to an injunction under 42 U.S.C. 1983 enjoining the continued enforcement of 17 R.I.G.L. 25.3-3 as applied to them and to other persons or organizations when the advertisement is genuine issue advocacy.

PRAYER FOR RELIEF

Plaintiffs, the Gaspee Project and Illinois Opportunity Project, respectfully request that this Court:

a. Declare that 17 R.I.G.L. 25.3, to the extent that it compels member and supporter disclosure for organizations engaged in issue advocacy, violates the Plaintiffs' right to freedom of speech and association under the First and Fourteenth Amendments;

b. Declare that 17 R.I.G.L. 25.3-1, in so far as it compels sponsor reporting for issue advocacy, violates the Plaintiffs' right to engage in anonymous speech under the First and Fourteenth Amendments;

c. Declare that 17 R.I.G.L. 25.3-3, to the extent that it compels sponsor disclosure for issue advocacy, violates the Plaintiffs' right to engage in anonymous speech under the First and Fourteenth Amendments;

d. Declare that 17 R.I.G.L. 25.3-3, to the extent that it compels in-ad donor disclosure for issue advocacy, violates the Plaintiffs' right against government compelled speech and government compelled disclosure of association;

e. Enjoin the Board from enforcing 17 R.I.G.L. 25.3-1 against Plaintiffs and other organizations that engage solely in issue advocacy;

f. Enjoin the Board from enforcing 17 R.I.G.L. 25.3-3 against Plaintiffs and other organizations when they sponsor issue advocacy;

g. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and

h. Award any further relief to which Plaintiffs may be entitled.

Dated: March 6, 2020

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE GASPEE PROJECT & ILLINOIS OPPORTUNITY PROJECT, Plaintiffs,	:	19-cv-00609(MSM)
	:	United States Courthouse Providence, Rhode Island
vs.	:	
DIANE C. MEDEROS, in her official capacity as member of the Rhode Island State Board of Elections, et al., Defendants.	:	Tuesday, July 21, 2020

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE MARY S. MCELROY
UNITED STATES DISTRICT COURT JUDGE

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(VIA VIDEO CONFERENCE)

21 JULY 2020

THE COURT: Good morning. We're on the record in the Gaspee Project and Illinois Opportunity Project vs. Diane C. Mederos, et al. And that is civil action 19-609. I'm going to ask that counsel identify themselves for the record, first on behalf of the plaintiffs, and then the defendants. And then if you could just let me -- identify who will be speaking for each.

THE CLERK: Judge, can I cut in for one second?

THE COURT: Sure.

THE CLERK: We're having a problem recording so I think we have to call IT because Lisa won't have a recording. One second.

THE COURT: Okay. So we're going to be even a little more delayed. I really do apologize. I hope everybody's patient and well today.

Carrie, let me know when you're all set, okay?

THE CLERK: We did have it recording on Wendy's computer, but now it's not.

(Brief pause)

THE COURT: All right. Thank you, everyone, for your patience. I apologize that we're getting under way about 15 minutes late. That's not our norm,

although technical difficulties usually cost me a few minutes.

So we are on the record, again, in the Gaspee Project and Illinois Opportunity Project vs. Diane Mederos, et al. And it's civil action 19-609. Again, I will ask the parties for the plaintiff and then the defendant to identify themselves. And if you could just identify who will be speaking on behalf of each party, I would appreciate that. Thank you.

MR. SUHR: Good morning, your Honor.

THE COURT: Good morning.

MR. SUHR: Daniel Suhr, S-u-h-r. I'm the lead counsel for the plaintiffs. And I am here with my excellent local counsel, Joe Larisa.

THE COURT: Good morning, Mr. Suhr and Mr. Larisa.

MS. SADECK: Good morning, your Honor. Special Assistant Attorney General Katherine Sadeck. I'll be arguing for the defendants. And also here today is Keith Hoffmann from our office and attorney Ray Marcaccio.

THE COURT: Good morning, Ms. Sadeck, Mr. Hoffmann and Mr. Marcaccio.

MR. MARCACCIO: Good morning, your Honor.

THE COURT: Good morning. So a couple of things

before we get started. I'm sure you're all used to Zoom. We do have a court reporter on the line, and she is trying to take everything down for the record, so speak slowly, speak clearly and speak for the record. I have a tendency to just interrupt without saying your name, and I'm going to try to not interrupt and also try to be a little more directed in my comments so the record is a little clearer. But it's your record, so I'd like us to try to, you know, go as slowly as we can.

We are here today on the defendants' motion to dismiss -- and I believe that is ECF number 22 -- and then the plaintiffs' opposition to the motion to dismiss which is at ECF-23. And then the defendants filed a reply memorandum at ECF number 26. So since this is the defendants' motion, Ms. Sadeck, I will hear from you. Thank you.

MS. SADECK: Thank you, your Honor.

THE COURT: You're welcome.

MS. SADECK: So at first glance I think this case can come off as a bit complicated, but when the rhetoric is peeled away and the underlying case law is examined, I think it actually becomes quite apparent.

Your Honor, the plaintiffs' position is based on inapplicable cases that don't pertain to the subject

matter at hand. The defendants' position is supported by directly on-point recent precedent from the United States Supreme Court and the First Circuit upholding the social laws just like the ones at issue in this case.

(Brief pause)

MS. SADECK: In particular, the First Circuit's 2011 decision in *NOM vs. McKee* is directly on point, and it provides a roadmap in a lot of ways for this case. And it also makes clear that the First Circuit has already expressly considered and rejected the same arguments that plaintiffs present to this Court today. What I'd like to do is briefly talk about how exact scrutiny is a relevant standard of review and what that means, and then apply that to the provisions that are being challenged in this case.

So to start with, the plaintiffs urge this Court to apply the higher strict scrutiny standard of review, but the First Circuit and the U.S. Supreme Court have expressly held that the lower exacting scrutiny standard of review is the applicable one in cases like this.

Where a strict scrutiny would require a compelling government interest and narrow tailoring and least restrictive means, the courts have found that the

lower exacting scrutiny standard, which only requires an important government interest that be substantially related to the law, is the one that applies. The First Circuit recognized this in the 2011 *McKee* decision when the Court held that the Supreme Court in its First Amendment decision distinguished between laws that restrict the amount you can contribute and laws that simply require you to disclose information about who is speaking about political issues.

And the Supreme Court in the First Circuit in *McKee* were very clear that that latter type of disclosure law, the type that's at issue in this case, is less restrictive and, as a result, it's subjected to a lower level of scrutiny, exacting scrutiny. And for that reason, *McKee* says disclosure requirements have not been subjected to strict scrutiny but rather exacting scrutiny. And plaintiffs essentially acknowledge this in Footnote 3 of their brief.

Another part of the framework that's relevant here is that the Rhode Island Federal District Court has previously recognized that all laws regularly enacted by the Rhode Island legislature, which includes these laws, come to the Court with a presumption of constitutionality. So against that framework, we now look at the provisions that are at issue in this case.

Plaintiffs' lawsuit challenges commonsense provisions in Rhode Island's election law framework that we require disclosure of certain limited information regarding certain expenditures of over a thousand dollars. To even be impacted by these laws, you'd have to spend over a thousand dollars. You have to communicate through certain identified media. You have to expressly advocate about a candidate or referenda or identify a candidate or referenda in close proximity to an election in a communication that reaches over 2,000 people.

Additionally, you can opt out. If you don't want your donation being used for these types of expenditures, you can opt out and then not be subject to these disclosure requirements. There are also other exemptions such as for communications to members of an organization. The First Circuit and other courts have broadly upheld these type of commonsense disclosure laws which subjected to exacting scrutiny.

So if we look first at the first exacting scrutiny factor, which is whether there is an important government interest, well, here, the First Circuit in *McKee* has already done the work for us. In that case, the First Circuit identified at least two important government interests that apply. First, *McKee*

recognized a government interest in disseminating information about the electoral process so that citizens can make informed choices and know where political campaign money comes from and how it is spent. *McKee* also identified a second related interest which derives from the Supreme Court *Citizens United* case, an interest in identifying the speakers behind politically oriented messages.

The court said disclosing the identity and constituency of a speaker engaged in political speech enables the electorate to make informed decisions and give proper weight to different speakers and messages. So in this regard, *McKee* is directly on point, and it makes clear that Rhode Island has important government interests related to informing voters about the individuals and interests behind election-related disclosures. And these interests are applicable not just to communications about candidates, but also referenda. In either case, the interest in identifying speakers behind, as the court put it, politically oriented messages, applies. So now we can turn to the second exacting scrutiny factor which requires a substantial relation between those important interests and the challenge provisions.

With regard to the main statute that the court

in *McKee* examined, that applied even more broadly than the Rhode Island statute. It covered expenditures over $100 as opposed to the thousand dollars here. And the First Circuit held that this factor, this second substantial relationship factor, was satisfied because the modest amount of information requested is not unduly burdensome and ties directly and closely to the important government interests.

In the 2000 *Daggett* case, which is another First Circuit case, the court again found a substantial relation between reporting requirements and government interests. In *McKee*, the First Circuit was clear that this standard, this factor, is that not only with regard to independent expenditures but also electionary communication because disclosure requirements bear a substantial relationship to the public's interest in knowing who is speaking about a candidate shortly before an election, even if the ad does not expressly advocate for or against that candidate.

The *Citizens United* decision probably is most widely known for holding that contribution limits on corporations are unconstitutional. But the court in that case also made very important statements about the importance of disclosure requirements and how those disclosure requirements are so important in helping

citizens in this modern age more than ever understand who is speaking about political issues. Citizens can properly evaluate the message including the trustworthiness and the biases of the speaker.

To the extent that the plaintiffs here argue that the disclosure requirements will somehow harm them or subject their members to harassment, they've only offered the most generalized conclusory allegations in that regard and not even any specific allegations about concerns or incidence experience by their own members.

THE COURT: Ms. Sadeck, I don't want to derail you here, but I want to ask you about that.

Are there any cases where the motion-to-dismiss standard has been applied when a party has alleged, you know, potential harm to the speakers? So in other words, can you address the fact that the plaintiffs have made this allegation and we are at a motion-to-dismiss standard.

MS. SADECK: Sure, your Honor. So the allegations in the complaint are general -- they talk about a generalized concern -- but it's not specific. There are no specific factual allegations about members of these organizations, the Gaspee Project, the Illinois Opportunity Project, experiencing harassment, retaliation or anything like that.

And the United States Supreme Court in *Citizens United* was very, very clear regarding the extremely high standard of specific allegations that are necessary for harm to be a consideration. And I think it's very clear that the *NAACP* case regarding the members of the NAACP in 1950s Alabama and the very real and present threat that they faced by their members being disclosed is a very unique circumstance. And in *Citizens United*, the Court considered the same kinds of things that are alleged in this complaint. Now, *Citizens United* was not in a motion-to-dismiss standard, but we're really in the same position in the sense that in a motion-to-dismiss standard we accept the allegations as true.

So even accepting as true the allegations in the complaint, even accepting those type of more generalized allegations of harm as true, we're in the same situation as *Citizens United* which considered the same level of generalized allegation. The plaintiffs in *Citizens United* made the general argument that disclosure requirements can kill those donations to an organization by exposing donors to retaliation.

THE COURT: And I don't want to interrupt again, Ms. Sadeck, because I try not to do this, but I just want to kind of hone in on this point because the *NAACP*

case is still good law. So my question is sort of at a motion-to-dismiss level standard, taking all allegations as alleged by the plaintiffs, is there a point where -- is this a bright line or is it a sliding scale? Because clearly what the NAACP was alleging in 1958, I believe, or 1950, whatever it was, was a very extreme sort of backlash.

But taking the allegations as pled, is there a point where the Court has to say that at least discovery needs to proceed on that issue or are we at a point where just a conclusory allegation is not enough?

MS. SADECK: We're at a point where we take the complaint as it is, and we take the allegations in the complaint as it is. And we're assuming that they're all true. What the state's position is, is even giving them the credit, we're going to assume that all the allegations in the complaint are true, that's what we do under the 12(b)(6) standard, even doing that, we're still in the same position as the court was in *Citizens United*. The nature of the allegations in the complaint are general, just like the ones that were before the court in *Citizens United*.

The plaintiff here hasn't alleged member Joe Smith was told he'd be fired from his job if he did this. They haven't alleged we've received 50 emails

from our members that if we have to disclose, we're not going to donate anymore. We don't have anything approaching that kind of specific allegation of harm.

Instead, we have the exact same kinds of allegations of harm that the court in *Citizens United* considered. I mean, it wasn't minimal. In *Citizens United*, the court was presented with arguments -- here's a quote -- "that recent events in which donors to certain causes were blacklisted, threatened or otherwise targeted for retaliation."

That's very familiar because that's the same type of arguments that the plaintiffs in this case are presenting. They're talking about cases where someone took down confederate monuments and was threatened or someone supported gay marriage and was threatened with retaliation. They talk about all these other instances where individuals have experienced potential threats of reprisal.

And that's the same thing that the *Citizens United* court considered, but the court found that the plaintiffs in that case had offered no evidence that its members may face similar threats or reprisals. So the court was very clear that even those same types of allegations that are in the complaint, that we assume were true, don't rise to the level of specificity

necessary to establish the kind of harm that would come even close to equating to the *NAACP* case and the situation where the harm is very real and present danger.

And we just don't have those allegations here. Even crediting the allegations, they don't rise to that level. Even if we assume that discovery -- all of the allegations in the complaint as true, it still wouldn't rise to that level.

The other factor is that this is brought as a facial challenge. We noticed that in our motion to dismiss and the plaintiffs haven't disagreed. So under a facial challenge standard, the plaintiffs have to show that there's no constitutionally appropriate application of this statute. Even, for instance, if there were an organization or two to whom application of this statute might be unconstitutional, that doesn't cut it. They would have to show that it's unconstitutional across the board when applied, and because they sought release not just for themselves but for other organizations, that's the relevant standard and they can't meet that standard here.

The plaintiffs have also alleged that the statutory provisions in this case requiring that the top five donors be listed on communications constitutes

compelled speech. That's another way that they try to differentiate the precedent. As an initial matter, that provision only applies in the communications made by certain tax-exempt entities. And, again, *McKee* applies here. *McKee* and other courts have observed that there can be confusion caused by ambiguous entity names that don't really make clear who is speaking. And *McKee* in the First Circuit applied exacting scrutiny to disclaimer requirements and determined that there was a substantial relationship between the government's important interests and a law requiring disclaimer of the persons who are speaking or financing the communication. And in that case, the court said that the disclaimer and attribution requirements are, on their face, unquestionably constitutional. And that applies here too.

Plaintiffs try to escape this precedent by saying that their case is analogous to the *National Institute of Family and Life Advocates* case. In that case, the court struck down a law that required a pregnancy clinic to post a message that was directly contrary to that clinic's own belief systems. The law required a pro-life clinic to post a message about abortion resources.

The disconnect between that case and this case

is obvious. Here, the disclaimer requirement is only a content-neutral requirement to identify the speaker, not a requirement to spread a substantive message that is against the entity's own beliefs.

And multiple courts have rejected the argument that plaintiffs are making that this equates to compelled speech. In *Citizens United vs. Schneiderman*, which was a Second Circuit 2018 case, the court noted that disclosure requirements are not inherently content based. Massachusetts federal court, faced with a similar top five disclosure provision, held that that pregnancy clinic case that plaintiffs rely on does not command a different result given the content-neutral nature of the disclaimer requirement in this case and the minimal burden placed on plaintiffs' speech. That's the *Mass. Fiscal Alliance vs. Sullivan* case cited in the brief.

Seemingly recognizing that the precedent is entirely against them, the plaintiffs try to say their case is different because they wish to engage in issue advocacy rather than express advocacy without expressly advocating for or against a certain candidate or referenda. And at first the rhetoric of that argument has some appeal, but the exact same argument was already before the United States Supreme Court and the

First Circuit and both soundly rejected.

In the First Circuit in the *McKee* decision, the First Circuit noted that fundamentally the Supreme Court has explicitly rejected an attempt to import the distinction between issue and express advocacy into the consideration of disclosure requirements. The court went on to similarly say, "We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."

The 2011 *Daluz* case, decided the same day as the *McKee* case, it examined Rhode Island's disclosure laws, held likewise and said that the contention that disclosure laws must be limited to regulation of express advocacy is rejected. The D.C. District Court in a decision that was summarily affirmed by the United States Supreme Court, stated that the Supreme Court in every court of appeals to consider the question have already largely, if not completely, closed the door to the argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying explicit reference to an electoral candidate.

The court found that the United States Supreme

Court had rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy. The First Circuit in these other federal courts could not have been clearer in rejecting the very same argument that the plaintiffs base their case on, and accepting plaintiffs' argument would not only run afoul of this precedent, it would also create a gaping loophole in Rhode Island's disclosure laws.

If we take, for example, the Gaspee Project, they say that they want to spend over a thousand dollars sending out mailers to thousands of Rhode Islanders in close proximity to election telling them that if they vote yes on a certain referenda, their taxes will go up. And they say, well, we're not telling them to vote no; we're just going to tell them that their taxes are going to go up if they vote yes.

Well, Rhode Island disclosure laws and the relevant court precedent I just discussed recognized this for what it is; it's an electioneering communication. And plaintiffs' complaint at paragraph 5 admits as much. They say that plaintiffs, quote, "intend to engage in issue advocacy in Rhode Island concerning referenda and legislators up for votes in 2020."

It's obvious that plaintiffs are trying to speak about matters that are, quote, "up for votes" and are seeking to spread a message to voters about election issues. The loophole that plaintiffs advocate for would allow the rule to be swallowed up and would render disclosure laws meaningless. Its nameless, faceless entities could avoid disclosure laws simply by saying here are all the bad things that are going to happen if you vote yes, but we're not going to tell you to vote no. That puts form over substance, and the courts have clearly and consistently rejected that.

The applicable case law in this disclosure context is all against the plaintiffs' position, and that leaves them relying on inapplicable cases; namely, the *NAACP* case and the *McIntyre* case. They make very clear on page 24 of their brief that their case is basically resting entirely on these two cases, neither of which pertain to disclosure laws.

The *NAACP* case sought disclosure of a membership list. Let's be clear, nothing in Rhode Island's laws requires disclosure of a membership list. Disclosure is only triggered by expenditures over a thousand dollars that meet the other requirements of the statute. And there's an opt-out provision. So members who wish to donate, but not be subject to the

disclosure laws, can do so.

And as I already discussed, there's no specific allegations of harm here. Try as they might to equate their position to that of NAACP members in Alabama in the 1950s, there are no factual allegations pled that would even come close to that level of harm.

The *McIntyre* case is just as inapplicable. It pertained to a woman who, as the plaintiffs put it, showed up in a meeting with a bunch of flyers to hand out to her neighbors. That case did not pertain to election disclosure laws; it was completely different.

Here, the laws at issue require a thousand-dollar threshold and other requirements to be met. The *Blakeslee* case relied upon by plaintiffs, Rhode Island District Court case in 2014, is the same as the *McIntyre* case and it too does not apply to disclosure laws.

Your Honor's question earlier asked about the appropriateness of resolving this on a motion-to-dismiss level. And the Supreme Court spoke about that in the case of *Neitzke vs. Williams*, 490 U.S. 319. And in that case, the court said that Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of dispositive issue of law.

The court went on to say, "This procedure,

operating on the assumption that the factual allegations in the complaint are true, streamlined litigation by dispensing with needless discovery and fact-finding. If, as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, a claim must be dismissed without regard to whether it's based on outlandish legal theory or on a close unavailing one."

This case fits neatly within that framework. Plaintiffs are bringing a facial challenge. They have not identified any need for discovery and there is none. Even if accepting the plaintiffs' factual allegations are true, as a matter of law, their entire case is based on legal arguments that the First Circuit has already rejected. And for that reason, dismissal is appropriate on a motion-to-dismiss standard.

I'd be happy to answer any other questions the Court has.

THE COURT: Thank you, Ms. Sadeck. I don't have any at this time. I'm going to ask attorney Suhr to argue, but I would ask you to address first initially one thing.

Is this a facial challenge and has the plaintiff conceded that?

MR. SUHR: It is a facial challenge, your Honor, to the extent that we are seeking relief for more than just ourselves. I think *Doe vs. Reed* has a useful paragraph on this concept.

THE COURT: Right.

MR. SUHR: Yes.

THE COURT: Okay. Let me ask you in that framework, assuming that the framework applies, are there any federal cases where a disclosure and disclaimer law was found unconstitutional under exacting scrutiny or are you arguing that we're looking at a heightened scrutiny?

MR. SUHR: So for the first two claims, I think we recognize that *McKee* compels exacting scrutiny. And we believe for the third claim, strict scrutiny is the appropriate standard.

THE COURT: Right. I'll let you argue. I just want you to know that those are the questions that I have in my mind as you are arguing. Thank you.

MR. SUHR: Thank you, ma'am.

As you're obviously aware, we're at a motion to dismiss and so I guess I would phrase the standard slightly differently. I think the First Circuit case we cited in our brief used the phrase "frame a viable legal theory" as the burden that we have or cognizable

legal theory. I feel like we've at least met that standard that for now you only need to conclude -- rather, for now to conclude that the motion should be granted, that our activities are clearly not protected.

So I think it's important to start, your Honor, by remembering we have three separate claims. Defendants' strategy here has been to sort of lump them all together, say that they are controlled by *McKee* and move on, but we have three separate claims with three separate legal theories. And though *McKee* may provide some guidance, if you read *McKee*, you will find nowhere in it any discussion of *McIntyre* or *NAACP* or *NIFLA*, because that case was based on an overbreadth and vagueness challenge. They were simply different legal theories.

So the holdings in *McKee* are certainly applicable, for instance, on the standard of review; nonetheless, the issues that we're bringing forward here are new issues that call for your Honor's attention.

So the first is the donor disclosure claim which I'll call the NAACP claim which, as your Honor has noted, is still good law and its holding is very clear. Privacy in association for speech is important and the

state cannot lightly invade it. I'll focus on just responding to my colleague's points here.

The reason we only had generalized allegations as to the harm to our clients is because our clients' donors are currently private. This is the inherent problem in the state's argument is that no group could ever succeed if it has -- the NAACP couldn't have necessarily succeeded because they couldn't say, well, you know, this person is a member of ours and they have been targeted without acknowledging that that person was a member. And the whole point is to preserve the member's privacy.

So I would point you to Justice Alito's concurrence in *Doe vs. Reed* which is a great maybe two paragraphs where he talked about the standard for new organizations that are first entering the public square in this way, what standard should be applied. And there the answer is that you can look to the experiences of other similar groups and what their members have experienced in order to prove your own concern or fear. And so I think there, at least as you noted at the motion-to-dismiss stage, we certainly deserve an opportunity to show that similar organizations like ours have experienced similar responses.

THE COURT: So without -- I don't want to derail you -- I hated it when judges did that to me and then I lost my place -- but I just want to focus you a little bit in on that. What do you have to allege in a complaint, though? Is it not available to you to make out specific allegations about similar organizations that have experienced and similar individuals who are members of similar organizations who have experienced this kind of backlash?

I think recognizing that *NAACP* is still good law, we also need to recognize the climate in which it occurred and the timing in which it occurred. And there was some good evidence of backlash against members of not only their organization but similar organizations. So I'd ask you, why haven't you brought that forth and how would discovery flesh that out?

MR. SUHR: Sure.

THE COURT: Because -- and maybe I'm just oversimplifying, but I'm looking at it, the Rhode Island Board of Elections isn't going to have the evidence of that, right?

MR. SUHR: No. It's our opportunity I think at the summary judgment stage to prove that, including by providing evidence from affidavits from our client. And that's -- you know, I think in the complaint, what

we reference is our clients and their organizational leaders who are professionals in the space who have to raise money to sustain their organizations. You know, they allege that they have this legitimate fear based on these experiences.

And you're right certainly, your Honor, thankfully, we don't live in an era of burning crosses anymore, but there have been instances since then when organizations have brought forth similar claims that we can look at. So the ACLU, which is certainly a recognized national brand-name organization, has brought donor privacy claims based on the experiences of its members working on controversial issues. The Black Panther party had a good case in the D.C. circuit on this point.

THE COURT: Have any of the courts -- have any federal cases since *Citizens United* struck down disclosure and disclaimer laws under exacting scrutiny?

MR. SUHR: Yes, your Honor, two. One is *Americans for Prosperity vs. Holden*. It's a New Jersey case. There, admittedly, the disclosure was far broader; it applied to issue advocacy at any time. It wasn't specific to the electoral time period.

But Judge Martinotti in that case has a great final two pages in his opinion where he talks about --

THE COURT: Do you have the cite?

MR. SUHR: I'll file a notice of supplemental authority, your Honor.

THE COURT: Thank you.

MR. SUHR: Judge Martinotti has a great section for about two pages at the end where he talks about the cancel culture that we live in and the experience of people. And then there's also a case, *Citizens Union*, not *Citizens United*, which is a conservative group, but *Citizens Union*, which is actually a Ralph Nader group. We'll also submit the supplemental authority, your Honor, which was, again, decided within the last year.

And then third, there was a case, again, not specifically in the electoral context, it was a contract disclosure case, but from the Southern District of California, L.A., had passed a law saying that you had to disclose if you were a member of the NRA in order to qualify for a city contract. And the court there recognized that being an NRA member is a controversial thing in our society and that city contractors shouldn't have to disclose that in order to -- it was an unconstitutional condition. So I'll submit those cases, your Honor. But I think that probably covers the waterfront on our first point.

Again, I really think Justice Alito's

concurrence in *Doe vs. Reed* is a great starting point on this claim because he talks a lot about the harassment, especially the internet, and the way in which the internet has just so changed our society. It struck me, your Honor, that Illinois Opportunity Project is here in Rhode Island and we're concerned about this, but the reality for my client is if they engage in this advocacy in Rhode Island like they plan to, they may have donors in Illinois or elsewhere in the country who are going to be disclosed because of this law. And that's just on the internet. And so a fight that they might be fighting in one state all of a sudden becomes information that's available in a fight in a different state, so anyway that's our first claim.

Our second claim is the disclosure claim, what I'll call the *McIntyre* claim. The first question I think you have to confront is whether *McIntyre* is still good law. Defendants have adduced no evidence that the Supreme Court has overruled it. Indeed, they cannot. The Supreme Court has not. All the state can say is that it is hard to reconcile with *Citizens United*.

The Supreme Court did not think that *Citizens United* overruled *McIntyre* because only six months later in *Doe vs. Reed*, which is a case I have mentioned several times already, there is extensive discussion of

McIntyre in Justice Stevens' concurrence, Justice Alito's concurrence and Judge Thomas's dissent all which came out after *Citizens United*. So I think the case is still good law. And knowing that it is, the question is how does it apply?

And I think here the Seventh Circuit has charted the way in the *Wisconsin Right to Life vs. Barland* case, which is a very long case which I apologize, but if you turn to the pages that we cite in particular, Judge Sykes has a really strong discussion of the importance of grassroots organizations in our public square and the role that they play. And the fact that when they speak up on issues, especially when people are paying attention to issues, which is close to an election, that it's not constitutional to just impose on them this political committee status that the state seeks to impose.

Our third claim, your Honor, is the compelled speech claim, what I'll call the *NIFLA* claim. And the state wants you to see this as a disclaimer requirement or disclosure requirement, but it's really not. A disclosure requirement in the vein of *Citizens United* or *Buckley vs. Valeo*, right, where we really start from, is that you have to fill out a form, you have to send it to defendants, the board, and they'll post it

on the website. And that is one thing and it is disclosure and it is a burden on speech, but it is not speech in and of itself.

What this provision of the law requires is speech; it is compelled speech. In order to enter the public square, in order to say what you want to say, you also have to say what the state wants you to say.

THE COURT: But it's not content based, right? It's content neutral.

MR. SUHR: It is content neutral, but it is content altering, which is the phrase the Court uses in *NIFLA*. It applies to everybody regardless of what issue you want to talk about, but it changes what you say when you talk about your issue. So it is content altering -- again, that's the phrase in *NIFLA* -- and because of that, it is subject to strict scrutiny.

It's the same sort of -- I think the Supreme Court in *NIFLA* arrives at strict scrutiny by saying content altering and content based are similar and so they take *Reed vs. Town of Gilbert*, which is the content-based case, and say, okay, content-altering laws, also it makes sense to apply the same standard.

But it is content altering and, you know, my colleague on the other side tried to distinguish *NIFLA* by saying the pro-life crisis pregnancy centers really

didn't want to say what the state wanted them to say. And my only answer to that is my clients really don't want to say what the state wants them to say.

THE COURT: Isn't it different when you're talking about a clinic that would be forced to put information out there that is completely in opposition to its belief system as opposed to disclosure law that requires you to say, hey, these are the people who are providing the most or the top five, you know, amounts of money for our issue campaign or our candidate campaign?

MR. SUHR: I would say my clients are just as committed to privacy as the pro-life pregnancy centers are committed to being pro-life.

THE COURT: But this isn't -- so your issue isn't a private -- you're not arguing privacy -- that electioneering around privacy issues is the issues.

MR. SUHR: No.

THE COURT: So this is a slightly different -- it's not requiring you just to -- or requiring people to say here's the opposing viewpoints, right?

MR. SUHR: That's true.

THE COURT: And *NIFLA* was.

MR. SUHR: It is not a fairness doctrine sort of

requirement. So I would agree with you, your Honor, that *NIFLA* is perhaps a more obvious infringement, but I think if you read the holding in *NIFLA*, it is absolutely on point. Though the court is certainly sympathetic to the pro-life center's unwillingness to say it, and I think it's skeptical of the state's motives in making them say it, nevertheless, the holding in the case is the reason the state can't make them say it is because it's altering their speech and making them say something they don't want to say.

And that is equal issue for my clients; that it is forcing them to alter the content of their communication and say something they don't want to say. For that reason, it's subject to strict scrutiny.

Now, your Honor still might say, well, okay, in *NIFLA* the state's interests were different and the tailoring was different, whereas in this case, you know, the state's interests are different and the tailoring is different. But I think the strict scrutiny rule still applied.

Specifically, on the tailoring question, your Honor, even if you conclude that the exacting scrutiny is met by the state's informational interests, I think it's much harder to say that strict scrutiny is met by the state's informational interests. And that's

because the court in a number of the campaign finance cases the state has cited has said preventing corruption? That's compelling, that's important.

That's not an interest here. There are no corruption concerns that the state has brought forward. It's only the informational interests which the court has always sort of tagged on at the end of the interest that justify these disclosure laws because it's the least powerful of the state's interests. So even if it does justify the first two, I really do think you have to look at the third one differently.

And the final thing I'll say on this third claim, your Honor, is just that the state is certainly right; *Massachusetts Fiscal Alliance* came out one way, which is the district court case there. I would just point out that I've got a district court case in *California Republican Party* that came out the other way.

THE COURT: Well, we're First Circuit jurisdiction, so don't I need to look at what the First Circuit says with a little closer eye than, say, the Ninth Circuit?

MR. SUHR: Certainly so. But when we have two district court opinions, I really don't know what to say other than you have to read *NIFLA*.

THE COURT: Is the California case still good law?

MR. SUHR: It's a district court decision. It was never vacated or changed on appeal. I think the case actually just kind of died. The election happened and so the case sort of went away.

THE COURT: Okay.

MR. SUHR: Those are my three claims, your Honor. I think, in closing, perhaps just for the benefit of my clients or any press that are listening, this case is about the fundamental right of every citizen to band together with others who share his or her beliefs, to speak out together in a public square on issues of importance for them while not having to register with the government, hand over their names and home addresses of all their supporters for the world to find on the internet and then say things they don't want to say because the government makes them say it. The First Amendment protects my clients from these incredibly broad, invasive mandates. Thank you, your Honor.

THE COURT: Well, let me just ask you a question.

MR. SUHR: Of course.

THE COURT: Because your summary there at the

end, you say, you know, to band together and not disclose. There are opt-out provisions in the law, and it's only within a certain time frame and it is only with certain electioneering kind of speech; isn't that correct?

MR. SUHR: Yes, ma'am. I think that all goes to the tailoring question.

THE COURT: I understand that, but at the end you said, you know, that this impacts their right to band together. It doesn't do any of those things; isn't that correct?

MR. SUHR: So I would say it does affect their right to band together privately.

THE COURT: They can band together privately and all donate $999 or all opt out of whatever issue is less than that, can't they, without anybody ever knowing about it?

MR. SUHR: Yes, ma'am, that is true.

THE COURT: It may impact it, but it's not completely disrupting it. So I just want to be pretty clear for the record.

MR. SUHR: Fair enough, ma'am.

THE COURT: All right. Thank you.

Is there anything else, Ms. Sadeck, you'd like to respond to?

MS. SADECK: Yes, your Honor. If I can just quickly respond to just a few points?

THE COURT: Sure.

MS. SADECK: One is regarding the -- plaintiff makes the argument, essentially, that all we have to do to survive a Rule 12(b)(6) is not present an outlandish argument and because it's a coherent argument, that that gets past the gate. I think the Supreme Court case I cited was very clear on rejecting that position and saying that it really doesn't matter if it's an outlandish argument or a close argument that just misses. The bottom line is it's a legal argument that fails as a matter of law. And in that case, dismissal is appropriate under 12(b)(6).

In regard to the allegations about donor concerns, there's really two issues there and I think those issues I raised before, and I'll just follow up on those now based on what plaintiffs' counsel said. First, is that regarding concerns of harm, discovery would not help here. Under *Twombly*, you need to plead allegations that would survive a motion to dismiss and that state a claim. And the allegations pled in the complaint are extremely general. Plaintiffs are concerned, they plead, that compelled disclosure could lead to substantial personal and economic

repercussions, but then the complaint goes on to say that this is based on the fact that across the country individual and corporate donors to other political candidates and issues have been subject to harassment. That's the exact same situation as *Citizens United* where the court was presented with arguments that, well, we feel we're going to be reprised against because others have been reprised against. Even accepting that allegation as true, *Citizens United* said that's not enough, that's not *NAACP*.

THE COURT: I guess my question is, somewhere between *NAACP* and *Citizens United* there is some sort of alliance, right? And I think we can acknowledge that the climate has changed even since *Citizens United*. I think that's what Mr. Suhr is saying.

So I guess my question is: Do we get to discovery in order to allow them to present information saying here's how people with similar views, with similar disclosure laws in similar situations, have been retaliated against, or do we allow the plaintiffs an opportunity to supplement by affidavit and then convert the standard to a summary judgment standard?

I'm unclear of where along that continuum this case falls. I'm just interested in your opinion and also Mr. Suhr's.

MS. SADECK: Sure, your Honor. I think there's two points there. And the first point, which I think is the most dispositive one, is that plaintiffs have acknowledged that this is a facial challenge so it, frankly, doesn't matter. Even if Gaspee Project had affidavits from a hundred members saying I've been threatened, I've been reprised against, this is a facial challenge. The plaintiffs under a facial challenge have to show that the law is unconstitutional and lacks any plainly legitimate sweep.

The *Hightower* decision, that's the First Circuit decision, 693 F.3d 61, says that to succeed in a facial challenge, you have to show that the law lacks any plainly legitimate sweep. In the *Naser Jewelers* case, which I believe is cited in our brief, which is 513 F.3d 27, says that for a facial challenge, you, the plaintiff, have the burden to show that the law has no constitutional application.

So even if, just assuming arguendo, Gaspee Project could come up with a type of level of harm that could bring it into the realm of *NAACP*, it doesn't matter, that's just them. That doesn't mean that the law lacks any plainly legitimate sweep or that it wouldn't be constitutional to apply the law to everybody else that doesn't have that specific factual

scenario.

So I think that's the most dispositive answer about why discovery isn't needed and why it doesn't matter; because it's a facial challenge. But even putting that aside, there's the issue about how under *Twombly*, in order to even open the door to discovery, you need to plead specific facts or at least specific allegations that go beyond the level of being conclusory. And the allegations in the complaint, even accepted as true, are all at that conclusory level of we're afraid we're going to be harmed because other people have been harmed. And that's what *Citizens United* had before it and said wasn't enough.

And, you know, even if plaintiffs didn't want to divulge the names of their members in the complaint, they can even do it as John Doe or some other mechanism. But they haven't done that. To say, oh, we'll provide affidavits down the line, but to not plead that there are factual allegations of specific harm, is insufficient to survive a 12(b)(6) motion. But again, I think just the fact that it's a facial challenge just resolves that issue and shows that it really doesn't matter what these two plaintiffs plead about harm to them because it doesn't show the law lacks a plainly legitimate sweep.

Regarding the top five donor provision, plaintiffs rely on a California District Court case. Of course, as your Honor pointed out, the First Circuit law that's directly on point is what's really applicable here and binding. And it's also notable that following the case that plaintiffs rely on, California District Court in *Yes on Prop B* held that it was okay to require disclosure of donors and recognized that the names of these organizations can oftentimes be very opaque and confusing to voters. And that's why there is a legitimate need to require a disclosure disclaimer of who is actually behind these various ads.

And, you know, I think I've already discussed at length the *McKee* decision. *McKee* doesn't mention *McIntyre* -- they're absolutely -- and that's for a reason; because it's a different line of precedent. It's a different circumstance. These are financial disclosure laws. And *McKee* is the directly on-point precedent for those laws. Thank you, your Honor.

THE COURT: Thank you.

Mr. Suhr, anything briefly?

MR. SUHR: I will say three things, your Honor, very briefly. First, *Citizens United* was at the summary judgment stage and so I think the standard there is notable.

Second, the reason we can't produce an affidavit from, you know, John Doe donor to our organization showing retaliation for being a donor, is because nobody knows they're a donor so they haven't been subject to retaliation for being our donor yet.

THE COURT: I think that Ms. Sadeck is arguing that you could show similarly situated people by affidavit.

MR. SUHR: We could. That's the opportunity we're seeking is that in similar organizations people had these sorts of experiences.

Mostly, though, I want to concentrate on this facial or as-applied question of how to read *NAACP*. Honestly, your Honor, I don't think the Supreme Court agrees on it, right. I think some people read *NAACP* and say we have a general disclosure law, but if you can show you'll be subject to retaliation, you can get an as-applied exception. And that's the way Justice Scalia, for instance, reads *NAACP* throughout his career.

Other people read *NAACP* and say in a free society privacy is the presumption, and the references in *NAACP* to retaliation illustrate why that privacy is important. But, for instance, Justice Douglas in the *Gibson NAACP* case -- sorry, I'm throwing out a lot of

names -- Justice Douglas says even if there was no retaliation, the state still has to show why it has an entitlement to access the private records of a private organization, why it can force disclosure on a group that doesn't want to be disclosed. So there's this back and forth amongst the Justices about whether *NAACP* sets a facial rule or if it only requires an as-applied rule.

And I think the Justices would say that it's a facial rule, that it just recognizes this broad right of privacy for associations of right, and in our brief we mention the three cases I think that hold that, which are *California Bankers, Shelton v. Tucker* and *Baird v. State Bar*, which all recognize in a free society citizens enjoy a right of privacy in their associations. And it's the government's burden to show it needs information, not the individual association's burden to show that it needs privacy.

THE COURT: Thank you.

MR. SUHR: More homework, I apologize, your Honor.

THE COURT: No, that's okay. That's all I do. Nowhere else to go. We will take this under advisement and try to issue an opinion as quickly as we can. I recognize that we are approaching election season.

MR. SUHR: If your Honor lets our case proceed, we'll have a preliminary injunction shortly after your ruling that tries to reflect what you've said and show our likelihood of success on the merits.

THE COURT: All right. Thank you.

MR. SUHR: Thank you, your Honor.

MS. SADECK: Thank you, your Honor.

THE COURT: Okay.

(Time noted; 11:12 a.m.)

I, Lisa Schwam, CRR-RPR-RMR, do hereby certify that the foregoing transcript is a correct transcript ***of a remote video conference*** prepared to the best of my skill, knowledge and ability of the proceedings in the above-entitled matter.

/S/ Lisa Schwam

Lisa Schwam, CRR-RPR-RMR
Federal Official Court Reporter November 17, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

The Gaspee Project and **Illinois Opportunity Project**, Plaintiffs, v. **Diane C. Mederos**, et al., Defendants.	Case No. 1:19-cv-00609-MSM-LDA

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Gaspee Project, Inc., and Illinois Opportunity Project appeal to the United States Court of Appeals for the First Circuit the Judgment entered by this Court on August 28, 2020 (dkt. 30), in accordance with its decision of August 28, 2020 (dkt. 31).

Dated: September 26, 2020

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Respectfully Submitted,

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