UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE GASPEE PROJECT, and ILLINOIS OPPORTUNITY PROJECT, ***Plaintiffs,***	:	
v.	:	
	:	**C.A. 1:19-cv-00609-MSM-LDA**
DIANE C. MEDEROS, STEPHEN P. ERICKSON, JENNIFER L. JOHNSON, RICHARD H. PIERCE, DR. ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacities only as members of the Rhode Island State Board of Elections, ***Defendants.***	:	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

To hear Plaintiffs tell it, Rhode Island's Independent Expenditures and Electioneering Communications Act is intended to ensnare everyday citizens who pass out pamphlets. If the law is permitted to stand – as it has for nearly eight years and at least four election cycles – Plaintiffs insist that "the government will post your home address on the Internet for the world to see." Pls.' Opp. at 8. And Plaintiffs spare no hyperbole calling the Act "the most all-encompassing, most aggressive, most speech-regulating of all the examples offered by Defendants[.]" *Id.* at 21.

But this parade of horribles bears no relation to the Act at issue. Indeed, despite clocking in at a hefty thirty-seven pages, very little of Plaintiffs' Opposition focuses on the wording of the statute it purports to overturn. *See generally id.* The Act institutes modest disclosure and disclaimer requirements *if and only if* an

independent expenditure or electioneering communication exceeds $1000 in a calendar year. *See* R.I. Gen. Laws § 17-25.3-1(b), (h). And the disclosure and disclaimer requirements are further targeted to only apply to certain media, during certain time periods, and to large enough groups of people. *See* R.I. Gen. Laws § 17-25-3(16); R.I. Gen. Laws § 17-25-3(17). The Act even provides an opt-out for donors who wish to remain anonymous – they can simply designate that their donations not be used for independent expenditures or electioneering communications. *See* R.I. Gen. Laws §§ 17-25.3-1(i)(1), (2).

Thus, far from Plaintiffs' imagined government intrusion into Hank Jones' donation of $76 or a lone pamphleteer, the Act is a balanced means of informing Rhode Island voters who and what is spending large sums of money in elections. *Cf.* Pls.' Opp. at 19. Carefully circumscribed, the Act is analogous to the numerous other state statutes considered and upheld by federal courts across the country, including the First Circuit. *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) ("Maine's independent expenditure reporting provision poses no First Amendment concerns.") (*"NOM"*); *see also Del. Strong Families v. Attorney General of Delaware*, 793 F.3d 304 (3d Cir. 2015) (upholding Delaware election law that required disclosure of groups that spent more than $500 annually and individual contributors of more than $100); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014) (upholding Vermont election law that required reporting for groups that spent $1000 or more in a two year election cycle); *Nat'l Assoc. for Gun Rights v. Mangan*, 933 F.3d 1102 (9th Cir. 2019) (upholding Montana election law that required

disclosure of groups that spent more than $250); *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012) (upholding Washington election law that required disclosure of contributors to organizations who donated more than $25); *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir. 2015) ("[T]he majority of circuits have concluded that such disclosure requirements are not unduly burdensome.") (citations omitted).

In the face of this overwhelming jurisprudence, Plaintiffs' Opposition: (1) relies on distinguishable and outdated caselaw; (2) belabors a false distinction between issue and direct advocacy; and (3) insists that the Court must consider the burden to the Plaintiffs, despite the facial nature of Plaintiffs' challenge and the lack of such a consideration in the applicable constitutional test. Still, these tactics do not alter the Act's constitutionality; by substantially furthering the State's sufficiently important interest in informing the public who is spending money in state elections, the Act passes constitutional muster.

I. Plaintiffs' Opposition Relies on Distinguishable and Outdated Caselaw

Perhaps cognizant of the significant caselaw – including in this Circuit – upholding state election disclosure laws, Plaintiffs' Opposition raise a host of alternative jurisprudence to support their claims. But many of the cases cited in Plaintiffs' Opposition do not address the circumstances presented here: First Amendment challenges to election disclosure laws.

And, in any event, the Supreme Court's 2010 *Citizens United* decision – which post-dates a number of the cases Plaintiffs' Opposition relies on – altered the landscape of these challenges. *Citizens United*, then, is the lodestar case and should be the starting point of this Court's inquiry. *See Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 371 (2010)

Instead, Plaintiffs' Opposition makes much ado about the following:

McIntyre. Plaintiffs' Opposition begins with a lengthy recitation of *McIntyre*, apparently comparing Plaintiffs' statewide (and even nationwide) electioneering efforts to *McIntyre*'s lone woman passing out fliers. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995); *see also* Pls.' Opp. at 11 ("The Plaintiffs here are looking to do much the same thing as Ms. McIntyre."). But *McIntyre*, in addition to pre-dating *Citizens United*, is readily distinguishable in that the statute imposed a "blanket prohibition on all anonymous campaign literature[,]" unlike the modest election disclosure requirements here. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014).

In fact, several plaintiffs have taken the same tact as Plaintiffs here and attempted to challenge election disclosure requirements under *McIntyre;* they have all been rebuffed. *See id.* at 420 ("The [plaintiff's] reliance on *McIntyre* [] is also unavailing."); *see also Worley v. Fla. Sec. of State*, 717 F.3d 1238, 1247 (11th Cir. 2013) ("[W]e do not find *McIntyre* to be as helpful to Challengers' case as they suggest."). In *McIntyre*, the challenged statute was an absolute fiat against the distribution of any campaign literature that did not contain the name and address of the person issuing

the literature. *McIntyre*, 514 U.S. at 357. As the Sixth Circuit noted in upholding an Ohio election disclosure statute, whatever chilling effect disclosure statutes that undermine donor anonymity might have on speech protected by the First Amendment "is far less than the freeze-out which the *McIntyre* Court confronted." *Husted*, 751 F.3d at 421; *see also Worley*, 717 F.3d at 1247 (noting that campaign finance disclosures are a "far cry from compelled self-identification on all election-related writings").

Further, *McIntyre* effectively applied strict scrutiny to the Ohio statute, a harsher constitutional standard than the exacting scrutiny framework that is applicable here. *See McIntyre*, 514 U.S. at 337 ("[W]e uphold the restriction only if it is narrowly tailored to serve an overriding state interest[.]"); *see also NOM*, 649 F.3d at 56 ("[W]e reject [plaintiff's] argument that strict scrutiny should apply."). Thus, *McIntyre*'s strict scrutiny analysis is of little utility in this case. *See Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (noting that in *Citizens United* "the Supreme Court has made clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure requirements").

Finally, and most importantly, *Citizens United*, not *McIntyre,* is the operative precedent. *Citizens United* "upheld the federal disclaimer provision without so much as mentioning *McIntyre*, noting that while disclaimer provisions 'burden the ability to speak,' they do not limit speech." *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399 (D. Vt. 2012) (*aff'd Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014)); *see also NOM,* 649 F.3d at 61 ("*Citizens United* has effectively

disposed of any attack on Maine's attribution and disclaimer requirements") (citations omitted). After *Citizens United*, "*McIntyre* is inapposite to the class of restrictions at issue." *Vt. Right to Life*, 875 F. Supp. 2d at 400. *Citizens United*'s primacy in this arena is underscored by the First Circuit's decision in *NOM*, which cited *Citizens United* no less than thirty times without mentioning *McIntyre* once. *See generally NOM,* 649 F.3d at 34.

In sum, *McIntyre* is not germane. It should not govern the Court's analysis here.

Blakeslee. Plaintiffs' Opposition turns next to *Blakeslee v. St. Sauveur*, a case from this District where the Court found a 1923 statute (amended in the 1970s) unconstitutional. 51 F. Supp. 3d 210 (D.R.I. 2014). Plaintiffs' Opposition posits that this case is just like *Blakeslee*. *See* Pls.' Opp. at 10–11.

But *Blakeslee* is just *McIntyre* redux. The *Blakeslee* statute, like *McIntyre*, was an absolute regulation of "'pure speech[,]'" prohibiting all anonymous political pamphleteering. *Blakeslee*, 51 F. Supp. 3d at 212 (quoting *McIntyre*, 514 U.S. at 345). The Rhode Island Attorney General, tasked with defending the state defendants at that time, did not even oppose the plaintiff's motion for summary judgment, indicating that "his office was unable to distinguish *McIntyre* from the facts presented here." *Id.*

Blakeslee therefore has as much application to this case as *McIntyre* does. Like *McIntyre*, *Blakeslee* dealt with a regulation of political speech that is different in kind, not just degree, from the election disclosure and disclaimer requirements implicated

here. Underscoring the apples and oranges difference between *McIntyre* cases and *Citizens United* cases, the *Blakeslee* Court never referenced *Citizens United*. *See generally id.* Thus, *Blakeslee* has little relevance to this matter.

NAACP. Plaintiffs' Opposition moves next to another analogy, comparing themselves to members of the NAACP in the Jim Crow South in the 1950s. Pls.' Opp. at 14 ("Plaintiffs stand in the same stead as the NAACP."). Relying on *NAACP v. Alabama*, Plaintiffs' Opposition insists that their freedom of association means that "[t]heir membership lists should receive the same protections as the NAACP." *Id.*; *see also Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex. rel. Patterson*, 357 U.S. 449 (1958) ("*NAACP*").

It is true that in 1958 the Supreme Court struck down an Alabama state court order that required the NAACP to reveal the names and addresses of its members. *NAACP*, 357 U.S. at 463–66. However, crucial to the result in *NAACP* was that the "NAACP members rightly feared violent retaliation from white supremacists for their membership in an organization then actively fighting to overthrow Jim Crow" and that the NAACP had presented "[a]mple evidence of past retaliation and threats[.]" *Citizens United v. Schneiderman*, 882 F.3d 374, 381 (2d Cir. 2018) (discussing *NAACP*). Indeed, the organization "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. On that record, the Court held that "disclosure of petitioner's Alabama membership is likely to affect

adversely the ability of petitioner and its members to pursue their collective effort *** in that it may induce members to withdraw from the Association and dissuade others from joining it[.]" *Id.* at 462–63.

As other plaintiffs who have sought to use *NAACP* to invalidate election disclosure laws have found, *NAACP* is a unique factual scenario such that Plaintiffs "cannot credibly analogize their situation to that of a small group of rank and file members of the *** NAACP[.]" *Doe v. Reed*, 823 F. Supp. 2d 1195, 1204 (W.D. Wash. 2011). Federal courts have been understandably reluctant to extend the solicitude afforded to the 1950s Alabama NAACP to modern political organizations. *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018) (noting that the non-profit Citizens United is "a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s."); *see also N.A. of Mfrs. v. Taylor*, 582 F.3d 1, 22 (D.C. Cir. 2009) ("This, then, is a case like *Buckley,* not *NAACP*."). When the D.C. and Second Circuit Courts of Appeal denied similar claims from similar plaintiff organizations, they each found lacking harms "sufficiently likely and of a sufficient magnitude that they outweigh the governmental interest[.]" *Schneiderman*, 882 F.3d at 385; *see also Taylor*, 582 F.3d at 22 ("[T]he [plaintiff] proffers no evidence of any past incidents suggesting that public affiliation with the [plaintiff] leads to a substantial risk of threats, harassment, or reprisals from either Government officials or private parties[.]") (quotations omitted).

So too here. While Plaintiffs may insist they "stand in the same stead as the NAACP[,]" nothing in the Complaint alleges anything close. Plaintiffs allege that they are "concerned" about disclosures because "[a]cross 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[.]" Am. Compl. at ¶ 35. But these allegations "in no way indicate that any member of the [Plaintiffs] *** has suffered harm or retaliation as a result of the [Plaintiffs'] lobbying activities or as a result of being linked to [the Plaintiffs.]" *Taylor*, 582 F.3d at 22. Indeed, the Plaintiffs have "tendered no record evidence of the sort proffered in *NAA*CP[.]" *Id.* (quotations omitted). If the Plaintiffs' allegations were found sufficient, "[they] would invalidate *** most compelled campaign finance disclosures in contravention of *Buckley*." *Id.* That cannot be so. Thus, this case is not like *NAACP*.

NIFLA. Plaintiffs' Opposition next turns to *Nat'l Inst. of Family & Life Advocates v. Becerra* to contend that election disclosures violate their right against compelled speech. 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"). *NIFLA* invalidated a California law that required pregnancy-related clinics to disseminate a content-based government-drafted notice[1]. *See generally id.* Plaintiffs insist that they are just like the plaintiffs in *NIFLA* and that the case is "directly on point to the Plaintiffs' situation." Pls.' Opp. at 15.

[1] The required notice stated "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *NIFLA*, 138 S.Ct. at 2369.

This maneuver conflates compelled content-based speech with disclosures that merely identify the speaker. *See Schneiderman*, 882 F.3d at 382 ("Disclosure requirements are not inherently content-based nor do they inherently discriminate among speakers."). As the First Circuit noted, albeit in a different context, "[t]he idea that *** thousands of routine [disclosure] regulations require an extensive First Amendment analysis is mistaken." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005). Disclosure and disclaimer requirements "reflect[] the [State's] permissible determination that on-message disclosure of the source of money behind the speaker is also an effective means for achieving voter understanding and knowledge." *Mass. Fiscal Alliance v. Sullivan*, C.A. No. 18-12119, 2018 WL 5816344, at *3 (D. Mass. Nov. 6, 2018) (citing *NOM*, 649 F.3d at 57). Also, "[d]isclosing 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." *NOM*, 649 F.3d at 57. This is precisely why a federal district court in Massachusetts – faced with a similar "top five" donor disclosure requirement and a similar plaintiff organization arguing that *NIFLA* applied – found that the state statute passed constitutional muster, noting that "[*NIFLA]* does not command a different result, given the content-neutral nature of the [disclaimer] requirement in this case and the minimal burden placed on plaintiff's speech." *Sullivan*, 2018 WL 5816344, at *3.

That reasoning holds true here. The disclosure and disclaimer requirements at issue do not compel content-based speech. Instead, they are content-neutral means of

ensuring that the speaker of the message is identified. *See Vt. Right to Life Comm.*, 758 F.3d at 138 (holding that donor "disclosure requirements simply address[] the situation where, for example, a corporation creates an entity with an opaque name—say, 'Americans for Responsible Solutions'—contributes money to that entity, and has that entity engage in speech on its behalf. By requiring that entity to meet reporting and organizational requirements, Vermont can ensure that the underlying speaker is revealed."). And similar requirements have been upheld by the First Circuit. *See NOM*, 649 F.3d at 58 (upholding donor disclosures requirements, noting that the requirements were narrowly tailored in that they "requir[ed] disclosure only of *** identifying information for any contributors who have given more than $50 to the PAC to support or oppose a candidate or campaign."). Therefore, *NIFLA* does not apply here.[2]

In sum, Plaintiffs' Opposition takes the Court down a distinguishable and outdated jurisprudential path. The Court should reject Plaintiffs' attempt to cast themselves as the lone pamphleteer in *McIntyre*, the 1950s NAACP in *NAACP*, and

[2] Demonstrating the tenuous nature of their legal position, Plaintiffs' Opposition also relies on an unpublished 2004 Eastern District of California decision that Plaintiffs' own Opposition concedes has been termed "no longer good law[.]" Pls.' Opp. at 22, n.6; *see also Cal. Republican Party v. Fair Political Practices Comm'n,* No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS 22160 (E.D. Cal. Oct. 27, 2004). The unpublished nature of the decision, its pre-dating of *Citizens United*, and its lack of binding authority in the First Circuit all cast doubt on its persuasive value here. Further, a federal court recently took pains to elucidate *California Republican Party*'s lack of utility. *See Yes on Prop B, Comm. in Support of the Earthquake Safety and Emergency Response Bond v. City and County of San Francisco*, No. 20-cv-00630-CRB, 2020 WL 836748, at *8–9 (N.D. Cal. Feb. 20, 2020) (declining to give *California Republican Party* any persuasive weight).

the pregnancy centers in *NIFLA*. Even if the organizations and individuals described in those case bore any semblance to Plaintiffs here, the nature of campaign activity that is regulated here is easily distinguishable. The relevant legal framework for the Plaintiffs' First Amendment claims against Rhode Island's election disclosure and disclaimer law is *Citizens United* and the First Circuit's application of it in *NOM*.

II. *Citizens United* Did Away with the Distinction Between Express and Issue Advocacy

Plaintiffs' Opposition belabors a false dichotomy between express and issue advocacy. After *Citizens United*, that distinction does not make a constitutional difference. *See Citizens United*, 558 U.S. at 371; *see also* Defendants' Memorandum in Support of its Motion to Dismiss the Amended Complaint, III.A.

Plaintiffs' Opposition misleads, contending that "[t]he First Circuit took a pass on resolving" the distinction between express and issue advocacy. Pls.' Opp. at 25. Not so. The First Circuit did note that the distinction was not "important for the issues addressed in this appeal[,]" but it also unequivocally stated that "[w]e 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." *NOM*, 649 F.3d at 54–55. The First Circuit then held, "to the extent that [plaintiff's] overbreadth arguments turn on the distinction between issue discussion and express advocacy, we reject them." *Id.* at 55.

The First Circuit's holding in *NOM* is in line with the Supreme Court's own understanding of *Citizens United*'s affect on the issue/express advocacy distinction. *See Independence Institute v. FEC*, 216 F. Supp. 3d 176, 178 (D.D.C. 2016), *summarily aff'd* 137 S. Ct. 1204 (2017) (observing that *Citizens United* had "closed the door to the *** argument that the constitutionality of a disclosure provision turns on the content of the advocacy").[3]

Therefore, Plaintiffs' Opposition's repeated harping on the distinction between issue and express advocacy is without merit. *See Citizens for Responsibility and Ethics in Washington v. Federal Elec. Comm'n.*, 209 F. Supp. 3d 77, 90 (D.D.C. 2016) ("In the wake of *Citizens United*, federal appellate courts have resoundingly concluded that [a] constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context.").

III. Exacting Scrutiny Does Not Evaluate the Putative Harm to Plaintiffs

Plaintiffs' Opposition also insists that the Court should consider the potential harm to Plaintiffs in determining the Act's constitutionality. Plaintiffs' Opposition painstakingly speculates about how election disclosures would putatively harm the Plaintiffs, summoning the specter of property crimes, harassment, and even "arson or bombing." Pls.' Opp. at 33.

[3] Summary affirmances have precedential effect on "the precise issues presented and necessarily decided by those actions." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quotations omitted). A summary affirmance simply applies "principles established by prior decisions" – here, *Citizens United* – "to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

But harm to a particular plaintiff is not a component of exacting scrutiny. *See NOM*, 649 F.3d at 55 (describing exacting scrutiny as inquiring whether there is a substantial relationship between the disclosure or disclaimer requirement and a sufficiently important governmental interest) (quoting *Citizens United*, 558 U.S. at 366–67). To be sure, the magnitude of the particular requirement is part and parcel of determining the relationship between the requirement and the state's interest. Yet no Court has invalidated (or affirmed) an election disclosure statute based on the imagined speculative harms to a particular plaintiff. *See, e.g.*, *NOM*, 649 F.3d at 55–56.

In any event, Plaintiffs' Complaint is a facial challenge to the Act. *See* Am. Compl. at "Prayer for Relief, e, f." (asking the Court to enjoin Defendants from enforcing the Act "against Plaintiffs *and other organizations* that engage solely in issue advocacy") (emphasis added). Plaintiffs' particular hypothetical burdens are simply not relevant in the context of a facial challenge. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (holding that for facial challenges "the challenger must establish that no set of circumstances exists under which the Act would be valid."). Exacting scrutiny does not encompass such an inquiry.

IV. Under First Circuit Precedent, the Act Passes Exacting Scrutiny

A. *Citizens United* and *NOM* are Binding

The lodestar case in the area of First Amendment challenges to election disclosure and disclaimer statutes is *Citizens United*; its First Circuit corollary is

NOM. Plaintiffs' Opposition attempts to sidestep these precedents by focusing on superficial factual differences.[4]

First, Plaintiffs' Opposition casts *NOM* as distinguishable, despite footnoting its desire to argue that *NOM* should be overturned. *See* Pls.' Opp. at 24. Plaintiffs' Opposition maintains that *NOM* was argued under a different legal theory – overbreadth and vagueness – and that Plaintiffs raise new legal theories. Plaintiffs' Opposition also notes that Maine's statute provided an administrative hearing to rebut the presumption that an ad was an electioneering communication. Finally, Plaintiffs' Opposition observes that the Maine statute in *NOM* did not appear to apply to ballot referenda.

None of these factual distinctions are legally relevant. The *NOM* Court evaluated a First Amendment challenge to Maine's election disclosure and disclaimer statute. Applying exacting scrutiny, the First Circuit concluded "each of the challenged statutes pass[es] muster under the First Amendment[.]" *NOM*, 649 F.3d at 61. The First Circuit's determination did not depend on the nature of the legal theory advanced, the statute's provision for an administrative hearing, or the fact that the statute did not cover ballot referenda. *See generally id.* Instead, the First Circuit's determination was based on the evaluation of Maine's interest and its fit

[4] To the extent that Plaintiffs' Opposition relies on *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir 2014), it is an outlier. As the federal district court of the District of Columbia explained, "*Barland* is out of step with the legal consensus not only because it read nonexistent qualifiers into a Supreme Court opinion, but also because it rested on a flawed premise." *Citizens for Responsibility and Ethics in Washington*, 209 F. Supp. 2d at 91.

with the regulation, i.e. exacting scrutiny. *See id.* 58–59 ("Because we find a substantial relation between [the statute] and its interest in the dissemination of information regarding the financing of political speech, we conclude that the law does not, on its face, offend the First Amendment.").

Therefore, Plaintiffs' attempts to distinguish *NOM* are unavailing. The Act here and the Maine statute in *NOM* parallel each other. *NOM* thus controls.

Second, Plaintiffs' Opposition seeks to minimize *Citizens United*. This tactic, though perhaps understandable given *Citizens United*'s full-throated approval of election disclosure and disclaimer laws, is misguided. Under Plaintiffs' reading, *Citizens United* is inapposite because it was "political commentary about a political candidate" not "issue commentary that mentions an elected official or referendum." Pls.' Opp. at 27. But this argument is premised on the distinction between express and issue advocacy, a distinction that the Supreme Court and the First Circuit have held irrelevant. *See NOM*, 649 F.3d at 54–55 ("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."); *see also Delaware Strong Families*, 793 F.3d at 308 ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United*[.]"); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 132 ("*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations in this context.").

B. Rhode Island Has a Substantial State Informational Interest

Contrary to Plaintiffs' unsupported assertion that Rhode Island only has "a single, weak interest" in support of the Act, Rhode Island has a substantial interest in ensuring that the electorate knows where political campaign money comes from. *See Buckley,* 424 U.S. at 66–67 ("[D]isclosure provides the electorate with information as to where political campaign money comes from[.]") (quotations omitted); *see also McConnell,* 540 U.S. at 196 (countenancing the government's informational interest and rejecting a challenge to a federal election statute's disclosure provisions); *Citizens United,* 558 U.S. at 371 (stating that "disclosure permits citizens *** to make informed decisions and give proper weight to different speakers and messages"). The First Circuit likewise recognized state's informational interest in the election disclosure context as "compelling[.]" *NOM*, 649 F.3d at 57. In light of this significant authority, there can be little doubt that Rhode Island's informational interest is sufficiently substantial to pass exacting scrutiny. *See id.* at 57 (noting that *Citizen United* "continued to recognize the importance of this informational interest").

C. The Act is Substantially Related to Rhode Island's Informational Interest

Further, the Act passes the "fit" component of exacting scrutiny because its requirements are substantially related to Rhode Island's informational interest. On this point, Plaintiffs' Opposition retreads similar ground, claiming that because they engage in issue advocacy "it is really no circumcision at all." Pls.' Opp. at 20. As set

forth in Section II, *supra*, this rests on a false distinction between issue and express advocacy. More to the point, Plaintiffs' Opposition fails to acknowledge the Act's careful limitations: the disclosure and disclaimer obligations only fall on those who use traditional methods of political communication that are likely to reach a wide swath of the electorate during specific time periods and who spend a significant sum to do so. As argued in the State's initial memorandum, the Act's tailoring is in line with other upheld state election disclosure and disclaimer statutes.

Plaintiffs' Opposition takes one final swing: insisting that the Act "covers general fund donors" and labeling it "especially problematic." Pls.' Opp. at 21. This claim ignores the Act's escape hatch for donors keen on anonymity: donors can designate that their donations are not to be used for independent expenditures or electioneering communications and, after the person or entity certifies as such, "the donor will not be required to appear in the list of donors." R.I. Gen. Laws §§ 17-25.3-1(i)(1), (2). Surely such targeted requirements "bear a close relation to [Rhode Island's] interest in dissemination of information regarding the financing of political messages." *NOM*, 649 F.3d at 61.

In sum, the Act passes exacting scrutiny. Like Maine's statute in *NOM*, the Act is substantially related to a sufficiently important state interest. It should be upheld and the Plaintiffs' Amended Complaint dismissed.

V. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Amended Complaint.

Respectfully submitted,

DEFENDANTS,

By:

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Sean Lyness
Sean Lyness, Bar No. 9481
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel: (401) 274-4400, Extension 2481
Fax: (401) 222-3016
SLyness@riag.ri.gov

CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF filing system on this 30th day of April 2020 and that a copy is available for viewing and downloading.

/s/ Sean Lyness