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

Plaintiffs' Notice of Supplemental Authority

In response to the Court's question yesterday concerning recent federal cases finding that compelled disclosure leads to harassment, Plaintiffs respectfully submit citations for the following cases that counsel mentioned during oral argument:

Ams. for Prosperity v. Grewal, No. 3:19-cv-14228-BRM-LHG, 2019 U.S. Dist. LEXIS 170793, at *60-62 (D.N.J. Oct. 2, 2019) (as-applied challenge; preliminary injunction)

Citizens Union of N.Y. v. AG of N.Y., 408 F. Supp. 3d 478, 504-06 (S.D.N.Y. 2019) (facial challenge; summary judgment)

NRA of Am. v. City of L.A., No. 2:19-cv-03212-SVW-GJS, 2019 U.S. Dist. LEXIS 231511, at *37 (C.D. Cal. Dec. 11, 2019) (facial challenge; preliminary injunction)

Respectfully submitted,

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Dated: July 22, 2020
Served via CM/ECF

Americans for Prosperity v. Grewal

United States District Court for the District of New Jersey

October 2, 2019, Decided; October 2, 2019, Filed

Case No. 3:19-cv-14228-BRM-LHG

Reporter
2019 U.S. Dist. LEXIS 170793 *; 2019 WL 4855853

AMERICANS FOR PROSPERITY, Plaintiff, v. GURBIR GREWAL, in his official capacity As Attorney General of New Jersey, et al., Defendants.

Notice: NOT FOR PUBLICATION

Counsel: **[*1]** For AMERICANS FOR PROSPERITY, Plaintiff: JOHN A. BOYLE, LEAD ATTORNEY, MARINO TORTORELLA & BOYLE PC, CHATHAM, NJ; KEVIN HARRY MARINO, MARINO TORTORELLA & BOYLE, PC, CHATHAM, NJ.

For GURBIR GREWAL, In his official capacity as Attorney General of New Jersey, ERIC H. JASO, In his official capacity as Chairperson of the New Jersey Election Law Enforcement Commission, STEPHEN M. HOLDEN, In his official capacity as Commissioner of the New Jersey Election Law Enforcement Commission, MARGUERITE T. SIMON, In her official capacity as Commissioner of the New Jersey Election Law Enforcement Commission, Defendants: STUART MARK FEINBLATT, LEAD ATTORNEY, Office of the Attorney General, Hughes Justice Complex, Trenton, NJ; ADAM BLAKE MASEF, STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL, R.J. HUGHES JUSTICE COMPLEX, TRENTON, NJ.

Judges: HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE

Before this Court is a Motion for a Preliminary Injunction (ECF No. 3) to enjoin Defendants Gurbir Grewal, Attorney General of New Jersey, Eric H. Jaso, Chairman of New Jersey Election Law Enforcement Commission (or "ELEC"), and two ELEC Commissioners, Stephen M. Holden and **[*2]** Marguerite T. Simon, (collectively, "Defendants") from enforcing New Jersey Senate Bill No. 150 (also known as "S150" or "the Act"), which compels disclosure of the identities of donors to "independent expenditure committees" and enforces compliance with the Act's financial-reporting and money-handling requirements when these groups spend more than $3,000 annually for political communications during a specified reporting period. Plaintiff Americans for Prosperity ("Plaintiff" or "AFP") claims an injunction is needed because the Act unconstitutionally infringes on its *First Amendment* rights and because it is unconstitutional as applied to AFP as it will chill its *First Amendment* rights by deterring potential contributors from donating to AFP. Defendants oppose the Motion, arguing that the Act is constitutional both on its face and as applied to AFP. Pursuant to *Federal Rule of Civil Procedure 78(a)*, the Court heard oral argument on September 17, 2019. Having reviewed the submissions filed in connection with the motion and having heard the arguments of the parties, for the reasons set forth below and for good cause appearing, Plaintiff's Motion is **GRANTED**.

I. Background and Procedural History[1]

The New Jersey Senate passed legislation identified as S1500 **[*3]** on March 25, 2019.[2] (*See* Compl. (ECF No. 1) ¶ 3, n.1.) According to a statement by the Senate Budget and Appropriations Committee, this legislation was intended to update "'The New Jersey Campaign Contributions and Expenditures Reporting Act' to institute new reporting requirements on certain organizations, and increase the limits on the amount of money that may be contributed by individuals, candidates, and committees to other candidates and committees."[3] S1500 called the organizations pertinent to this action "independent expenditure committees" and amended *N.J. Stat. Ann. § 19:44A-3* to define them as any person or entity "organized under *section 527* of the federal Internal Revenue Code (*26 U.S.C. § 527*) or under *paragraph (4) of subsection c. of section 501* of the federal Internal Revenue Code (*26 U.S.C. § 501*) that does not fall within the definition of any other organization" subject to the pre-existing requirements of *N.J. Stat. Ann. § 19:44A-3* and

> engages in *influencing or attempting to influence* the outcome of any election or the nomination, election, or defeat of any person to any State or local elective public office, or the passage or defeat of any public question, or in *providing political information* on any candidate or public question, and raises or expends $3,000 or more in the aggregate **[*4]** for any such purpose annually, but does not coordinate its activities with any candidate or political party.[4]

Pursuant to *N.J. Stat. Ann. § 19:44A-8(d)(1)* as amended by S1500, these independent groups must file quarterly with ELEC a list of all contributions of more than $10,000 and, pursuant to *N.J. Stat. Ann. § 19:44A-8(d)(2)*, all expenditures of more than $3,000 spent on "influencing or attempting to influence the outcome" of any election, public question, legislation or regulation, or "provide any political information" on any candidate, public question, legislation or regulation. The non-exhaustive list of expenditures that count toward the $3,000 include "electioneering communications, voter registration, get-out-the-vote efforts, polling, and research." *N.J. Stat. Ann. § 19:44A-8(d)(2)*. The Act amends *§ 19:44A-3* to define "electioneering communications" as

> any communication made within the period beginning on January 1 of an election year and the date of the election and refers to: (1) a clearly identified candidate for office and promotes or supports a candidate for that office or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate; or (2) a public question and promotes or supports the passage **[*5]** or defeat of that question, regardless of whether the communication expressly advocates a vote for or against the passage of the question. The term includes communications published in any newspaper or periodical; broadcast on radio, television, or the Internet or digital media, or any public address system; placed on any billboard, outdoor facility, button, motor vehicle, window display, poster, card, pamphlet, leaflet, flyer, or other circular; or contained in any direct mailing, robotic phone calls, or mass e-mails.

N.J. Stat. Ann. § 19:44A-3(u).

New Jersey Governor Phillip Murphy (the "Governor") conditionally vetoed the bill on May 13, 2019, stating that while he commended the Legislature's attempt to "ensure that so-called 'dark money'[5] is brought out into the open," he believed certain provisions "may infringe" rights of free speech and free association protected by

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[1] Unless otherwise noted, the following facts are taken from Plaintiff's Complaint and assumed true for purposes of this Opinion.

[2] The General Assembly passed an identical version that same day, A1524, 218th Leg., available at N.J. Office of Legis. Serv., https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A1524. The bill originally was introduced in 2016 and numbered S2430, 217th Leg. (*See* Pl. Br., (ECF No. 3-1) at 9 n.4.)

[3] *See* S1500, 218th Leg., available at N.J. Office of Legis. Serv., https://www.njleg.state.nj.us/2018/Bills/S1500/1500_S1.PDF at 1.

[4] *See* S1500, 218th Leg., Fifth Reprint, at 7, §(t), available at N.J. Office of Legis. Serv., https://www.njleg.state.nj.us/2018/Bills/S1500/1500_R5.PDF (emphasis added).

[5] "Dark money" is shorthand for political spending by groups independent of political parties and candidates that are not required to disclose the identities of their donors when they do not coordinate their activities with candidates or political parties.

the *First Amendment of the U.S. Constitution*.[6] Among the flaws identified by the Governor was that "the bill covers all issue advocacy conducted at any time, regardless of whether the advocacy is connected to an issue before the electorate."[7] As a result, the Governor stated, "It is unclear whether disclosure requirements for communications that are not connected to an election would withstand **[*6]** [] judicial scrutiny."[8] Accordingly, the Governor sent the bill back to the Senate and recommended substantive revisions and the correction of "drafting errors."[9]

In response, on June 10, 2019, the Senate passed a bill practically identical to S1500 that was renumbered as S150.[10] (ECF No. 1 at ¶ 3, n.1.) The Governor signed S150 into law on June 17, 2019, though he issued a signing statement reiterating the same concerns identified in his conditional veto of the prior bill, but indicating he signed S150 into law "'based on an express commitment' from the Legislature to 'pass legislation removing advocacy in connection with legislation and regulations from its parameters, thereby ensuring that the bill's disclosure requirements apply to election-related advocacy, and making previously recommended technical revisions."[11] (*Id.* ¶¶ 3, 42.) To date, the legislature has not passed a so-called clean-up bill.[12]

AFP is a nonprofit corporation based in Virginia that identifies as a social welfare organization under *Section 501(c)(4) of the Internal Revenue Code*. (*Id.* ¶ 12.) AFP operates an office in Morris County, and its New Jersey Chapter publishes, among other things, a New Jersey Taxpayer Scorecard that "track[s] legislators' voting records on key issues ranging from criminal justice reform to occupational licensing." (*Id.* ¶¶ 12, 46; *see also* ECF No. 3-1 at 14 **[*8]** (citing Decl. of Erica Jedynak (ECF No. 3-5) ¶ 14).) AFP says its mission "is to inspire people to embrace and promote principles and policies of economic freedom and liberty, and to educate and train citizens to advocate for the ideas, principles, and policies of a free society at the local, state, and federal levels." (ECF No. 1 ¶ 13.) AFP claims the Act violates the United States Constitution because it

> requires disclosure by groups that discuss, in any way, any issue or fact that touches on a New Jersey election, legislation, or regulation. Its astonishingly broad terms ensnare not just electioneering communications, but also pure issue advocacy and even the transmission of mere "facts" related to "any candidate or public question, legislation, or regulation.

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[6] *See* Conditional Veto, N.J., available at Office of Legis. Serv., https://www.njleg.state.nj.us/2018/Bills/S1500/1500_V1.PDF, at 2.

[7] *Id.* at 3.

[8] *Id.* at 3.

[9] *Ibid.*

[10] The Assembly approved an identical bill, A100, that same day. *See* N.J. Office of Legis. Serv., at https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S150.

[11] "Governor's Statement Upon Signing Senate Bill No. 150," NJ.Gov/Governor/news, available at http://d31hzlhk6di2h5.cloudfront.net/20190617/d5/6c/b5/d7/94c04a9f14b0b88b6254ca19/S150.pdf.

[12] A clean-up bill, known as A5633, 218th Leg., has been introduced in the General Assembly and has been referred to the Assembly Appropriations Committee. *See* N.J. Office of Legis. Serv., at https://www.njleg.state.nj.us/bills/BillView.asp. As can be seen from the following colloquy, the parties at oral argument agree any injunction granted by this Court would not enjoin legislative or rulemaking changes to the Act:

> THE COURT: For purposes of a hypothetical question, if I were to grant the injunction saying that the statute is facially unconstitutional, what happens next? [The Legislature or ELEC] can still try to fix it?
>
> PLAINTIFF/DEREK L. SHAFFER: Your Honor, we have no—we would still be there **[*7]** at the end of the fix-it process to express any remaining concerns, but we are not asking the Court to enjoin their efforts to fix it or to pass regulation.
>
> THE COURT: Nor would the Court ever think about doing that. So they can still go and try to fix it, ELEC can still promulgate opinions, and I guess it would be a revolving lawsuit.
>
> MR. SHAFFER: I think that's exactly right, Your Honor.
>
> THE COURT: Do you agree with that, counsel?
>
> DEFENDANTS/STUART M. FEINBLATT: Yeah. It would be an opportunity to deal with it later. We don't think that is necessary, and I am happy to hear that counsel here would not be seeking an injunction as to ELEC working on clarifying regulations. But for the reasons we've stated, we don't think there is any need for an injunction.
>
> THE COURT: Understood.

See Sept. 17, 2019 Oral Arg. Tr. (ECF No. 38) at 93:12-94:9.

(*Id.* ¶ 21.) These "astonishing broad terms," AFP claims, render the Act unconstitutional on its face and as applied to AFP. (*Id.* ¶ 11.) As a result, Plaintiff filed a Complaint on June 25, 2019, seeking a "declaration that S150's provisions compelling disclosure of donor information and compliance with its burdensome reporting requirements violates the *First Amendment* (as incorporated by the *Fourteenth Amendment*) both on their face and as applied to AFP, and **[*9]** are therefore null and void." (ECF No. 1 at 28, ¶ 3.)[13] Concomitantly, Plaintiff filed this Motion seeking to have this Court enjoin Defendants from enforcing the Act. (ECF No. 3 at 2.) Defendants filed opposition to the Motion on August 20, 2019. (ECF No. 29.) Plaintiff filed its reply on August 30, 2019. (ECF No. 32.) The Court heard oral argument on September 17, 2019. (ECF No. 38.)

II. The Parties' Arguments

A. Plaintiff's Arguments Supporting the Motion

Plaintiff contends the Act is unconstitutional on its face because it extends "formidable regulations and burdens properly reserved for electioneering" to communications focused entirely on issue advocacy or purely factual political information. (ECF No. 3-1 at 1.) Plaintiff also argues the Act is unconstitutional as applied to AFP because the disclosure requirements would chill its free speech by subjecting donors whose identities would have to be disclosed to "threats, harassment, and reprisals," a prospect that also would likely inhibit other individuals or groups from contributing to and supporting AFP's mission. (*Id.* at 33, 34.)

Plaintiff cites *Glossip* **[*10]** *v. Gross* for the four-part showing required from a party seeking a preliminary injunction: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." (*Id.* at 16-17 (quoting *Glossip, 135 S. Ct. 2726, 2736, 192 L. Ed. 2d 761 (2015)* (quoting *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*).) In the Third Circuit, AFP notes, "a plaintiff must merely 'demonstrate that it can win,' not make a 'more-likely-than-not showing of success.'" (*Id.* at 17 (quoting *Reilly v. City of Harrisburg, 858 F.3d 173, 177 n.3 (3d Cir. 2017)*, *as amended*, (June 26, 2017)).) Also, Plaintiff contends, in "*First Amendment* cases where 'the [g]overnment bears the burden of proof on the ultimate question of [a statute's] constitutionality, [plaintiffs] must be deemed likely to prevail [when considering a preliminary injunction] unless the Government has shown'[] the statute withstands scrutiny." (*Id.* at 17-18 (citing *Reilly, 858 F.3d at 180*) (quoting *Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)*).)

i. Likelihood of Prevailing on the Merits

Plaintiff argues it is likely to prevail on the merits of its facial challenge when considering the *Reilly* standard because the Government cannot show the Act can withstand judicial scrutiny. That is because, Plaintiff contends, the Act's provisions requiring disclosure of the identity **[*11]** of donors contributing more than $10,000 by groups engaging solely in issue advocacy or the dissemination of political factual information "obliterate" boundaries established the Supreme Court in *Buckley v. Valeo, 424 U.S. 1, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)*, defining the "narrow set of circumstances where disclosure demands meet" constitutional scrutiny. (ECF No. 3 at 19, 20 (quoting *Buckley, 424 U.S. at 66*).) Instead, Plaintiff contends, the Act "breaks new, unconstitutional ground by imposing the same onerous regulations [allowed for electioneering] upon pure ***issue advocacy*** and dissemination of mere ***political information***." (*Id.* at 21.) As authority for this conclusion, Plaintiff cites the veto of S1500, where the Governor said S1500's "compelled disclosure for groups that attempt to influence, or provide public information about, legislation or regulation that is wholly unconnected to any election or candidate" was unconstitutional and he recommended revisions to, among other changes, "eliminate [S1500's] references to legislation and regulation." (*Id.* at 11-12.) Plaintiff also cites the Governor's signing statement for S150 "reiterating his view that S150 'may infringe upon constitutionally protected speech and association rights.'" (*Id.* at 13 (citing Gov.'s Statement Upon Signing

[13] In September 2019, the American Civil Liberties Union of New Jersey and the social welfare group Illinois Opportunity Project filed actions also seeking to have the Act declared unconstitutional. *See ACLU of N.J., et al., v. Grewal, et al.*, Case No. 3:19-cv-17807, and *Illinois Opportunity Project v. Holden, et al.*, Case No. 3:19-cv-17912. By text order, this Court ordered those related actions to be held in abeyance until this Motion is decided. *See* Text Order dated September 17, 2019, on the docket for this action.

Senate Bill **[*12]** No. 150 (June 17, 2019)[14].)

More textually, Plaintiff references the Act's language defining the organizations it calls independent expenditure committees that fall under the Act's disclosure umbrella as groups:

> that engage in *influencing or attempting to influence* the outcome of any election or the nomination, election, or defeat of any person to any State or local elective public office, or the passage or defeat of any public question, legislation, or regulation, or in *providing political information* on any candidate or public question, legislation, or regulation.

(*Id.* at 6 (quoting N.J. Stat. Ann. § 19:44A-3(t) as amended by S150) (emphasis added).)

Plaintiff's focus for its facial challenge is threefold. First, Plaintiff contends the Act's provisions requiring disclosure of donor rolls by groups providing "political information" run afoul of *ACLU of N.J. v N.J. Election Law Enf't Comm'n*, a 1981 case in which a District of New Jersey Court struck down as unconstitutional what AFP says were "effectively identical" provisions applied to "political information organizations." (*Id.* at 21 (citing ACLU of N.J., 509 F. Supp. 1123, 1131-33 (D.N.J. 1981).[15]) This Act is unconstitutional, Plaintiff argues, because it "disregards the constitutional line cabining disclosure requirements to electioneering **[*13]** and resurrects the predecessor provision struck down" in *ACLU of N.J.* (*Id.* at 24.)

Second, Plaintiff contends the Act's provisions requiring disclosure of donor rolls of groups "influencing legislation" are contrary to *New Jersey State Chamber of Commerce v. New Jersey Election Law Enf't Comm'n*, a 1980 case in which the New Jersey Supreme Court found "effectively identical" provisions "so constitutionally offensive that it had to perform 'judicial surgery' to salvage any shred of constitutional regulation." (*Id.* (citing N.J. Chamber of Commerce, 82 N.J. 57, 411 A.2d 168, 177-80 (N.J. 1980).[16])

Third, Plaintiff contends, "the 'influencing elections' provision expands the meaning of campaign advocacy far beyond what the Supreme Court has indicated is constitutionally acceptable," meaning when communications center on "electioneering—particularly around *candidates*—and direct lobbying." (*Id.* at 19, 21 (citing Buckley, 424 U.S. at 66-67 and U.S. v. Harriss, 347 U.S. 612, 625, 74 S. Ct. 808, 98 L. Ed. 989 (1954)).)

AFP also argues S150 overreaches by requiring disclosure of any qualifying donor "whether or not that donor intended their donation to be used for issue advocacy in New Jersey, or has any other connection with New Jersey." (*Id.* at 2.)[17]

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[14] *See* supra n.11.

[15] At issue in *ACLU of N.J.* was N.J. Stat. Ann. § 19:44A-8, whose then-version required what the statute referred to as political information organizations "to report the names and addresses of all persons who contribute more than $100 during a calendar year and to itemize all expenditures made during the year, 'whether or not such expenditures were made, incurred, or authorized . . . to seek to influence the content, introduction, passage or defeat of any legislation.'" 509 F. Supp. at 1129. A three-judge panel of the U.S. District Court for the District of New Jersey ruled the State could not require reporting of contributions and expenditures with respect to political information that did not expressly advocate passage or defeat of legislation or a ballot question. Id. at 1131-33.

[16] The *New Jersey State Chamber of Commerce* Court examined the New Jersey Campaign Contributions and Expenditures Reporting Act of 1973, which "impose[d] a wide range of restraints, including financial reporting and disclosure, upon persons who seek to influence the election of political candidates, the outcome of elections for the passage or defeat of public questions, and the content and fate of legislation." N.J. State Chamber of Commerce, 82 N.J. 57, 411 A.2d 168, 170 (1980). The Court ultimately narrowly interpreted the word "influence," a term it said had "amoebic contours," to mean "activity which consists of direct, express, and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals." Id. at 179.

[17] Plaintiff identifies other burdens triggered by the Act including:

> (1) submitting a statement of registration, N.J. Stat. Ann. § 19:44A-21(a); (2) appointing a treasurer and designating a depository, **[*14]** N.J. Stat. Ann. § 19:44A-10; (3) maintaining records of contributions and expenditures for four years, N.J. Stat. Ann. § 19:44A-8(d)(2); (4) ensuring all contributions and expenditures are made solely through the treasurer or a deputy and deposited within 10 days, N.J. Stat. Ann. § 19:44A-11, 12; (5) providing ELEC with details in advance about any public solicitation, regardless of any connection to New Jersey, N.J. Stat. Ann. § 19:44A-19(b); and (6) reporting receipts and expenditures for any testimonial affairs, i.e., fundraisers, including any contribution greater than $300 (not $10,000), regardless of any connection to New

Plaintiff argues it is likely to succeed on the merits of its as-applied challenge because AFP's issue advocacy and dissemination of factual political information such as a "NJ Taxpayer Scorecard" would subject it to disclosure and financial-reporting and record-keeping requirements historically limited to "electioneering communications that advocate for or against any particular candidate for office." (*Id.* at 13-14.) That compelled disclosure of its currently anonymous contributors, Plaintiff contends, "will **[*15]** chill the associational activity of AFP and its donors, because they reasonably fear that threats, harassment, and reprisals will result from any disclosure of their donations." (*Id.* at 15.) As a result, Plaintiff argues, Defendants cannot establish as required by the "exacting scrutiny" standard the Supreme Court calls for when courts review electioneering statutes such as S150 that there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." (*Id.* at 19 (citing *Doe v. Reed, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010)* (quoting *Citizens United v. FEC, 558 U.S. 310, 366-67, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).*)[18]

ii. Irreparable Harm

Plaintiff contends that carrying the first *Reilly* prong on its facial challenge to S150 requires a finding that AFP also has identified an irreparable harm as contemplated by *Glossip* because the "loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Id.* at 37 (citing *K.A. ex. rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 113 (3d Cir. 2013)* (quoting *Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)* (plurality opinion)).)

Regarding the as-applied challenge, Plaintiff argues it satisfies this prong because AFP and its donors will be harmed by enforcement of the Act. (*Id.* at 38.) Such enforcement would destroy the carefully protected anonymity of its donors located not only in New Jersey but also across the country because the Act extends **[*16]** disclosure typically reserved to electioneering communications to the issue advocacy and dissemination of political factual information AFP claims it only engages in. (*Id.*) Plaintiff lists a number of instances in which it says AFP itself and its donors have been subjected to harassment ranging from death threats to cyberattacks to violent protests at AFP events. (*Id.* at 34-36 (*citing* Decl. of Erica Jedynak (ECF No. 3-5)[19]).) AFP cites an appeal to the Ninth Circuit from a Central District of California case in which the appellate court concluded AFP's "evidence undeniably shows that some individuals publicly associated with the Foundation have been subjected to threats, harassment or economic reprisals." (*Id.* at 36 (citing *Americans for Prosperity Found. v. Becerra, 919 F.3d 1177, 1178 (9th Cir. 2019)* (Ikuta, J., dissenting from the denial of rehearing *en banc*).) Plaintiff further cites *Salvation Army v. Dep't of Cmty. Affairs of State of N.J.*, where the Third Circuit stated, "forced disclosure may chill individuals from associating with a group engaged in expression protected by the *First Amendment*." (*Id.* at 38 (*Salvation Army, 919 F.2d 183, 201 (3d Cir. 1990)*.) Lastly, Plaintiff cites *Stilp v. Contino* for the conclusion that "injunctive relief [is] 'clearly appropriate' where '*First Amendment* interests [are] either threatened or in fact being impaired at the time **[*17]** relief [is] sought.'" (*Id.* at 37-38 (quoting *Stilp, 613 F.3d 405, 409 n.4 (3d Cir. 2010)* (quoting *Elrod, 427 U.S. at 373*).)

iii. Balance of the Equities

> Jersey, *N.J. Stat. Ann. § 19:44A-8(g)*. These burdens increase before an election: in the period preceding an election, an IEC must report contributions above $500 or expenditures above $800 within 48 hours. *N.J. Stat. Ann. § 19:44A-8(e)*.

(ECF No. 32 at 2 n.1.)

[18] At oral argument, Plaintiff briefly advocated the position that strict scrutiny ought to be applied in this Court's review of S150 because the Act is "really shackling organizations, and it's potentially ending their ability to communicate and express themselves in this state. And it's doing it in a way that is really disfavoring certain groups," though it ultimately conceded exacting scrutiny applied, describing this standard as a "very searching and heightened scrutiny that looks for the actual purpose of the law, determines whether it's sufficiently compelling, and whether the state has arrived at a means of achieving that interest that are closely drawn around the interest." (ECF No. 38 at 34:5-24.) Defendants said that because disclosure requirements are a "much less restrictive alternative to more comprehensive regulations of speech" the Supreme Court applies exacting scrutiny and that "under that task there has to be a substantial relation between the disclosure requirement and a sufficiently important government interest." (*Id.* at 51:7-19.)

[19] Ms. Jedynak is Director of Employment Initiatives at Stand Together, a *501(c)(6)* group affiliated with AFP, after holding a variety of other roles since joining AFP in March 2015. (*See* ECF No. 3-5 ¶ 1.)

Plaintiff argues the balance of the equities favors AFP on both its facial and as-applied challenges because, in contrast to the "risk of irreparable injury looming over AFP and its donors, New Jersey faces no appreciable harm from an injunction." (*Id.* at 39.) This is because the disclosures required by the Act have not been sought before in New Jersey, thus there is no risk of disruption to the capturing of this information, Plaintiff says, and the "legislative record reveals no pressing need for 501(c)(4) donor information." (*Id.* at 39.) Plaintiff emphasizes that disclosure in compliance with the Act would "destroy the anonymity of AFP's donors ***throughout the United States*** . . . after which there would be no clawing donor identities back from the public domain in the event a preliminary injunction is denied but Plaintiff prevails in the underlying litigation." (*Id.* at 38-39.) Finally, Plaintiff cites *Klein v. City of San Clemente* for the proposition that "[w]here First Amendment rights are at stake, the 'balance of equities' 'tip[s] sharply in favor of' enjoining the offending governmental action." (*Id.* at 38 (citing Klein, 584 F.3d 1196, 1208 (9th Cir. 2009)).)

iv. The Public Interest

Plaintiff claims **[*18]** this prong also favors AFP on both its facial and as-applied challenges. As to the facial challenge, Plaintiff contends, this prong requires the granting of the Motion because "the enforcement of an unconstitutional law vindicates no public interest." (*Id.* (quoting K.A. ex rel. Ayers, 710 F.3d at 114 (citing ACLU v. Ashcroft, 322 F.3d 240, 251 n.11 (3d Cir. 2003)) ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.") (citation and international quotation marks omitted)).)

As to its as-applied challenge, Plaintiff argues an injunction would serve the public interest by allowing "important legal issues decided by courts, precisely as the requested preliminary relief will permit." (*Id.* at 40 (citing United States v. Mendoza, 464 U.S. 154, 160, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984) (noting that "[g]overnment litigation frequently involves legal questions of substantial public importance" and "the development of important questions of law" should not be thwarted)).)

B. Defendants' Arguments Opposing the Motion

Defendants posit S150 is constitutionally sound on its face and as applied to Plaintiff, that each of Plaintiff's arguments rely on an overbroad reading of the statute, and that its "election-related disclosure requirements" are similar to those "courts have upheld over the course of decades." **[*19]** (*See* Defs. Br. (ECF No. 29) at 16.)

Addressing the first *Reilly* prong, Defendants first contend Plaintiff cannot win on the merits because the "influencing or attempting to influence" language of the Act bears a "substantial relation to the State's important interest in ensuring that New Jersey's electorate is informed about the sources and identities behind election-related spending." (*Id.* (citing Citizens United, 558 U.S. at 366-69; *McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194-97, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)*; Buckley, 424 U.S. at 64, 66; Del. Strong Families v. Attorney General of Del., 793 F.3d 304, 309-10 (3d Cir. 2015)).) Defendants further argue AFP misreads the Act, or at the least reads it in an overbroadly manner. For instance, Defendants contend the "influencing or attempting to influence the outcome of any election" in § 19:44A-3(t) as amended by the Act is not synonymous with the definition of "electioneering communication" contained in the amended § 19:44A-3(u) but rather is limited by that § 19:44A-3(u) language, and that, as a result, other, non-electioneering communications "do not necessarily trigger the statute's disclosure requirements." (Id. at 20.) Furthermore, Defendants state, reading S150 as they claim AFP does "may raise constitutional vagueness issues not raised by Defendants' reading." (*Id.*) And even so, Defendants argue, reading the "influencing or attempting to influence the outcome of any election" language as limited by **[*20]** the "electioneering communications" wording "largely answers AFP's objections to the statute's breadth." (*Id.* at 21.) Reading those provisions together results in a statute that "*does* focus on communications that refer to a clearly identified candidate; *does* focus on specific kinds of media used in New Jersey elections . . . and *does* focus on communications between January 1 and Election Day for the referenced candidate(s)." (*Id.*)

Defendants further contend AFP exaggerates the Act's scope as to whether otherwise qualifying communications that reach only one or no New Jersey voters but still reach more than 50,000 voters nationwide would trigger the Act's disclosure obligations. (*Id.* (citing ECF No. 3-1 at 2, 29).) Defendants cite *Sandberg v. McDonald* for the proposition that "[l]egislation is 'presumptively territorial and confined to limits over which the law-making power has jurisdiction.'" (*Id.* (quoting Sandberg, 248 U.S. 185, 195,

39 S. Ct. 84, 63 L. Ed. 200 (1918)).) Indeed, Defendants contend AFP communications that do not reach the 50,000 floor of New Jersey voters would not trigger the Act's disclosure obligations. (*Id.* at 22) At oral argument, Defendants stated, "The statute specifically says it is limited in N.J. [Stat. Ann. §] 19:44A-4 [where] it's clear that the **[*21]** statute, the reach of the law, of course, is limited to New Jersey elections." (ECF No. 38 at 56:5-8.) As to "influencing or attempting to influence . . . the passage or defeat of any . . . legislation or regulation," or what is commonly referred to as "lobbying," Defendants contend this language mirrors wording where the Supreme Court of the United States in *Harriss* and the New Jersey Supreme Court in *N.J. Chamber of Commerce* adopted narrow interpretations "in order to avoid confronting constitutional questions that might be raised by a broader interpretation." (*Id.* at 23 (citing Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989; N.J. Chamber of Commerce, 82 N.J. 57, 411 A.2d 168).) More specifically, those courts limited their interpretation of "influencing legislation" to include only communications intended for legislators, not the general public. *Id.* Reading the Act in the same way, Defendants allege, "does not require this Court to undertake a 'judicial rewrite' of [the Act], it requires only application of the ordinary rules of statutory interpretation and due respect for authoritative decisions of the New Jersey Supreme Court." (*Id. at 24* (citing Walder Sondak Berkeley & Brogan v. Lipari, 300 N.J. Super. 67, 692 A.2d 68, 73 (N.J. Super. Ct. App. Div. 1997) ("It is a principal of statutory construction that when the Legislature re-enacts a statute that has been judicially construed, it adopts that **[*22]** judicial interpretation.") (quoting Smith v. U.S. Pipe & Foundry Co., 191 N.J. Super. 454, 467 A.2d 584 (N.J. Super. App. Div. 1983), *aff'd sub nom.*, Poswiatowski v. Standard Chlorine Chemical, 96 N.J. 321, 475 A.2d 1257 (N.J. 1984)).) Defendants further claim this reading comports both with the interpretation of S150 by the Attorney General's office, which would enforce the Act, and a 2002 ELEC advisory opinion of similar wording in New Jersey's Lobbying Act, N.J. Stat. Ann. § 52:13C-18, et seq. (*Id. at 25-26* (citing Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (rejecting a First Amendment overbreadth challenge to a state statute based in part on narrowing constructions advanced by the state attorney general and a state agency) and ELEC Advisory Opinion No. 03-2002 (June 20, 2002)).[20])

[20] Available at https://www.elec.state.nj.us/pdffiles/ao/2002/ao032002.pdf.

Finally, Defendants assure the Court that while

> courts have recognized since *N.J. Chamber of Commerce* that states may require disclosures for certain "indirect" lobbying . . . the legislative history of S150 indicates that [while] the Legislature likely intended the statute to require disclosure with respect to some indirect lobbying . . . the Legislature addressed such conduct in S150's "providing political information" provision.

(*Id.* at 26.) Furthermore, Defendants contend, this "political information" provision "will not be enforced by Defendants until it is clarified through regulations [so] preliminary relief from this part of the statute is unnecessary." (*Id.* at 27.)

Defendants do not concede the **[*23]** unconstitutionality arguments of AFP. Indeed, Defendants say AFP's attack on S150 is misplaced in its reliance on *ACLU of N.J. v. ELEC* because "intervening case law," specifically *McConnell, Citizens United*, and *Delaware Strong Families*, "demonstrate that the constitutional line drawn by the *ACLU* court in 1981" making a distinction between express and issue advocacy "is no longer tenable." (*Id.* at 29 (citing ACLU of N.J., 509 F. Supp. 1123; *McConnell, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491*; Citizens United, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753; and Delaware Strong Families, 793 F.3d 304)).)

Still, Defendants concede rulemaking is required to clarify the Act, specifically the "providing political information" language. (*Id.* at 27.) Defendants say the Act "leaves ambiguous what activity constitutes 'providing political information' but does not already fall within the scope of [S150's] provisions on efforts to influence elections, public questions, legislation and regulations." (*Id.* at 29.) Also, Defendants state, the definition of "independent expenditure" does not reference "political information," while the definition of "independent expenditure committee" omits any reference to "independent expenditure." (*Id.* at 30.) Defendants contend "rulemaking would be the most appropriate forum to address the apparent mismatch between S150's definitions of 'independent expenditure,' 'independent **[*24]** expenditure committee' and 'political information.'" (*Id.* at 30.)

Notably, even while attacking AFP's reliance on *ACLU of N.J.*, Defendants concede "it is not insignificant that the Legislature more or less used the same language to define 'independent expenditure committee' that was declared unconstitutional when used to define 'political

information organization'" by the *ACLU of N.J.* Court. (*Id.*) Defendants state, "In light of *ACLU* and the constitutional concerns articulated in the Governor's conditional veto statement, Defendants believe rulemaking to clarify S150's use of the phrase 'providing political information' is warranted to avoid deterring constitutionally protected speech that might arguably fall within the sweep of the statute." (*Id.* at 30-31.) Finally, Defendants acknowledge, "if construed broadly, the 'providing political information' part of the statement may be viewed as covering election- and legislation-related activity that is relatively peripheral to the core issues the Legislature sought to address." (*Id.* at 31.) Defendants maintain rulemaking is the best avenue for correcting this deficiency in the Act, too. (*Id.*)

As to the other prongs of the preliminary-injunction test, Defendants contend **[*25]** AFP cannot show irreparable harm, nor can AFP carry the balance-of-the-equities and public-interest prongs. Defendants argue AFP faces no imminent harm from the "providing political information" provisions of the Act because Defendants will not be enforcing those provisions until after any rulemaking, while it is not apparent, on the record before the Court, that AFP "even intends to engage in conduct falling within the scope of S150's 'influencing elections' and 'influencing legislation' provisions—as construed by Defendants." (*Id.* at 43-44.) Defendants further contend the balance of the equities and the public interest both favor denying relief. The State would be harmed by any judicial rewrite of the Act before a final determination of the merits of the case, Defendants argue, while delayed enforcement would deny voters of information on "how much independent expenditure groups spent in the 2019 election cycle, or who funded their activity." (*Id.* at 44-45 (citing *Maryland v. King, 567 U.S. 1301, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012)* ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")).)

C. Plaintiff's Reply

Plaintiff interprets Defendants' arguments regarding the lack of clarity **[*26]** of the "political information" provisions of the Act as an implicit recognition of the Act's facial unconstitutionality. (*See* Pl. Reply (ECF No. 32) at 1.) AFP argues ELEC is not bound to "adopt regulations mitigating the constitutional defect," nor is the Attorney General's office legally bound by any statements contained in its brief not to enforce the Act, "leaving countless regulated entities [such as AFP] facing irreparable harm starting October 15, 2019," the beginning of the first period during which activity covered by the Act would be enforced. (*Id.* at 1.) Therefore, Plaintiff says, a preliminary injunction is required to "preserv[e] the status quo and protect[] *First Amendment* rights that will otherwise be chilled." (*Id.*) Meantime, AFP contends, the "remainder of Defendants' arguments rest on interpretations that are not plausible and disavowals that are not binding." (*Id.* at 2.) Denial of the Motion would leave Defendants in the position of "arrogating to themselves the discretion to determine what they mean, and where to draw critical lines between regulated and unregulated political expression." (*Id.* at 5.) Plaintiff argues, "To the extent questions remain about the statute's precise meaning, that only confirms **[*27]** the propriety of a preliminary injunction preserving the status quo pending a final determination." (*Id.* at 6 (citing *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 428 F.3d 1139, 1144 (8th Cir. 2005)* (upholding a preliminary injunction pending a state court's interpretation of a statute)) and *Rivera-Feliciano v. Acevedo- Vila, 438 F.3d 50, 64 (1st Cir. 2006)* (upholding a preliminary injunction enjoining enforcement of Puerto Rican statute pending a final interpretation)).)

Plaintiff defends arguments made in its Brief in Support of the Motion grounded in *ACLU of N.J.*, contending that neither *ACLU of N.J.* "nor the portions of the D.C. Circuit's opinion in *Buckley v. Valeo, 519 F.2d 821, 171 U.S. App. D.C. 172 (D.C. Cir. 1975)* that it relied on has ever been overturned." (*Id.* at 8.) And, Plaintiff says, the intervening decisions on which Defendants rely "stand only for the proposition that government may *adjust* its line-drawing as part of a careful, conscientious effort to define and capture 'electioneering communications' outside the confines of express advocacy." (*Id.*) But, Plaintiff contends, the "Act does not adjust the line that delimits electioneering. Rather, S150 *obliterates* the line by treating the *entire universe* of political expression around officeholders, legislation, regulations, and public issues as electioneering." (*Id.*)

Plaintiff claims Defendants' argument that the "influencing legislation" provisions **[*28]** require a narrow interpretation to survive is an implicit admission that the Act is facially unconstitutional. (*Id.*) Also, Plaintiff argues, this narrow interpretation limits the Act to territory already covered by prior legislation. (*Id.* at 9.) It is not, Plaintiff also contends, "the proper role of a *federal* court to rewrite a *state* law." (*Id.* (citing *Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320,*

329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) (noting that courts "restrain [them]selves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it")).)

In addition, Plaintiff argues further ambiguity remains regarding what triggers disclosure since "there is pointed indication that S150 adds new triggers relative to preexisting lobbying law; among other things, S150 omits an earmarking requirement that is part of New Jersey's current lobbying regime." (*Id.* at 10 (citing N.J. Stat. Ann. § 52:13C-22.1).) Plaintiff emphasized this point at oral argument, stating that the lack of an earmarking provision means "[t]he donor-disclosure requirement applies to all donors nationwide, even if they have no connection to New Jersey." (ECF No. 38 at 26:2-4.) Further uncertainty, Plaintiff contends, infects the "influencing legislation and regulation" provision, which leaves open the question of **[*29]** whether "submitting comments on proposed regulations as invited by agencies would trigger [the Act's obligations]—and whether informal communications with regulators might do so." (ECF No. 32 at 10.)

Plaintiff states the "influencing elections" provision remains "wildly overbroad," as it "sweeps in a wide range of pure issue advocacy wholly unrelated to any election." (*Id. at 11*.) Indeed, Plaintiff argues, this section "by its terms does not even require that the covered candidate be running [for election] that particular year." (*Id.* at 12 (*citing* N.J. Stat. Ann. § 19:44A-3(u) (where "electioneering communication" is defined to include communications from "January 1 of an election year" to Election Day and "refers to: (1) a clearly identified candidate for office")).) Plaintiff argues there is similar uncertainty about whether the Act could be triggered by out-of-state communications that, say, are redirected to the inbox of a New Jersey voter, while the Act's limit of those communications to between January 1 and Election Day of an election year is "hardly a meaningful limitation considering that New Jersey holds elections every year." (*Id.* at 12-13.)

III. Legal Standard

"Preliminary injunctive relief is an 'extraordinary remedy, which should **[*30]** be granted only in limited circumstances.'" *Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 210 (3d Cir. 2014)* (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002))*. To obtain preliminary relief, a movant must show "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted. . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Reilly, 858 F.3d at 176* (citing *Del. River Port Auth. v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-20 (3d Cir. 1974)* (citations omitted).) The first two factors are the "most critical." *Reilly, 858 F.3d at 179*. To satisfy the first prong, a movant must "demonstrate that it can win on the merits[,] which requires a showing significantly better than negligible but not necessarily more likely than not." (*Id.* (internal punctuation omitted).) The Third Circuit does not require "a more-likely-than-not showing of success on the merits because a 'likelihood' [of success on the merits] does not mean more likely than not." *Reilly, 858 F.3d at 179 n.3* (quoting *Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011)* (en banc) (internal punctuation omitted); *cf. Nken v. Holder, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)* ("It is not enough that the chance of success on the merits be better than negligible[,]" and "more than a mere 'possibility' **[*31]** of relief is required.") (quotations omitted)). In *First Amendment* cases, "[plaintiffs] must be deemed likely to prevail [for the purpose of considering a preliminary injunction] unless the [g]overnment has shown that [plaintiffs'] proposed less restrictive alternatives are less effective than [the statute]." *Reilly, 858 F.3d at 180* (citing *Ashcroft v. ACLU, 542 U.S. at 666*.) "This is because 'the burdens at the preliminary injunction stage track the burdens at trial,' and for *First Amendment* purposes they rest with the government." *Reilly, 858 F.3d at 180* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al., 546 U.S. 418, 429, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)*.)

IV. Decision

Plaintiff seeks a preliminary injunction based on its contention S150 is unconstitutional on its face and unconstitutional as applied to AFP. To summarize, Plaintiff argues the Act is unconstitutional because it brings an onerous disclosure burden, as well as money-handling and reporting regulations—historically reserved for "electioneering communications" referencing a clearly defined candidate as defined by *Buckley* and *McConnell*, among others—to communications regarding what AFP calls pure issue advocacy and the

provision of nonpartisan factual political information. AFP contends this expanded regulatory regime is facially unconstitutional because it violates the protections of the right of free speech and the right **[*32]** to advocate anonymously provided by the *First Amendment* and made applicable to the states by the *Fourteenth Amendment*. AFP also challenges the constitutionality of the Act as applied to it, claiming S150 will impermissibly chill the organization's free speech by discouraging individuals seeking anonymity from donating to AFP as a result of the prospect that exposure of their personal information will subject them to repercussions from violence or other threats.

Meantime, Defendants argue this Court should ignore the widely reported genesis of the Act[21] and construe the statute as it was passed by the Senate and enacted by Governor Murphy. (ECF No. 38 at 44:2-8.)[22] By its plain language, Defendants contend, the "final product" passes constitutional rigor, though they concede some interpretive machinations are required. Specifically, Defendants contend the plain language of S150's provision regarding "electioneering communications" passes muster, while this Court should narrowly interpret the "influencing or attempting to influence" provisions that, among other things, define what is an independent expenditure committee. Counsel also represented that Defendants will not to enforce the "political information" provisions also **[*33]** defining an independent expenditure committee until rules are promulgated to bring clarity to the Act's unclear drafting.[23]

Because the parties disagree on how the Act is to be interpreted, the Court must first determine how to read the Act in order to decide whether the Act is constitutional on its face. As the attention of the parties is focused on the interplay of the phrases "influencing or attempting to influence," "providing political information" and "electioneering **[*34]** communications," the Court's inquiry begins by addressing these three phrases in turn.

The Supreme Court has stated, "[i]t is a familiar principle of statutory construction that courts should give effect, if possible, to every word [] used in a statute." *Connecticut Dep't of Income Maint. v. Heckler, 471 U.S. 524, 530 n.15, 105 S. Ct. 2210, 85 L. Ed. 2d 577 (1985)* (citing *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*.) As an initial matter, the Court concludes the plain language of the Act makes clear the same disclosure obligation is triggered whether a so-called independent expenditure committee engages in "influencing or attempting to influence" a direct election of individuals, in "influencing or attempting to influence" a vote to decide a ballot question, in "influencing or attempting to influence" legislators considering legislation, and in "influencing or attempting to influence" agencies drafting regulations, or

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[21] Plaintiff argues an NJ.com news article reporting that the Act grew out of a personal feud between Governor Phil Murphy and Senate President Stephen Sweeney demonstrates that the legislation is more power politics than inspired by the good government ideals of "Schoolhouse Rock." (ECF No. 3-1 at 9 & n.3 (citing Matt Arco, Murphy-Sweeney Feud Helped Fuel Legislation to Expose 'Dark Money' in Jersey Politics. It's Now on the Governor's Desk., NJ.com (Mar. 26, 2019)); available at https://www.nj.com/politics/2019/03/murphy-sweeney-feud-helpedfuel-legislation-to-expose-dark-money-in-jersey-politics-its-now-on-thegovernors-desk.html. Plaintiff contends the *501(c)(4)* group that supports Governor Murphy and triggered the political feud referred to in the NJ.com article would not be subject to the Act because it coordinates its activities with Governor Murphy. (ECF No. 38 at 81:17-25.) Nevertheless, the Governor Murphy-linked group recently disclosed its donors this month. *See* Andrew Seidman, Dark Money Group Aligned with Gov. Phil Murphy Finally Discloses Donors, Philadelphia Enquirer (Sept. 12, 2019); available at https://www.inquirer.com/news/phil-murphy-dark-money-new-direction-nj-disclose-donors-20190912.html.

[22] Specifically, Defendants stated at oral argument:

> There's certainly political infighting going into any legislation. I'm reminded [of] what Otto von Bismarck once said that if you like laws and sausages, you should never watch either one being made. The idea being that it is often a dirty process, you might say, or uncomfortable process leading to legislation. And sure there are always articles in the newspaper. But we submit that we have to look at the final product. This final product was passed not because of a political feud but because of a massive change in the political landscape in New Jersey . . . . What has happened is—and there's no dispute by my adversary that now spending by independent groups far exceeds spending by political parties in New Jersey.

(ECF No. 38 at 46:1-16.)

[23] *See* ECF No. 38 at 62:9-18 (DEFENDANTS: "... However, with regard to political information, the provision needs some clarification by the ELEC. We acknowledge that. And so at this point we are not going to enforce the—that aspect nor would ELEC do anything until they promulgate regulations for which there will be notice and opportunity to be heard. And whatever they end up doing would, of course, be enforced on a prospective basis. It would not be applied retroactively to anything going on at this time.")

whether the same group engages in "providing political information" on any candidate for office or any ballot issue or legislation up for vote in the Legislature, or on any regulation being considered by the Assembly or a state agency, whether that political information is a fact or an opinion held by the organization.

Defendants contend the phrase "influencing or attempting to influence" the outcome of any election contained **[*35]** in the amended § 19:44A-3 defining what constitutes an independent expenditure committee is, at the least, limited by the wording of or, at most, is synonymous with the definition of "electioneering communication" contained elsewhere in § 19:44A-3, and that other, nonelectioneering communications do not necessarily trigger the statute's disclosure requirements.

The Court is not persuaded. S150 amends N.J. Stat. Ann. § 19:44A-3 to define many of the terms introduced into the extant statute by the Act and to update existing definitions. One new definition covers independent expenditure committees, a provision constituting one sentence measuring roughly 150 words. The two primary phrases in that definition at issue here, "influencing or attempting to influence" and "providing political information," are joined by the conjunction "or." N.J. Stat. Ann. § 19:44A-3(t). It is these independent expenditure committees that are the target of the Act's disclosure provisions. The Court reads these phrases in the definition of "independent expenditure committee" to mean the Act's disclosure obligations are triggered whether an organization's communications are intended to "influenc[e] or attempt[] to influence" an election or legislation or are intended to "provid[e] political **[*36]** information" about an election or legislation.

The Court first will consider the phrase "providing political information." This term is defined as communications that "reflect[] *the opinion* of the members of the organization on any candidate or candidates for public office, on any public question, *or which contains facts* on any such candidate, or public question whether or not such facts are within the personal knowledge of members of the organization." (N.J. Stat. Ann. § 19:44A-3(h)) (emphasis added). S150 did not introduce this definition to The New Jersey Campaign Contributions and Expenditures Reporting Act, though it did expand the form of these types of communications to include the medium of "Internet or digital advertisements." (*Id.*)

It is clear from the plain language of the amended N.J. Stat. Ann. § 19:44A-3 that the Act's construction does not enable this Court to vacillate between a broad view of one phrase and a narrower interpretation of another phrase adjacent to it. Yet even if the Court were inclined to embark on such an exercise, there is no narrower interpretation possible of the "providing political information" phrase considering the plain text of the definition provided in § 19:44A-3(h), which corrals into the Act's disclosure regime **[*37]** any political information from independent groups spending more than $3,000 a year that contains either a fact or an opinion pertaining to any candidate for public office or "any public question." (*Id.*) The Court cannot read more narrowly statutory language that defines political information as broadly as any fact or opinion.

Next the Court looks to the other phrase of § 19:44A-3(t): "influencing or attempting to influence." Defendants argue this language can be read more narrowly by considering this phrase to be either limited by or synonymous with the definition of "electioneering communication" contained in § 19:44A-3(u). The Court is not persuaded.

A close review of the Act demonstrates N.J. Stat. Ann. § 19:44A-3(t) (defining an independent expenditure committee) is textually related to § 19:44A-3(h) (defining political information) because these independent expenditure committees are defined as engaging in, among other things, the provision of the political information that is then defined in § 19:44A-3(h). There is no similar nexus between § 19:44A-3(t) and § 19:44A-3(u) (defining electioneering communication), as advocated by Defendants. The plain text of the Act says independent expenditure groups are those that engage, in part, in "influencing or attempting to influence . . . elections, **[*38]** public questions, legislation, or regulations." By definition, then, independent expenditure committees are not defined as engaging in electioneering communications identifying a clearly defined candidate, legislation, or regulation, but by something broader that the Act calls "influencing or attempting to influence . . . the outcome of *any* election" or "*any* public question, legislation or regulation." N.J. Stat. Ann. § 19:44A-3(t) (emphasis added).

Therefore, the Court views the Act as a statute that defines these sorts of independent groups as those that engage in one set of activities that are not defined in the Act—"influencing or attempting to influence"—and that defines electioneering communications but does not expressly state that such communications are produced by these independent groups. In short, § 19:44A-3(t) and (u) are, as Defendants concede, mismatched.

The only express connection between independent expenditure committees and electioneering communications occurs in the Act's amendment of N.J. Stat. Ann. § 19:44A-8. However, the Court is not convinced this supports the position of Defendants. The amended § 19:44A-8 requires independent expenditure committees to report all expenditures of more than $3,000 "including, but not limited to, for electioneering **[*39]** communications, voter registration, get-out-the-vote efforts, polling, and research." (N.J. Stat. Ann. § 19:44A-8(d)(2).) The Act thus infers electioneering communications identifying a clearly defined candidate are but a subset of, and not synonymous with, "influencing or attempting to influence" any election, as the Court construes the plain meaning of the terms "get-out-the-vote efforts" and "voter registration" to connote influencing any election by encouraging more voters to vote, even though these efforts might not identify a clearly defined candidate, legislation or regulation.

Even if the Court were inclined to read "electioneering communications" as limiting or synonymous with "influencing or attempting to influence" as Defendants suggest, the Court's conclusion would be unchanged. That is because the Act requires the same disclosure scheme whether an independent expenditure committee engages in electioneering communications identifying a clearly defined candidate, engages in "influencing or attempting to influence" any election, or engages in providing political information, which the Act makes clear includes any fact or opinion. The interplay between the definitions of "electioneering communications" and **[*40]** "influencing or attempting to influence" advocated by Defendants may clear up confusion otherwise evident in the Act, but it is the definition of "providing political information" that the Court views as more constitutionally troubling, as it extends disclosure regimes the Supreme Court has approved of well beyond the boundaries set by *Buckley, McConnell*, and *Citizens United*.

Consider AFP's NJ Taxpayer Scorecard. Plaintiff says its Scorecard "focuses squarely on the issues" and "conveys facts and opinions" as it presents "legislators' voting records on key issues ranging from criminal justice reform to occupational licensing." (ECF No. 3-1 at 14 (citing Jedynak Decl. (ECF No. 3-5 ¶ 14)).) Plaintiff contends the Scorecard "could conceivably be characterized as influencing the electoral chances of each and every legislator mentioned." (*Id.*)

Defendants at oral argument stated that whether the Scorecard fell under the auspices of the Act depended upon the details of the Scorecard.[24] Essentially, Defendants argued, a neutral, nonpartisan statement identifying candidates might not be subject to the Act, but if the Scorecard advocated a particular position it would trigger the Act's disclosure **[*41]** regime.

The Court is persuaded the Scorecard would trigger the Act's disclosure obligations by being characterized as

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[24] The Court conducted the following, edited colloquy regarding the Scorecard:

> THE COURT: The scorecard that counsel referenced in their papers.
>
> DEFENDANTS/MR. FEINBLATT: Yes.
>
> THE COURT: Does that come under this law now?
>
> MR. FEINBLATT: I can't answer in the—in the general. I'd have—I have not studied their scorecard. And the point is that the law and --
>
> THE COURT: Doesn't that get right to the point?
>
> MR. FEINBLATT: No.
>
> ....
>
> MR. FEINBLATT: Since I don't have all the details on the—on the scorecard, we need to drill down to the statute.
>
> ....
>
> MR. FEINBLATT: Scorecard. So if the scorecard is a neutral, nonpartisan statement saying here are the candidates that are up for election in November, here's what their positions are, but there's no effort in that statement to advocate a position one way or another on whether that person should be elected or not, if that's the way it's presented, it may well not be subject to the statute. If it's presented in a way that says here are the candidates, we don't like the way this person is presenting his positions, we are more whatever our political bent is, and is advocating a particular position, then that may well be subject to the statute.
>
> THE COURT: How about a scorecard saying we give candidate X an F on their environmental **[*42]** stance?
>
> MR. FEINBLATT: It depends I think on the details of the thing. But if it's deemed to be an effort to promote or support or oppose a candidate, then it would be subject to the law as was the case in the *Delaware Strong Families* case. The court there did look at a voter's scorecard and found that scorecard was subject to the law.

(ECF No. 38 at 48:14-55:12.)

"influencing or attempting to influence" the chances of each and every candidate mentioned, as Plaintiff contends. However, because of the way the Act defines political information, meaning as any statement reflecting the opinion of members of an independent expenditure committee *or* "contain[ing] facts on any such candidate, or public question," the Court is not persuaded by Defendants' guidance that the Act would not be triggered by a neutral, nonpartisan statement identifying the candidates. The plain language of N.J. Stat. Ann. § 19:44A-3(h) makes clear that whether or not the Scorecard advocated a particular position is a distinction without a difference. A Scorecard merely listing a clearly defined candidate running in a particular election with that candidate's position **[*43]** on various issues, even if descriptions of those positions were absolutely neutral, still would constitute the provision by AFP of "facts on any such candidate" and meet the definition of "political information" as set out in § 19:44A-3(h), triggering the Act's disclosure and financial-reporting regime.

The Court concludes there is no practical difference in whether the language of the Act is interpreted narrowly, as advocated by Defendants, or read broadly, as Plaintiff does, or solely by the plain language of the "final product" that resulted from the Senate's drafting. Regardless of the interpretive approach, the conclusion is the same: the provision of any fact or opinion on any candidate or public question, legislation or regulation by an independent group that raises or expends more than $3,000 for that purpose annually must disclose the identities of donors who have contributed more than $10,000 annually and must disclose those expenditures. This is true whether the independent group intended to provide political information, intended to "influenc[e] or attempt[] to influence," or intended to engage in "electioneering communications" that promote or oppose a "clearly identified candidate **[*44]** for office" or "public question."

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1748, 204 L. Ed. 2d 34 (2019), *reh'g denied*, (2019) (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989); *see also* A. Scalia & B. Garner, Reading Law 167 (2012) (noting that the "text must be construed as a whole"); *accord,* Bailey v. United States, 516 U.S. 137, 145-46, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Thus, the Court considers the phrase "electioneering communications" in its context and with a view to its place in the overall statutory scheme.

The phrase "electioneering communications" appears twice in S150. The first reference is in the definitions section of the Act. N.J. Stat. Ann. § 19:44A-3(u). The context of this provision reveals no textual relationship to "independent expenditure committees" as defined by § 19:44A-3(t). The second reference occurs in N.J. Stat. Ann. § 19:44A-8(d)(2) titled "Contributions, expenditures, reports, requirements." This reference provides only that independent expenditure committees shall disclose all expenditures made by the committee for "electioneering communications, voter registration, get-out-the-vote efforts, poling, and research." By contrast, the phrase "political information" appears eleven times in the Act, while there are five references to the phrase **[*45]** "influencing or attempting to influence." The majority of these sixteen references set out the disclosure or financial recordkeeping obligations imposed by the Act and objected to by Plaintiff. It is clear "influencing or attempting to influence" and "providing political information" are more the more central targets of the Act triggering disclosure than are "electioneering communications" where independent expenditure committees are concerned.

Yet the Second Circuit in *Vermont Right to Life Committee, Inc. v Sorrell* recognized that other courts have found that the language influencing or attempting to influence "requires a limiting construction to avoid impermissible vagueness." 758 F.3d 118, 129 (2d Cir. 2014) (citing Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 664 (5th Cir. 2006); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999).) The Court is not persuaded narrowly construing this phrase either limits what the Court concludes is the likely unconstitutional reach of the Act or brings clarity to the vagueness inherent in the interplay between "electioneering communications" and "influencing or attempting to influence."

Having considered how to interpret the Act's plain language, the Court now must consider whether the Reilly factors favor granting Plaintiff's Motion or whether Defendants have carried their burden of demonstrating **[*46]** the Act can survive the exacting scrutiny standard set out by the Supreme Court.

In 1976, the Supreme Court of the United States recognized the compelled identification of contributors to independent groups that expend money on political causes "can seriously infringe" the rights to privacy of

association and to belief guaranteed by the First Amendment. Buckley, 424 U.S. at 63; see, e.g., Gibson v. Florida Legislative Comm., 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963); NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). As a result, the Supreme Court required that legislation and rules compelling the disclosure of such contributors, as called for by S150, must undergo "exacting scrutiny," meaning the Act "can be sustained only if it furthers a vital governmental interest . . . that is achieved by a means which does not unfairly or unnecessarily burden either a minority party's or individual candidate's equally important interest in the continued availability of political opportunity." Buckley, 424 U.S. at 93. Exacting scrutiny is required even if any deterrent effect on contributors' First Amendment rights resulted "indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure" and not directly from government action. (*Id.* at 65 (citing NAACP v. Alabama, 357 U.S. at 461).) The Supreme Court determined in *Buckley* "there are governmental interests sufficiently important to outweigh the possibility **[*47]** of infringement, particularly when the 'free functioning of our national institutions' is involved." Buckley, 424 U.S. at 66 (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961)). The Court upheld provisions of the Federal Election Campaign Act of 1971, as amended in 1974, ("FECA") requiring individuals or groups, other than political committees or candidates, that contributed more than a specified amount annually to a political committee or to a candidate for office to publicly disclose those contributions to the Federal Election Commission. Buckley, 424 U.S. at 67-68. The *Buckley* Court explained that the disclosure provisions, which were triggered only for spending above a certain level and used "for the purpose of . . . influencing" the "nomination or election of any person to federal office" served a "sufficiently important" government interest that outweighed the possibility of infringing upon First Amendment rights. (*Id.* at 61, 66 (citing 2 U.S.C. § 431(e)(1), (f)(1)).[25]) The Court determined "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." (*Id.* at 68.)

Buckley was superseded by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which came before the Supreme Court in 2003. *McConnell v. FEC, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491*. There the Court upheld **[*48]** BCRA's requirement, among other provisions, calling for the disclosure of those donors contributing more than $10,000 intended for "electioneering communications" that clearly identified a candidate for federal office. *McConnell, 540 U.S. at 194*. While much of *McConnell* was overturned by *Citizens United*, BCRA's disclosure provisions were upheld in *McConnell* "on the ground that they would help citizens 'make informed choices in the political marketplace.'" Citizens United, 558 U.S. at 367 (quoting *McConnell, 540 U.S. at 197*). *Citizens United* left undisturbed the elements of the *Buckley* and *McConnell* decisions declaring the constitutionality of the disclosure regulations before those Courts as well as their acknowledgments that "as-applied challenges would be available if a group could show a "reasonable probability" disclosure of contributors' names "'will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" Citizens United, 558 U.S. at 367 (citing *McConnell, 540 U.S. at 198* (quoting Buckley, 424 U.S. at 74).)[26] All three decisions examined disclosure rules triggered by "electioneering communications" identifying specific, clearly defined candidates.

Defendants contend the "influencing or attempting to influence" language of the Act bears a "substantial relation to the State's important **[*49]** interest in ensuring that New Jersey's electorate is informed about the sources and identities behind election-related spending." (ECF No. 29 at 16 (citing Citizens United, 558 U.S. at 366-69; *McConnell, 540 U.S. at 194-97*; Buckley, 424 U.S. at 64, 66; and Del. Strong Families, 793 F.3d at 309-10).)

In reviewing S150, the Court concludes the plain text does not reveal "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." Doe v. Reed, 561 U.S. at 196 (quoting Citizens United, 558 U.S. at 366-67). Courts

[25] Effective September 1, 2014, the provisions of FECA codified in Title 2 were transferred to 52 U.S.C. §§ 30101-30146. This Opinion will refer to the recodified provisions when citing to FECA.

[26] *Citizens United* also left untouched the exacting scrutiny standard by which disclosure and disclaimer requirements are evaluated. Citizens United, 558 U.S. at 366-67 ("The Court has subjected [disclaimer and disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.")

have found a substantial relation for what have come to be called electioneering communications, as well as for direct lobbying, on the federal level, *see, e.g.,* Buckley, 424 U.S. at 64, 66; *McConnell, 540 U.S. at 194-97*; Citizens United, 558 U.S. at 366-69, and on the state level, *see, e.g.,* Delaware Strong Families, 793 F.3d at 306-07, Vermont Right to Life, 758 F.3d at 133, and Wisconsin Right To Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014). None of those courts faced a statute with the breadth of S150. Indeed, the Court sees few, if any, limitations in the Act.

Consider the expansive roster of media covered by the Act. S150 corrals into its ambit any communication

> published in any newspaper or periodical; broadcast on radio, television, or the Internet or digital media, or any public address system; placed on any billboard, outdoor facility, button, motor vehicle, window display, poster, card, pamphlet, leaflet, flyer, or other circular; or contained in any direct mailing, robotic phone calls, or mass e-mails.

N.J. Stat. Ann. § 19:44A-3(u).

Defendants contend the Act "focus[es] **[*50]** on specific kinds of media used in New Jersey elections, with a list of media types that is not meaningfully different from those at issue in *Delaware Strong Families* and *Vermont Right to Life*." (ECF No. 29 at 21.) In *Delaware Strong Families*, the Third Circuit upheld a Delaware disclosure law whose definition of electioneering communications broadened the roster of qualifying media from the federal BCRA's "any broadcast, cable, or satellite communication," to "television, radio, newspaper or other periodical, sign, Internet, mail or telephone." Delaware Strong Families, 793 F.3d at 311. The Third Circuit concluded that "media covered by the Act reflects the media actually used by candidates for office in Delaware, and thus it bears a substantial relation to Delaware's interest in an informed electorate." (*Id.*) As the Third Circuit noted, "Delaware does not have its own major-network television station" and direct mail constituted "80% of campaign expenditures in state." (*Id.*)[27]

Here, Defendants produce an ELEC White Paper showing that mass-media spending by candidates and independent groups in the state's 2015 elections totaled $12.5 million, or 37% of total spending. (ECF No. 29-1 at ¶ 3, Ex. 1 at 15). **[*51]** That White Paper demonstrates how this Act is distinguished from the statutory regime reviewed by Delaware Strong Families. One table shows that the category "independent groups" spent 66% of their portion of that $12.5 million on television, 13% on mail, 9% on "media mixed," while spending negligible amounts or nothing on radio (2%), media-production (1%), cable television ($0), billboards ($0), printing ($0), newspapers ($0), robocalls ($0) and Internet (2%). (*Id.* at 17.) That negligible spending on cable television, billboards, printing, robocalls and the Internet means these are not media widely used by independent groups to communicate with New Jersey voters. Yet all are included in the Act's definition of what constitutes "electioneering communications" and many are included also in the Act's definition of what constitutes "political information."[28] The Court finds this text is susceptible to no limiting language or interpretation. The Court further concludes that the broad inclusiveness of the Act's definition of media bears little relation to what media are actually used by independent groups. As a result, any "substantial relation" the disclosure requirement has to New Jersey's interest **[*52]** in an informed electorate becomes more tenuous. Instead, practically any media spending appears to trigger the Act's disclosure and reporting regime, whether or not New Jersey voters are reached by the media listed in the Act.

Separately, through § 19:44A-3(u), the Act applies to any electioneering communications or spending occurring from January 1 through Election Day. Plaintiff rightly points out that every year in New Jersey is an election year. In 2019, all 80 seats in the General Assembly will be up for election. The following year, one-third of the U.S. Senate, including a New Jersey

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[27] In *Vermont Right to Life*, the statute at issue contained an expansive definition of what outlets it included in so-called mass media activity including "a television commercial, radio commercial, Internet advertisement, mass mailing, mass electronic or digital communication, literature drop, newspaper or periodical advertisement, robotic phone call, or telephone bank, that includes the name or likeness of a clearly identified candidate for office." Vermont Right to Life, 758 F.3d at 122-23 (quoting Vt. Stat. Ann. tit. 17, § 2901). The Second Circuit did not address the constitutional implications of this expansive list, and so this Court draws no conclusions from the opinion as to this point.

[28] N.J. Stat. Ann. § 19:44A-3(h)'s definition of political information is "any statement including, but not limited to, press releases, pamphlets, newsletters, advertisements, flyers, form letters, Internet or digital advertisements, or radio or television programs or advertisements." The Court concludes this is substantially similar to the media listed in N.J. Stat. Ann. § 19:44A-3(u)'s definition of the media through which electioneering communications is accomplished.

seat, the entire House of Representatives, and the Presidency are up for election. The year 2021 marks the gubernatorial election in New Jersey, as well as contests for the General Assembly. In 2022, one-third of the seats in U.S. Senate and all of the House of Representatives will be contested.[29] In other words, qualifying communications occurring on 1235 of the 1461 days from January 1, 2019 through December 31, 2022, or 84.53% of the time, would trigger the Act's disclosure obligations. This stands in stark contrast to other disclosure statutes cited by Defendants for affirmative comparison, where typically **[*53]** only communications occurring within 30 or 60 days of an Election Day would trigger a disclosure obligation. *See, e.g.,* Delaware Strong Families, 793 F.3d at 307 (citing Del. Code Ann. Tit. 15, § 8002 (West) (upholding a disclosure statute defining an electioneering communication as one publicly distributed within 30 days before a primary election or 60 days before a general election)). The FECA amendments upheld by the Supreme Court in *McConnell* similarly limited FECA's purview to electioneering communications within 60 days before a general, special, or runoff election or 30 days before a primary. *McConnell, 540 U.S. at 194* (citing 2 U.S.C. § 304(f)(3)).[30] On the one hand, it is clear S150's time limitations are, for all intents and purposes, no limitation at all. On the other hand, it is clear that under the Act qualifying communications to influence, say, a vote on a bill before the Assembly from January 1 of any year to Election Day in November would trigger the regulatory scheme, while the same otherwise qualifying communication seeking to influence the same bill but occurring from the day after Election Day to December 31 would not. Neither the Act nor Defendants explain how the substantial relation between the disclosure requirement and the sufficiently important government interest that Defendants **[*54]** contend exists for communications from January 1 through Election Day melts away for communications from the day after Election Day to December 31. Certainly, legislation and regulatory activities occur from Election Day to the end of the year. Judging from the construction of the Act, New Jersey seems uninterested in informing its citizens about who is communicating with legislators and regulators during this period. For elections, as the Supreme Court stated in *Citizens United*:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

558 U.S. at 334.

S150 ignores the teachings of *Citizens United* yet also does not explain how communications with legislators and regulators during the first 10 months of the year merit the scrutiny that comes with the Act's disclosure requirement but not communications during the last two months of the year. The Court concludes the breadth **[*55]** of the time limitations that subject independent groups to the strictures of the Act undermines the disclosure requirement's "substantial relation" to New Jersey's interest in an informed electorate.

Most constitutionally troubling to the Court is the way in which, as discussed to some degree above, the Act brings communications of purely factual political information into a disclosure and financial-reporting regime historically limited to electioneering communications.

The Act defines an "electioneering communication" as any communication occurring within the prescribed time frames described above and referring to:

> (1) a clearly identified candidate for office and promotes or supports a candidate for that office or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate; or (2) a public question and promotes or supports the passage or defeat of that question, regardless of whether the communication expressly advocates a vote for or against the passage of the question.

N.J. Stat. Ann. § 19:44A-3(u).

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[29] This list does not include municipal elections, which also would be elections and ballot questions for which electioneering communications would be subject to the Act. (ECF No. 38 at 61:23-62:3) (Defendants: "[W]hat does this law add to the lobbying law that was out there already? It adds, I think, two primary things. One is it expands disclosures from just statewide but to local lobbying, meaning county, local school district levels. There's a huge amount of lobbying activity going on at the local levels, which is covered by the statute.")

[30] Now *52 U.S.C.A. § 30104* (West)

Crucially, electioneering communication is not among the activities that define independent expenditure committees. Rather, the Act defines independent **[*56]** expenditure committees as groups engaging in "influencing or attempting to influence" an election or the passage of any public question, legislation or regulation—a category the Court concluded above is broader than electioneering communications—or that engage in "providing political information on any public question, legislation or regulation." *N.J. Stat. Ann. § 19:44A-3(t)*.

Political information is not defined in *19:44A-3(t)*. Instead, it is defined as:

> any statement including, but not limited to, press releases, pamphlets, newsletters, advertisements, flyers, form letters, Internet or digital advertisements, or radio or television programs or advertisements which reflects the opinion of the members of the organization on any candidate or candidates for public office, on any public question, or which contains facts on any such candidate, or public question whether or not such facts are within the personal knowledge of members of the organization.

N.J. Stat. Ann. § 19:44A-3(h).

In other words, political information consists of communications containing any fact or opinion about a candidate or public question. Therefore, for the purposes of the Act's disclosure requirements, "providing political information" is effectively synonymous with "electioneering **[*57]** communications." As discussed, AFP publishes an "NJ Taxpayer Scorecard" tracking legislators' voting records on issues ranging from criminal justice reform to occupational licensing. AFP contends that though this report focuses squarely on the issues and not on supporting or opposing any particular candidate, it believes this report could be characterized as influencing the electoral chances of each and every legislator mentioned therein, thus triggering the Act's disclosure obligations. The Court agrees. But, whether the Taxpayer Scorecard is an attempt to influence the election of a particular candidate or represents only the communication of "political information" is a distinction without a difference for the purpose of triggering the Act's disclosure and financial-reporting regime. If AFP raised or expended more than $3,000 on compiling or distributing this Scorecard during roughly 85% of the year, the disclosure obligation would be the same whether AFP was attempting to advocate for or against a clearly identified candidate, to influence an election, legislation or regulation, or only to educate voters about the issues it monitors and/or advocates by providing facts or opinions. **[*58]**

Plaintiff contends the breadth of the Act requires this Court to grant this Motion. Importantly, while Plaintiff argues the Act is unconstitutional on its face, Plaintiff does not contend the grant of a preliminary injunction should or would prevent the New Jersey Legislature from approving legislation required to correct the unconstitutional weaknesses in the Act identified by, among others, Governor Murphy.[31] Neither would an injunction prevent ELEC from engaging in rulemaking that also might bring clarity to the Act's language and to how the regulator would enforce the Act. Instead, Plaintiff suggests, a preliminary injunction would merely preserve the status quo to provide the Legislature and/or ELEC time to engage in such activity while preventing harm to Plaintiff and other independent groups in the form of disclosing information about donors in New Jersey and nationwide whose anonymity would be forever lost. (ECF No. 3-1 at 5, 39.) The Court agrees and concludes Plaintiff has met its burden of demonstrating it has a reasonable probability of winning on the merits at trial on its claim that the Act is facially unconstitutional. Concomitantly, the Court concludes the State has not **[*59]** met its burden of demonstrating that "the statute withstands scrutiny." *Reilly, 858 F.3d at 180*) (quoting *Ashcroft v. ACLU, 542 U.S. at 666*.)

Having reached this conclusion, it is axiomatic Plaintiff has met the other *Reilly* factors for granting a preliminary injunction. The Court concludes Plaintiff has met its burden of showing irreparable harm by meeting the "success on the merits" prong because, as stated above, the "loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *K.A. ex. rel. Ayers, 710 F.3d at 113* (quoting *Elrod v. Burns, 427 U.S. at 373*.) Similarly, Plaintiff has met its burden of showing a preliminary injunction to be in the public interest because "the enforcement of an unconstitutional law vindicates no public interest." *K.A. ex rel. Ayers, 710 F.3d at 114* (citing *ACLU v. Ashcroft, 322 F.3d at 251 n.11* ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.")) (citation and international quotation marks omitted).)

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[31] *See* supra n.10.

Finally, the Court is persuaded by Plaintiff's argument that the balance of the equities favors AFP on its facial challenge because, in contrast to the "risk of irreparable injury looming over AFP and its donors, New Jersey faces no appreciable harm from an injunction." (ECF No. 3-1 at 39.) Accordingly, Plaintiff's Motion for a **[*60]** Preliminary Injunction enjoining Defendants from enforcing the provisions of the Act is **GRANTED**.

In the event the Court ruled against its facial challenge to S150, Plaintiff also claims the Act is unconstitutional as applied to AFP. As part of its as-applied challenge, Plaintiff contends the Act will subject its donors to "threats, harassment, or reprisals from either Government officials or private parties" after their information is disclosed and that loss of anonymity would chill its *First Amendment* rights through a decline in funding that would result from public disclosure of its contributors' personal information. Defendants counter that donors may be more concerned about avoiding accountability than about public criticism or about significant harassment that will not be addressed by law enforcement. (ECF No. 29 at 41.) Defendants also argue that *Doe v. Reed* "underscore[s] the heavy burden that AFP must carry." (*Id.* (citing *Doe v. Reed, 561 U.S. at 202-28*).) Plaintiff supports its argument with declarations from officers reporting a litany of threats ranging from personal death threats and actual physical attacks to cyberattacks and other Internet-based retaliation. (ECF No. 3-1 at 15-16 (citing Decl. of Jedynak (ECF No. **[*61]** 3-5) and Decl. of Emily Seidel (ECF No. 3-4).) Defendants describe these as "only a few isolated—though clearly regrettable—incidents of concern over fifteen years of its operations." (ECF No. 29 at 41.)

The Court observes that the question about the extent of any threats is likely to be more favorable to Plaintiff than Defendants contend, especially amid a political climate that many say has become far more divisive than it was even in 2010 when *Citizens United* and *Doe v. Reed* were decided. Also, *Citizens United* tells us that as-applied challenges still require only a showing that there is a "reasonable probability" disclosure of contributors' names "will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United, 558 U.S. at 370* (citing *McConnell, 540 U.S. at 198* (quoting *Buckley, 424 U.S. at 74*)). In a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others, in addition to AFP's list of threats already experienced against those AFP stakeholders whose identities have become known, a "reasonable probability" **[*62]** standard strikes the Court as less burdensome as Defendants maintain. However, because the Court granted Plaintiff's Motion based on AFP's facial challenge to the Act, it need not rule on the merits of Plaintiff's as-applied challenge.

V. CONCLUSION

A preliminary injunction is an extraordinary remedy to be used in limited circumstances. Nevertheless, for the reasons stated above the Court concludes Plaintiff has met its burden of demonstrating that *Reilly* factors weigh in favor of an injunction. Accordingly, Plaintiff's Motion is **GRANTED**.

Date: October 2, 2019

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

ORDER

THIS MATTER having been opened to the Court pursuant to Americans for Prosperity's ("Plaintiff" or "AFP") Motion for a Preliminary Injunction (ECF No. 3) enjoining Defendants Gurbir Grewal, Attorney General of New Jersey, Eric H. Jaso, Chairman of New Jersey Election Law Enforcement Commission (or "ELEC"), and two ELEC Commissioners, Stephen M. Holden and Marguerite T. Simon, (collectively, "Defendants") from enforcing New Jersey Senate Bill No. 150 (also known as "S150" or "the Act"), and the Court having heard oral argument on Plaintiff's motion on **[*63]** September 17, 2019, and having considered the parties' submissions, for the reasons set forth in the accompanying Opinion, and for good cause appearing,

IT IS on this 2nd day of October 2019,

ORDERED that Plaintiff's Motion for a Preliminary Injunction (ECF No. 3) is **GRANTED**; and it is further

ORDERED that Defendants and any state officers acting in concert with them, or under their direction or authority, be and hereby are preliminarily enjoined from enforcing the provisions in New Jersey Senate Bill No. 150 compelling disclosure of donor information and

compliance with the Act's reporting requirements for independent expenditure committees; and it is further

ORDERED that, neither party having addressed the implications on this Motion of *Fed. R. Civ. P. 65(c)*, pursuant to which "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained," and the ultimate decision of the issue being within the discretion of the trial judge, *Scanvec Amiable Ltd. v. Chang, 80 F. App'x 171, 177 (3d Cir. 2003)*, and the Third Circuit recognizing that public-interest cases may represent an exception **[*64]** to the strict requirements of *Rule 65(c)*, *Temple Univ. v. White*, 941 F.2d 201, 218 n.25 (3d Cir. 1991) (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 803 n.8 (3d Cir. 1989)*, and as Defendants did not request a bond requirement and did not present any evidence about potential damages in the event this Court issued a preliminary injunction, and the Court concluding that Defendants would suffer no monetary damage from enforcement of this Order, the Court grants the Motion without requiring the posting of a bond by Plaintiff.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

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Citizens Union of N.Y. v. AG of N.Y.

United States District Court for the Southern District of New York

September 30, 2019, Decided; September 30, 2019, Filed

16cv9592 (DLC)

Reporter
408 F. Supp. 3d 478 *; 2019 U.S. Dist. LEXIS 169438 **; 2019 WL 4748054

Judges: DENISE COTE, United States District Judge.

CITIZENS UNION OF THE CITY OF ***NEW YORK***, et al., Plaintiffs, -v- ATTORNEY GENERAL OF THE STATE OF ***NEW YORK***, Defendant.

Opinion by: DENISE COTE

Prior History: *Citizens Union of N.Y. v. Governor of N.Y., 2017 U.S. Dist. LEXIS 14946 (S.D.N.Y., Jan. 11, 2017)*

Counsel: **[**1]** For ***Citizens Union*** of the City of ***New York*** and ***Citizens Union*** Foundation, Inc. of the City of ***New York***, plaintiffs: Randy M. Mastro, Akiva Shapiro, Timothy Sun, Gibson, Dunn & Crutcher LLP, ***New York***, ***New York***.

For American Civil Liberties ***Union*** Foundation, ***New York*** Civil Liberties ***Union*** Foundation, and ***New York*** Civil Liberties ***Union***, plaintiffs: William F. Cavanaugh, Stephanie Teplin, D. Brandon Trice, Michael D. Schwartz, Patterson Belknap Webb & Tyler LLP, ***New York***, ***New York***.

For Lawyers Alliance for ***New York*** and Nonprofit Coordinating Committee of ***New York***, plaintiffs: Lawrence S. Lustberg, J. David Pollock, Gibbons P.C., Newark, NJ.

For the defendant: Andrew Amer, James M. Thompson, Office of the ***New York*** Attorney General, ***New York***, ***New York***.

Opinion

[*481] OPINION AND ORDER

DENISE COTE, District Judge:

[*482] In 2016, ***New York*** state enacted an Ethics Law addressing several issues related to elections, campaigning, and conduct in office by state officials. Two provisions of the Ethics Law require entities that are exempt from federal taxation -- under *26 U.S.C. § 501(c)(3)* and *501(c)(4)* -- to publicly report their donors under certain circumstances. The plaintiffs assert that these two **[**2]** provisions unconstitutionally burden their *First Amendment* rights of free speech and association. For the following reasons, the plaintiffs' motion for summary judgment is granted. These provisions of the Ethics Law, ***N.Y.*** *Exec. Law §§ 172-e* and *172-f*, are invalid on their face.

Background

Before addressing the legal issues at stake in this summary judgment motion, this Opinion describes the federal law that governs 501(c)(3) and 501(c)(4) entities, and transfers of funds or support from a 501(c)(3) to a 501(c)(4); the legislative history of *§§ 172-e* and *172-f*, the two sections of the ***New York*** Ethics Law that are challenged in this lawsuit; the provisions of *§§ 172-e* and *172-f*; and the procedural history of this litigation.

I. Federal Regulation of Tax-Exempt Entities

Certain entities are exempt from federal taxation. To qualify for tax exemption under *26 U.S.C. § 501(c)(3)*, an entity must have an exempt purpose. It must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual." Such an entity is commonly known as a "501(c)(3)." In addition to a 501(c)(3) being itself exempt from taxation, **[**3]** donations to a 501(c)(3) are tax-deductible. Id. *§ 170*.

Section 501(c)(3) places two restrictions on such an entity's activities. These restrictions concern lobbying and political activity. An entity loses its 501(c)(3) tax exemption if "a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation." Id. *§ 501(h)(1)*; see also id. *§ 501(c)(3)*. This language limits a 501(c)(3)'s ability to engage in lobbying, such as "contact[ing], or urg[ing] the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation" or "advocat[ing] the **[*483]** adoption or rejection of legislation."[1] The Internal Revenue Service ("IRS") evaluates whether a "substantial part" of the 501(c)(3)'s activities consist of lobbying, based on "a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity."[2] Alternatively, a 501(c)(3) may choose to have its lobbying activity evaluated under the "expenditure test," which, based on the organization's size, provides a maximum amount that the 501(c)(3) may spend on lobbying. *26 U.S.C. §§ 501(h)*, *4911*.[3]

An entity also loses its tax-exempt status if it "participate[s] in, or intervene[s] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." *26 U.S.C. § 501(c)(3)*. "Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity."[4] A 501(c)(3), however, may participate in "certain voter education activities (including presenting public forums and publishing voter education guides) conducted in a non-partisan manner."[5]

In order to retain its tax exemption, an entity "must be both organized and operated exclusively for" charitable purposes. *26 C.F.R. § 1.501(c)(3)-1(a)(1)*. "If an organization fails to meet either the organizational test or the operational test, it is not exempt." Id. In order to satisfy the organizational **[**5]** test, an entity must have articles of organization that (1) "[l]imit the purposes of such organization to one or more exempt purposes" and (2) "[d]o not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes." Id. *§ 1.501(c)(3)-1(b)*.

To satisfy the operational test, an entity must "engage[] primarily in activities which accomplish one or more of such exempt purposes." Id. *§ 1.501(c)(3)-1(c)(1)*. "It is well-settled that an incidental non-exempt purpose will not disqualify an organization, but a single substantial nonexempt purpose or activity will destroy the exemption, regardless of the number or quality of exempt purposes." **[*484]** *Family Tr. of Mass., Inc. v.*

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[1] IRS, Charities **[**4]** and Nonprofits: Lobbying (Aug. 7, 2019), https://www.irs.gov/charities-non-profits/lobbying.

[2] IRS, Measuring Lobbying: Substantial Part Test (Dec. 13, 2018), https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test; *see also* All. for Justice, Lobbying Under the Insubstantial Part Test (last visited Sept. 29, 2019), https://bolderadvocacy.org/wp-content/uploads/2018/06/Lobbying_under_the_insubstantial_part_test.pdf ("Most tax practitioners generally advise that charities can safely devote 3-5% of their overall activities toward lobbying.").

[3] The lobbying ceiling is determined by the 501(c)(3)'s exempt purpose expenditures. *26 U.S.C. §§ 501(h)*, *4911*; *26 C.F.R. §§ 1.501(h)-1*, *56.4911-1*, *56.4911-4*. For example, if a 501(c)(3)'s exempt purpose expenditures are less than or equal to $500,000, the lobbying ceiling is 20% of the exempt purpose expenditures; or, if the exempt purpose expenditures exceed $17,000,000, the lobbying ceiling is $1,000,000. IRS, Measuring Lobbying Activity: Expenditure Test (Feb. 25, 2019), https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test.

[4] IRS, The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations (Aug. 7, 2019), https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations.

[5] Id.

United States, 892 F. Supp. 2d 149, 159 (D.D.C. 2012) (citation omitted). "[T]he presence of a single substantial purpose that is not described in section 501(c)(3) precludes exemption from tax . . . ." Giving Hearts, Inc. v. Comm'r of Internal Revenue, 118 T.C.M. (CCH) 102, T.C. Memo 2019-94 (T.C. 2019). An organization fails the operational test if "a substantial part of its activities is attempting to influence legislation by propaganda or otherwise." 26 C.F.R. § 1.501(c)(3)-1(c)(3)(i) to (ii). "[A]n organization will be regarded as attempting to influence legislation if the organization" (1) "[c]ontacts, or urges the public to contact, members of a legislative **[**6]** body for the purpose of proposing, supporting, or opposing legislation;" or (2) "[a]dvocates the adoption or rejection of legislation." Id. § 1.501(c)(3)-1(c)(3)(ii).

There is a second type of tax-exempt entity that is relevant to the discussion that follows. Under 26 U.S.C. § 501(c)(4), "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare" are tax-exempt. An entity exempt from federal taxation under this provision is commonly referred to as a "501(c)(4)." In order to be a 501(c)(4), an organization must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). Unlike a 501(c)(3), a 501(c)(4) may engage in substantial lobbying. Compare 26 U.S.C. § 501(c)(3), with id. § 501(c)(4); see also Regan v. Taxation Without Representation of Wash., 461 U.S. 540, 543, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983).[6]

There are limitations, however, on the extent to which a 501(c)(4) may participate in political activities. "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii). But a 501(c)(4) "may engage in some political activities, **[**7]** so long as that is not its primary activity."

[6] See also IRS, Action Organizations (May 13, 2019), https://www.irs.gov/charities-non-profits/action-organizations ("Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes. Thus, a section 501(c)(4) social welfare organization may further its exempt purposes through lobbying as its sole or primary activity without jeopardizing its exempt status."); All. for Justice, Comparison of 501(c)(3) and 501(c)(4) Permissible Activities (last visited Sept. 29, 2019), https://www.bolderadvocacy.org/wp-content/uploads/2018/06/Comparison_of_501c3_and_50c4_Permissible_Activities.pdf.

IRS, Social Welfare Organizations (May 13, 2019), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations (emphasis added); see also 26 C.F.R. §1.501(c)(4)-1(a). Unlike donations to 501(c)(3)s, donations to 501(c)(4)s are generally not tax-deductible.[7] Congress has chosen "not to subsidize lobbying as extensively" as the activities to which a 501(c)(3) may properly be dedicated. Regan, 461 U.S. at 544.

As a result of the requirement that a 501(c)(3) be organized and operated "exclusively for" charitable purposes, a 501(c)(3) is limited in its ability to transfer funds or offer in-kind support to a 501(c)(4). A 501(c)(3) must at a minimum "keep records adequate to show that tax deductible contributions are not used to pay for lobbying." Regan, 461 U.S. at 544 n.6; see also **[*485]** Bob Jones Univ. Museum & Gallery, Inc. v. Comm'r, T.C. Memo 1996-247, 71 T.C.M. (CCH) 3120 (T.C. 1996) (holding that a tax-exempt entity may pay rent to a taxable entity, where the rent is an "ordinary and necessary business expense[]" and not paid for the purpose of "funnel[ing] tax-deductible contributions" to the taxable entity.). Some commentators describe it as a best practice for a 501(c)(3) to not subsidize a 501(c)(4) in any way.[8] But the IRS has not articulated a bright line

[7] IRS, Donations to Section 501(c)(4) Organizations (Mar. 26, 2019), https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501c4-organizations; see also 26 U.S.C. § 170(c)(2)(B).

[8] See All. for Justice, 501(c)(3) and 501(c)(4) Collaboration 10 (last visited Sept. 29, 2019), https://bolderadvocacy.org/wp-content/uploads/2019/08/BA-Power-of-Collaboration.pdf ("When (c)(3)s and (c)(4)s share resources, the key principle to keep in mind is that a (c)(3) may not subsidize a (c)(4)."); Carolyne R. Dilgard et al., Section 501(c)(3) Tax-Exempt Entities Forming Affiliations With Other Entities 14 (June 2011), https://www.probonopartner.org/wp-content/uploads/2016/05/Affiliation-Primer-Unabridged.pdf ("To the extent sister entities or a tax-exempt entity and a joint venture in which it participates have a landlord-tenant relationship, detailed record keeping and appropriate allocation of fair value costs remain best practices."); Gene Takagi, Affiliated Organizations: Sharing Resources (Apr. 21, 2018), http://www.nonprofitlawblog.com/affiliated-organizations-sharing-resources ("[T]he 501(c)(3) organization should generally make sure that it pays only its fair share for shared resources if such resources may be used by its affiliate to engage in or support political intervention activities."); Hurwit & Assocs., Nonprofit Lobbying & 501(c)(4) Primer (last visited Sept. 29, 2019), https://www.hurwitassociates.com/lobbying-

beyond **[**8]** which a 501(c)(3)'s support of a 501(c)(4) indicates a "substantial" lobbying purpose sufficient to jeopardize the 501(c)(3)'s tax exemption. See All. for Justice, 501(c)(3) and 501(c)(4) Collaboration 9 (last visited Sept. 29, 2019), https://bolderadvocacy.org/wp-content/uploads/2019/08/BA-Power-of-Collaboration.pdf ("While there are lines that (c)(3)s may not cross, many of the issues that arise do not have bright-line answers.").[9]

In short, a 501(c)(3) may not freely transfer funds to a 501(c)(4), but it may provide some financial support to a 501(c)(4) without losing its 501(c)(3) status. Lobbying cannot constitute a "substantial part" of a 501(c)(3)'s activities, but there is no restriction on a 501(c)(4)'s ability to engage in lobbying. A 501(c)(3) may not participate in political campaigns. A 501(c)(4) may participate in political activities so long as such work is not the entity's "primary" activity.

II. The Challenged Provisions

A. Legislative History

Sections 172-e and *172-f* were enacted as part of a larger **[**9]** ethics bill that was introduced on June 17, 2016 and passed in the early morning hours of the following day (the "Ethics Law"). The entire bill contained eleven sections, which made a variety of statutory changes, such as adding a ***new*** definition of "coordination" to ***New York*** election law that narrowed the scope of "independent expenditures," establishing rules for the disposition of campaign funds after the death of a candidate, increasing the possible fine to be imposed against a lobbyist who accepts a contingent fee, creating a registration requirement for political consultants, and adding certain procedural requirements for investigations by ***New York***'s Commission on Public Ethics. See *2016 **N.Y.** Laws ch. 286*; see also **[*486]** 2016 Sess. Law News of ***N.Y.***, Legis. Memo ch. 286 (McKinney's). Only two sections of the Ethics Law are challenged here; the following legislative history focuses on those portions of the record that may shed light on the state's interest in these two provisions.

New York Governor Andrew Cuomo first announced proposed ethics-reform legislation on June 8, 2016 through a press release and a speech at Fordham University. The press release described the legislation as "first-in-the-nation **[**10]** action to curb the power of independent expenditure campaigns unleashed by the 2010 Supreme Court case ***Citizens*** United vs. Federal Election Commission." ***Citizens*** United, of course, had held that a federal statute prohibiting corporations from using their general treasury funds to make independent electoral expenditures advocating for or against candidates, violated the *First Amendment*. ***Citizens*** *United v. FEC, (**Citizens** United I), 558 U.S. 310, 365, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)*. The press release described a number of policy goals for the legislation: "limit[ing] the 'quid pro quo' danger posed by colossal corporate donations," "ensur[ing] that independent expenditure groups remain autonomous from the entities they support," and "strengthen[ing] disclosure requirements." According to the press release, ***Citizens*** United "ignited the equivalent of a campaign nuclear arms race and created a shadow industry in ***New York*** -- maligning the integrity of the electoral process and drowning out the voice of the people." The press release listed specific steps that the legislation would take, including "[r]equir[ing] additional disclosures for individuals and entities making independent expenditures."

On June 17, the Governor's office and legislative leaders from the ***New York*** Senate and Assembly released **[**11]** a statement announcing their "agreement on a 5 Point Ethics Reform Plan to toughen election, lobbying, and ethics enforcement laws." The announcement included a statement from Governor Cuomo, saying that ***Citizens*** United "decimates the right to free speech by allowing it to be eclipsed by paid speech" and that under the ***new*** legislation "independent expenditure groups and PACs will be required to adhere to unprecedented disclosure requirements." ***New York*** Senate Majority Leader John J. Flanagan said the legislation would "strengthen[] our campaign finance laws to crack down on coordination between candidates and Independent Expenditure groups, who all too often operate in the shadows while enjoying an outsized influence on our politics." Assembly Speaker Carl Heastie said that the legislation would "close the gaps that have allowed lobbying organizations and outside groups to gain undue influence on state government." Senate Independent Democratic Conference Leader Jeffrey Klein said that

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advocacy/lobbying-amp-501-c-4-primer ("[F]unds given to the 501(c)(3) for its charitable purposes may not be used by or commingled with the 501(c)(4).").

[9] If a 501(c)(3) has chosen to have its lobbying activity measured using the expenditure test and is part of an "affiliated group of organizations," the lobbying expenditures of any member of the group count against the lobbying ceiling. *26 U.S.C. § 4911(f)(1)*; see also id. *§ 4911(f)(2)* (defining "affiliation" in this context).

the legislation would "require[] disclosure of political relationships and behaviors widely recognized to be influential, but which operate in the shadows."

The announcement also described the specific **[**12]** provisions challenged in this legislation. The first would "[r]equire 501(c)(4) organizations, which are entities that can engage in unlimited lobbying, to disclose financial support and in-kind donations from 501(c)(3) organizations, which are organizations that are not permitted to engage in political activity." The announcement described the purpose of this provision as "prevent[ing] organizations from corrupting the political process and utilizing funds that are not intended for political purposes." The second provision would "[r]equire 501(c)(4) organizations to disclose their sources of funding if **[*487]** they engage in activities to influence electoral politics using 'issue advocacy.'"

Governor Cuomo submitted to the legislature a memorandum in support of the Ethics Law. The memorandum described the purpose of the bill as "provid[ing] ***New York*** State with comprehensive ethics, lobbying, campaign finance, and public officer's law reform." As relevant to the provisions challenged here, the memorandum said that "[d]isclosure of political relationships and funding behaviors widely recognized to be influential, but which operate in the shadows, is essential to restoring the public's faith **[**13]** and trust in our political process."

The Governor also submitted a message of necessity[10] that said the Ethics Law would "require disclosures of political relationships and behaviors widely recognized to be influential but which operate in the shadows." The message continued, "As passage of this bill would enact the strongest reforms in the country to combat the outsized influence of dark money in politics, it is imperative that ***New York*** pass this bill."

The Ethics Law was passed by the ***New York*** Senate around 3:00 a.m., after approximately fifteen minutes of discussion. In the ***New York*** Assembly, the bill was passed around 4:50 a.m., after approximately ten minutes of discussion. Assemblymember Charles D. Lavine began that discussion with a brief overview of the bill, describing it as providing "the most powerful protections in the nation, to date, against the corrosive effect of the misguided ***Citizens*** United case." He said that ***New York*** would "lead the nation in safeguarding our ***citizens*** from the corrupting influence of money and special interests in government." He noted that the bill was "composed of 11 separate components" and said that he would "describe very briefly what they are." **[**14]** Regarding the challenged provisions, Assemblymember Lavine said, "[The Ethics Law] deals with sources of funding disclosures, or 501(c)3s and 4s in certain circumstances. . . . It deals with in-kind disclosures. It deals with issue advocacy disclosures."

Governor Cuomo signed the bill on August 24, 2016. In his approval message, Governor Cuomo wrote,

> I am proud to sign this bill, which is a critical step toward restoring the public's faith and trust in our political process. First, this bill provides much-needed reform to ***New York***'s campaign finance system. It takes the strongest stand in the nation to reverse the indisputably unfair protections afforded to corporate interests by the ***Citizens*** United v. Federal Election Commission decision. . . . Second, the bill enacts sweeping ethics reform. . . . It will also implement various measures to shed light on the dark money that runs rampant through our political process.

B. *Section 172-e*

Section 172-e requires any 501(c)(3) that makes an in-kind donation in excess of $2,500 to a 501(c)(4) engaged in lobbying activity to file a funding disclosure report. ***N.Y.*** *Exec. Law § 172-e(2)*. The funding disclosure report must include, among other things, any donation in excess of $2,500 **[*488]** to the 501(c)(3) **[**15]** and the identities of any donors who made such a donation. Id.

The full text of *§ 172-e* provides:

> 1. Definitions. For the purposes of this section:
>
> (a) "Covered entity" shall mean any corporation or entity that is qualified as an exempt organization or entity by the United States Department of the Treasury under *I.R.C. 501(c)(3)* that is required to report to the department of law pursuant to this section.
> (b) "In-kind donation" shall mean donations of staff,

[10] The ***New York*** Constitution requires that a bill be "printed and upon the desks of the members [of the legislature], in its final form, at least three calendar legislative days prior to its final passage, unless the governor . . . shall have certified . . . the facts which in his or her opinion necessitate an immediate vote thereon." ***N.Y.*** *Const. art. III, § 14*. Because the ethics bill was introduced on the last day of the legislative section, Governor Cuomo was required to submit such a message of necessity.

staff time, personnel, offices, office supplies, financial support of any kind or any other resources. (c) "Donation" shall mean any contribution, including a gift, loan, in-kind donation, advance or deposit of money or anything of value.

(d) "Recipient entity" shall mean any corporation or entity that is qualified as an exempt organization or entity by the United States Department of the Treasury under *I.R.C. 501(c)(4)* that is required to file a source of funding report with the joint commission on public ethics pursuant to *sections one-h* and *one-j* of the legislative law.

(e) "Reporting period" shall mean the six month period within a calendar year starting January first and ending June thirtieth or the six month period within a calendar year starting July first and ending **[**16]** December thirty-first.

2. Funding disclosure reports to be filed by covered entities. (a) Any covered entity that makes an in-kind donation in excess of two thousand five hundred dollars to a recipient entity during a relevant reporting period shall file a funding disclosure report with the department of law. The funding disclosure report shall include:

(i) the name and address of the covered entity that made the in-kind donation;

(ii) the name and address of the recipient entity that received or benefitted from the in-kind donation;

(iii) the names of any persons who exert operational or managerial control over the covered entity. The disclosures required by this paragraph shall include the name of at least one natural person;

(iv) the date the in-kind donation was made by the covered entity;

(v) any donation in excess of two thousand five hundred dollars to the covered entity during the relevant reporting period including the identity of the donor of any such donation; and

(vi) the date of any such donation to a covered entity.

(b) The covered entity shall file a funding disclosure report with the department of law within thirty days of the close of a reporting period.

3. Public disclosure **[**17]** of funding disclosure reports. The department of law shall promulgate any regulations necessary to implement these requirements and shall forward the disclosure reports to the joint commission on public ethics for the purpose of publishing such reports on the commission's website, within thirty days of the close of each reporting period; provided however that the attorney general, or his or her designee, may determine that disclosure of donations to the covered entity shall not be made public if, based upon a review of the relevant facts presented by the covered entity, such disclosure may cause harm, threats, harassment, or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation. The covered entity may appeal the attorney general's determination **[*489]** and such appeal shall be heard by a judicial hearing officer who is independent and not affiliated with or employed by the department of law, pursuant to regulations promulgated by the department of law. The covered entity's sources of donations that are the subject of such appeal shall not be made public pending final judgment on appeal.

N.Y. *Exec. Law §172-e* (emphasis added).

A "recipient entity" is defined **[**18]** as any 501(c)(4) "that is required to file a source of funding report with the joint commission on public ethics" pursuant to ***N.Y.*** *Legislative Law section 1-h* or *1-j*. Id. *§ 172-e(1)(d)*. *Sections 1-h* and *1-j* are provisions of a separate statute, the ***New York*** *Lobbying Act*, which defines "lobbyist" as "every person or organization retained, employed or designated by any client to engage in lobbying." ***N.Y.*** *Legis. Law § 1-c(a)*. "Lobbying" is defined as an "attempt to influence" any of ten categories of official action, such as "the passage or defeat of any legislation or resolution by either house of the state legislature including but not limited to the introduction or intended introduction of such legislation or resolution or approval or disapproval of any legislation by the governor." Id. *§ 1-c(c)*.[11]

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[11] See also ***N.Y.*** ***Comp. Codes R. & Regs. tit. 19, §§ 943.1, 943.5-943.7*** (defining types of lobbying that trigger disclosures under the ***New York*** Lobbying Act); *November Team, Inc. v. **N.Y.** State Joint Comm'n on Pub. Ethics, 233 F. Supp. 3d 366, 368 (S.D.**N.Y.** 2017)* ("The Act regulates both direct lobbying, which involves direct contact with a public official, and grassroots lobbying, which seeks to influence a public official indirectly through the intermediary of the public."); ***N.Y.*** State Joint Comm'n on Public Ethics, Am I Lobbying? (Jan. 2019), https://jcope.***ny***.gov/system/files/documents/2019/01/am-i-lobbying-1232019.pdf (describing types of lobbying and required disclosures).

N.Y. *Legislative Law § 1-h* requires any lobbyist that performs lobbying on its own behalf, rather than on behalf of a client, to file a source of funding report if it has spent over $15,000 on lobbying during the twelve months prior to the reporting date and at least 3% of its total expenditures were devoted to lobbying in ***New York***. Id. *§ 1-h(c)(4)*. *Section 1-j* requires any client that retains or employs a lobbyist to file a source of funding report if the client has spent over $15,000 on lobbying in the twelve **[**19]** months prior to the reporting date and at least 3% of the client's total expenditures were devoted to lobbying in ***New York***. Id. *§ 1-j(c)(4)*. Under either provision, a source of funding report must include the names of each source of funding that contributed over $2,500 that was used to fund the lobbying activities. Id. *§§ 1-h(c)(4)(ii)*, *1-j(c)(4)(ii)*.

To summarize: *Section 172-e* requires a 501(c)(3) to disclose all donors who contributed over $2,500 in the following circumstance. The disclosure of such donors must be made if the 501(c)(3) itself makes an in-kind donation to a 501(c)(4) that engages in lobbying in ***New York***, either on its own behalf or through a retained lobbyist.

C. *Section 172-f*

Section 172-f requires a 501(c)(4) that expends more than $10,000 in a calendar year on "covered communications" to file a financial disclosure report. ***N.Y.*** *Exec. Law § 172(f)(2)*. A "covered communication" is a published statement that is "conveyed to five hundred or more members of a general public audience" and

> refers to and advocates for or against a clearly identified elected official or the position of any elected official or administrative or legislative body relating to the outcome of any vote or substance of any legislation, potential legislation, pending legislation, rule, regulation, **[*490]** hearing, **[**20]** or decision by any legislative, executive or administrative body.

Id. *§ 172-f(1)(b)*.

In pertinent part, *§ 172-f* provides:

> 1. Definitions. (a) "Covered Entity" means any corporation or entity that is qualified as an exempt organization or entity by the United States Department of the Treasury under *I.R.C. 501(c)(4)*.
>
> (b) "Covered communication" means a communication, that does not require a report pursuant to article one-A of the legislative law or article fourteen of the election law, by a covered entity conveyed to five hundred or more members of a general public audience in the form of: (i) an audio or video communication via broadcast, cable or satellite; (ii) a written communication via advertisements, pamphlets, circulars, flyers, brochures, letterheads; or (iii) other published statement which: refers to and advocates for or against a clearly identified elected official or the position of any elected official or administrative or legislative body relating to the outcome of any vote or substance of any legislation, potential legislation, pending legislation, rule, regulation, hearing, or decision by any legislative, executive or administrative body.
> * * *
>
> (c) "Expenditures for covered communications" shall mean: (i) any **[**21]** expenditure made, liability incurred, or contribution provided for covered communications; or (ii) any other transfer of funds, assets, services or any other thing of value to any individual, group, association, corporation whether organized for profit or not-for-profit, labor ***union***, political committee, political action committee, or any other entity for the purpose of supporting or engaging in covered communications by the recipient or a third party.
> (d) "Donation" shall mean any contribution, including in-kind, gift, loan, advance or deposit of money or anything of value made to a covered entity unless such donation is deposited into an account the funds of which are not used for making expenditures for covered communications.
> (e) "Reporting period" shall mean the six month period within a calendar year starting January first and ending June thirtieth or the six month period within a calendar year starting July first and ending December thirty-first.
>
> 2. Disclosure of expenditures for covered communications. (a) Any covered entity that makes expenditures for covered communications in an aggregate amount or fair market value exceeding ten thousand dollars in a calendar year shall file **[**22]** a financial disclosure report with the department of law. The financial disclosure report shall include:

> (i) the name and address of the covered entity that made the expenditure for covered communications;
> (ii) the name or names of any individuals who exert operational or managerial control over the covered entity. The disclosures required by this paragraph shall include the name of at least one natural person;
> (iii) a description of the covered communication;
> (iv) the dollar amount paid for each covered communication, the name and address of the person or entity receiving the payment, and the date the payment was made; and
>
> [(v)] the name and address of any individual, corporation, association, or group that made a donation of one thousand dollars or more to the **[*491]** covered entity and the date of such donation.
>
> (b) The covered entity shall file a financial disclosure report with the department of law within thirty days of the close of a reporting period.
>
> (c) If a covered entity keeps one or more segregated bank accounts containing funds used solely for covered communications and makes all of its expenditures for covered communications from such accounts, then with respect to donations included **[**23]** in *subparagraph (iv) of paragraph (a) of this subdivision*, the financial report need only include donations deposited into such accounts.
>
> 3. The department of law shall make the financial disclosure reports available to the public on the department of law website within thirty days of the close of each reporting period, provided however that the attorney general, or his or her designee, may determine that disclosure of donations shall not be made public if, based upon a review of the relevant facts presented by the covered entity, such disclosure may cause harm, threats, harassment, or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation. The covered entity may appeal the attorney general's determination and such appeal shall be heard by a judicial hearing officer who is independent and not affiliated with or employed by the department of law, pursuant to regulations promulgated by the department of law. The covered entity shall not be required to disclose the sources of donations that are the subject of such appeal pending final judgment on appeal.

N.Y. *Exec. Law § 172-f* (emphasis added).

Several provisions of *§ 172-f* bear emphasis. Communications that already "require **[**24]** a report" under the ***New York*** Lobbying Act are carved out from *§ 172-f*. Id. at *§ 172-f(1)(b)*. Similarly carved out are communications that are already subject to reporting requirements under ***New York*** election law, id., such as communications that "call for the election or defeat of [a] clearly identified candidate" or that "refer[] to and advocate[] for or against a clearly identified candidate . . . on or after January first of the year of the election in which such candidate is seeking office." ***N.Y.*** *Elec. Law §§ 14-107*.

A financial disclosure report required under *§ 172-f* must include, among other things, "a description of the covered communication," "the dollar amount paid for each covered communication, the name and address of the person or entity receiving the payment, and the date the payment was made," and -- the item most vigorously challenged by plaintiffs -- "the name and address of any individual, corporation, association, or group that made a donation of one thousand dollars or more to the covered entity and the date of such donation." ***N.Y.*** *Exec. Law § 172-f(2)*. "If a covered entity keeps one or more segregated bank accounts containing funds used solely for covered communications and makes all of its expenditures for covered communications from such **[**25]** accounts, then . . . the financial report need only include donations deposited into such accounts." Id. *§ 172-f(2)(c)*; see also id. *§ 172-f(1)(d)* (excluding from the definition of "donation" one that is "deposited into an account the funds of which are not used for making expenditures for covered communications").

To summarize: *Section 172-f* requires a 501(c)(4) to disclose donors who contributed $1,000 or more, in the following circumstance. Disclosure of such donors must be made if the 501(c)(4) expends more than ten thousand dollars in a calendar year on **[*492]** communications made to at least 500 members of the public concerning the position of any elected official relating to any "potential" or pending legislation, unless the donors made contributions only into a segregated

account not used to support such communications.

D. Public Disclosure Requirements and Exemptions

As reflected in the statutory provisions recited above, the Ethics Law requires that a funding disclosure report filed under *§ 172-e* be made available on the ***New York*** Joint Commission on Public Ethics website, and that a financial disclosure report filed under *§ 172-f* be made available on the ***New York*** Department of Law website. ***N.Y.*** *Exec. Law §§ 172-e(3)*, *172-f(3)*. The ***New York*** Attorney General may determine, **[**26]** however, that disclosure should not occur if disclosure may cause "harm, threats, harassment, or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation." Id. *§ 172-e(3)*; see also id. *§ 172-f(3)* (containing a parallel exemption). An entity denied an exemption from the disclosure requirements may appeal the attorney general's determination. Id. *§§ 172-e(3)*, *172-f(3)*.

III. Procedural History

Citizens Union brought this suit on December 12, 2016, which was originally assigned to the Honorable Richard M. Berman.[12] On December 28, 2016, the Attorney General stipulated to a stay of enforcement of *§§ 172-e* and *172-f*, until resolution of plaintiffs' then-pending application for a preliminary injunction. The Attorney General ultimately agreed to extend the stay of enforcement pending disposition of any summary judgment motion. At a January 4, 2017 hearing, counsel for the Attorney General represented that "necessary regulations" concerning implementation of the challenged provisions were in the process of being promulgated and that such regulations would be "enacted in a timely manner." No such regulations have yet been promulgated.[13]

On January 11, 2017, Judge Berman issued an order authorizing **[**27]** "limited expedited discovery" in connection with plaintiffs' then-pending applications for a preliminary injunction. On October 18, 2017, Judge Berman granted the Attorney General's request to hold this litigation in abeyance until the Second Circuit's decision in ***Citizens*** United v. Schneiderman (***Citizens*** United II), which issued on February 15, 2018. *882 F.3d 374, 390 (2d Cir. 2018)*.

On May 24, 2018, plaintiffs filed a joint motion for summary judgment. On June 25, the Attorney General filed a cross-motion for summary judgment. Those motions became fully submitted on August 2. On November 28, Judge Berman held oral argument on the motions. On January 29, 2019, Judge Berman stayed the motions because the Governor had submitted to the legislature substantive amendments to the challenged provisions. The ***New York*** legislature did not take up consideration of the proposed amendments, and on April 1, **[*493]** 2019, Judge Berman granted the parties' request to lift the stay.

The consolidated cases were reassigned to this Court on August 28, 2019, and the parties were invited to submit supplemental briefing. The parties filed their supplemental briefs on September 13.

Discussion

I. Summary Judgment Standard

A motion for summary judgment **[**28]** may not be granted unless all of the submissions taken together "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 113 (2d Cir. 2017)* (citation omitted). In evaluating cross-motions for summary judgment, each motion must be examined "on its own merits," and "all reasonable inferences must be drawn against the party whose motion is under consideration." *Vugo, Inc. v. City of **New York**, 931 F.3d 42, 48 (2d Cir. 2019)* (citation omitted).

Once the moving party has cited evidence showing that the non-movant's claims or affirmative defenses cannot be sustained, the party opposing summary judgment "must set forth specific facts demonstrating that there is a genuine issue for trial." *Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009)* (citation omitted). "[C]onclusory statements, conjecture, and inadmissible evidence are insufficient to defeat summary judgment," *Ridinger v. Dow Jones & Co., 651 F.3d 309, 317 (2d Cir. 2011)*

[12] On March 6, 2017, Judge Berman consolidated the cases pending before him which challenge ***§§ 172-e*** and ***172-f***.

[13] The Attorney General represents in its motion papers that it met with the plaintiffs in March 2017 to "solicit their input regarding how regulations could be designed in such a way as to mitigate any concerns," that plaintiffs took the position that "no regulation could positively impact their constitutional concerns," and that the Attorney General put the rule-making process "on hold" because of plaintiffs' position.

(citation omitted), as is "mere speculation or conjecture as to the true nature of the facts." *Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010)* (citation omitted).

II. *First Amendment* Standard

The first issue to be resolved is the standard under which the constitutionality of the two state law provisions must be evaluated. **[**29]** The Supreme Court has held that content-neutral disclosure requirements challenged under the *First Amendment* are subject to "exacting scrutiny." See *John Doe No. 1 v. Reed, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010)*; ***Citizens** United II, 882 F.3d at 382*.

Exacting scrutiny requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on *First Amendment* rights." *John Doe No. 1, 561 U.S. at 196* (citation omitted); see also ***Citizens** United II, 882 F.3d at 382*. This test is easier for the government to satisfy than strict scrutiny and is sometimes equated with intermediate scrutiny. See ***Citizens** United II, 882 F.3d at 382* ("Content-neutral speech regulations receive exacting, or 'intermediate,' scrutiny. This includes neutral disclosure requirements." (citation omitted)).

In a facial challenge to a statute under the *First Amendment*, "a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)* (citation omitted). A claim is a facial challenge when it is not limited to a plaintiff's particular case, but challenges the application of the law more broadly. *John Doe No. 1, 561 U.S. at 194*. "[F]acial review thus focuses on **[*494]** whether too **[**30]** many of the applications interfere with expression for the *First Amendment* to tolerate." ***Citizens** United II, 882 F.3d at 383*. Applying exacting scrutiny, "if a substantial number of likely applications of the statute correspond to an important interest, a minority of potentially impermissible applications can be overlooked. The stronger the government interest and the weaker the *First Amendment* interest, the weaker the *First Amendment* claim." Id.

There is no question that public disclosure of donor identities burdens the *First Amendment* rights to free speech and free association. ***Citizens** United I, 558 U.S. at 366* (burden on speech); *Buckley v. Valeo, 424 U.S. 1, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)* (per curiam) (burden on privacy of association and belief); *NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)* (noting "close nexus between the freedoms of speech and assembly"). The Supreme Court has recognized three governmental interests that may justify donor disclosure in the context of election campaigns despite their burden on *First Amendment* rights. The Court described these interests in 1976 as follows:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis **[**31]** of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of [limits on campaign contributions].

Buckley, 424 U.S. at 66-67 (citation omitted); see also *McConnell v. FEC, 540 U.S. 93, 196, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)*. These will be referred to as the informational, corruption-deterrence, and violation-detection interests.

Both the Supreme Court and Second Circuit have considered *First Amendment* challenges to disclosure provisions. Those decisions most relevant to this litigation are discussed below in the following categories: (1) cases striking down disclosure requirements as facially overbroad, (2) cases upholding disclosure requirements, and (3) cases finding disclosure requirements unconstitutional as applied to particular plaintiffs.

A. Cases Striking Down Disclosure Requirements **[**32]** as Facially Overbroad

In Talley v. California, the Court examined a Los Angeles ordinance that prohibited the distribution of any handbill or other printed matter unless its cover was printed with the names and addresses of its author and distributor. 362 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960). The Court opined that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind," noting that "[e]ven the Federalist Papers . . . were published under fictitious names." **[*495]** Id. at 64-65. The Court had "no doubt" that the ordinance's "identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." Id. at 64. The state argued that the ordinance was "aimed at providing a way to identify those responsible for fraud, false advertising and libel." Id. But the Court found that the ordinance was "in no manner so limited." Id. The Court found that the ordinance's identification requirement and resulting "fear of reprisal might deter perfectly peaceful discussions of public matters of importance" and thus held that it was facially invalid. Id. at 65.

In McIntyre v. Ohio Elections Commission, the Court struck down another statute similar to that at issue in Talley. 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995). Ohio's **[**33]** statute provided:

> No person shall write, print, post, or distribute . . . any . . . form of general publication which is designed to . . . influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers . . . or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.

Id. at 337 n.3 (citation omitted) (emphasis added). Margaret McIntyre had distributed handbills signed "CONCERNED PARENTS AND TAX PAYERS," expressing her opposition to a proposed school tax levy. Id. at 337.

The Court explained that "[a]nonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent" and characterized Talley as having "embraced a respected tradition of anonymity in the advocacy of political causes." **[**34]** Id. at 342-43. Like California in Talley, Ohio argued that the challenged provision was designed to prevent "fraudulent, false, or libelous statements." Id. at 343-44. The Court again rejected this argument, finding that the statute applied "even when there is no hint of falsity or libel." Id.

Ohio argued that its statute was distinguishable from Talley because it applied only to documents "designed to influence voters in an election," while the Los Angeles ordinance prohibited "all anonymous handbilling in any place under any circumstances." Id. at 344 (citation omitted). The Court rejected this argument as well, explaining that "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment: Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Id. at 346 (citation omitted).

Alongside fraud and libel prevention, Ohio argued that it had an "interest in providing the electorate with relevant information." Id. at 348. In response, the Court opined that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." **[**35]** Id.[14] The Court continued, "The **[*496]** simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Id.

The Court also distinguished Buckley (which is discussed at greater length in the following section). Buckley involved the mandatory reporting and disclosure of "the amount and use of money expended in support of a candidate," which the Court found "a far

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[14] In a footnote, the Court quoted the following passage from a case that struck down a ***New York*** statute similar to Ohio's:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.

McIntyre, 514 U.S. at 348 n.11 (quoting People v. Duryea, 76 Misc. 2d 948, 351 **N.Y.**S.2d 978, 996 (**N.Y.** Sup. Ct. 1974)).

cry from compelled self-identification on all election-related writings." *Id. at 355*. The Court elaborated:

> A written election-related document -- particularly a leaflet -- is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the **[**36]** author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill -- and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

Id.

The Court found that Ohio's statute rested on "different and less powerful state interests" than those present in Buckley. *Id. at 356*. While the Buckley Court upheld financial disclosures for expenditures that "expressly advocate the election or defeat of a clearly identified candidate," such expenditures create a risk that "individuals will spend money to support a candidate as a quid pro quo for special treatment after the candidate is in office." Id. (citation omitted). The McIntyre Court suggested that Ohio's statute, which also reached "issue-based ballot measures," was not limited to promoting the anti-corruption **[**37]** interest applicable in candidate elections. Id. The Court concluded that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent," invalidated the Ohio statute, and reversed the judgment fining McIntyre. *Id. at 357*.

In Vermont Right to Life Committee, Inc. v. Sorrell (VRLC I), the Second Circuit considered a Vermont statute that defined a "political advertisement" as "any communication . . . which expressly or implicitly advocates the success or defeat of a candidate." *221 F.3d 376, 380 (2d Cir. 2000)* (citation omitted) (emphasis added). Any such advertisement was required to "contain the name and address of the person who paid for the advertisement." Id. (citation omitted). Drawing heavily on the teachings in *Buckley, 424 U.S. at 1*, the panel majority wrote, "The term 'implicitly' . . . extends the reach of [the] disclosure requirement to advocacy with respect to public issues." **[*497]** *VRLC I, 221 F.3d at 387*. The panel held the statute facially invalid, reasoning that it intruded on "communications that constitute protected issue advocacy." *Id. at 386*.[15]

B. Cases Upholding Disclosure Requirements

Both the plaintiffs and the government emphasize the importance of an early Supreme Court decision that upheld a federal statute **[**38]** requiring disclosure of those financially supporting lobbyists. In United States v. Harriss, the Court evaluated a challenge to the *Federal Regulation of Lobbying Act, Pub. L. No. 79-601, 60 Stat. 812, 839-42 (1946)*. *347 U.S. 612, 613, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)*. The statute applied to any person who "solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment" of the "passage or defeat of any legislation by the Congress of the United States," or "[t]o influence, directly or indirectly, the passage or defeat" of such legislation. *Id. at 619* (citation omitted). A person of such description, if also "'receiving any contributions or expending any money' for the purpose of influencing the passage or defeat of any legislation by Congress," was required to make quarterly disclosures to the Clerk of the House of Representatives that included the name and address of any person who had made contributions for lobbying purposes of $500 or more and of any person who received expenditures of $10 or more. *Id. at 614 & n.1*.

The statute required a distinct set of disclosures from any person who "engage[d] himself for pay or for any consideration for the purpose of attempting to influence the passage **[**39]** or defeat of any legislation." *Id. at 615 & n.2*. Such a person was required to make detailed quarterly disclosures to the Clerk of the House of Representatives and the Secretary of the Senate. Id. The statute also required these detailed disclosures, unlike those discussed in the previous paragraph, to be printed in the Congressional Record. *Id. at 615 n.2*; see also §§ 305, 308, 60 Stat. 840-42.

The Court began its analysis by construing the statute to require disclosures only from (1) persons that "solicited, collected, or received contributions," (2) where "one of the main purposes of such person, or one of the main purposes of such contributions [was] to influence the passage or defeat of legislation by Congress," and (3)

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[15] The Court of Appeals declined to adopt a construction of the statute where the statute was not "readily susceptible" to the construction. *VRLC I, 221 F.3d at 386* (citation omitted).

"the intended method of accomplishing this purpose [was] through direct communication with members of Congress." *347 U.S. at 623-24* (emphasis added) (citation omitted). This third limitation was a somewhat atextual one, based on the Court's belief that the statute "should be construed to refer only to lobbying in its commonly accepted sense," that is "direct communication with members of Congress on pending or proposed federal legislation." *Id. at 620* (citation omitted). The Court's examination of legislative history led it to conclude **[**40]** that Congress "would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible." *Id. at 620-21*.

So construed, the Court held that the statute did not violate the *First Amendment*, reasoning that Congress had not **[*498]** sought to prohibit the "myriad pressures" exerted by various interest groups, but had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much." *Id. at 625*. Striking down such a statute "would be to deny Congress in large measure the power of self-protection." *Id. at 625-26*. The Court concluded by saying that the risk that the disclosures would "as a practical matter act as a deterrent to [the] exercise of *First Amendment* rights" by persons other than those encompassed by the Court's narrowing construction of the statute was "too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id. at 626*.

In Buckley v. Valeo, the Court considered a challenge **[**41]** to numerous provisions of the *Federal Election Campaign Act ("FECA")*, including its contribution limits, expenditure limits, and disclosure provisions. *424 U.S. at 6*. As particularly relevant here, the statute required any "individual or group, other than a political committee or candidate, who makes contributions or expenditures of over $100 in a calendar year other than by contribution to a political committee or candidate" to file quarterly reports with the Federal Election Commission ("FEC"). *Id. at 63-64* (citation omitted). Such reports were "to be made available by the Commission for public inspection and copying." *Id. at 63* (citation omitted); see also *2 U.S.C. §§ 434(e), 438(a)(4) (1970 Supp. IV)*.

The Court set forth general principles to guide its analysis of the overbreadth challenge to the disclosure provisions. It observed that "[u]nlike . . . overall limitations on contributions and expenditures . . . disclosure requirements impose no ceiling on campaign-related activities." *Buckley, 424 U.S. at 64*. But, the Court continued, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the *First Amendment*." Id. "Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending **[**42]** of money as when it concerns the joining of organizations, for financial transactions can reveal much about a person's activities, associations, and beliefs." *Id. at 66* (citation omitted). The government argued that the disclosure requirements at issue in Buckley served the informational, corruption-deterrence, and violation-detection interests described above. The plaintiffs conceded, and the Court agreed, that "disclosure requirements -- certainly in most applications -- appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id. at 68*.

The Court described the provision requiring disclosures from groups that made independent expenditures as "part of Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id. at 76*. Before turning to its *First Amendment* analysis, the Court adopted a narrowing construction to avoid regulation of pure "issue discussion." *Id. at 78-80*. The Court construed the disclosure provision "to reach only funds used for communications that expressly advocate **[**43]** the election or defeat of a clearly **[*499]** identified candidate." *Id. at 80*. That is, the provision applied only to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" *Id. at 44, 80 & nn. 52, 108*. The disclosure provision at issue, therefore,

> Impose[d] independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80.

Having adopted this narrowing construction, the Court concluded that the disclosure provision had "a sufficient relationship to a substantial governmental interest." Id. It served an "informational interest" and went "beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise **[**44]** be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors." *Id. at 81*. Finally, the Court distinguished Talley, reasoning that while the authorship disclosures there made a poor fit with the government's asserted anti-fraud interests, the financial disclosures were "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." Id.

Thirty-four years later, in ***Citizens*** United I, the Court held that it violates the *First Amendment* to prohibit corporations from spending their general treasury funds on independent election-related expenditures. *558 U.S. at 365*. ***Citizens*** United, a nonprofit corporation, desired to pay for Hillary: The Movie, a film it had produced, to be placed on a video-on-demand service. *Id. at 319-20*. ***Citizens*** United also sought to promote the film with ten- and thirty-second television ads that contained "a short . . . pejorative[] statement about Senator Clinton, followed by the name of the movie and the movie's Web site address." *Id. at 320*.

In addition to the bar on corporate expenditures, ***Citizens*** United also challenged a "disclaimer" **[**45]** provision of the Bipartisan Campaign Reform Act ("BCRA"), *id. at 366*, that requires "electioneering communications" not made by a candidate's political committee to "clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication." *52 U.S.C. § 30120(a)(3)* (formerly codified at *2 U.S.C. § 441d*). The plaintiff further challenged a BCRA disclosure provision that requires "any person who spends more than $10,000 on electioneering communications within a calendar year [to] file a disclosure statement with the FEC." ***Citizens*** *United I, 558 U.S. at 366*; see also *52 U.S.C. § 30104(f)(1)* (formerly codified at *2 U.S.C. § 434(f)(1)*). Such a disclosure statement must include, among other things, "[t]he amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made" and the names and addresses of those who contributed $1,000 or more in support of electioneering **[*500]** communications. *52 U.S.C. § 30104(f)(2)*. The FEC is required to make the reported information publicly available on the internet. Id. *§ 30104(a)(11)(B)*.

It aids the discussion of ***Citizens*** United I that follows to describe two categories of communication identified in the Court's jurisprudence: "express advocacy" and "electioneering." **[**46]** The first category encompasses communications that "expressly advocate the election or defeat of a candidate." ***Citizens*** *United I, 558 U.S. at 320*; see also *McConnell, 540 U.S. at 126*; *Buckley, 424 U.S. at 44 & n.52*. "Electioneering communications," a defined term in BCRA, are those communications that "refer[] to a clearly identified candidate for Federal office" and are "made within 30 days of a primary or 60 days of a general election." ***Citizens*** *United I, 558 U.S. at 321* (citation omitted).

The Court held that the communications at issue in ***Citizens*** United I -- ads that "referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy" -- fell within BCRA's definition of an electioneering communication. *Id. at 368*. It also held that the disclaimers required by BCRA serve "the governmental interest in providing information to the electorate." Id. "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Id. (citation omitted). "At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party." Id.

The Court also rejected the argument that BCRA's disclosure requirements could **[**47]** only be imposed on "speech that is the functional equivalent of express advocacy," noting that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id. at 368-69*; see also *McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 223, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014)* ("Disclosure requirements burden speech, but . . . do not impose a ceiling on speech."). "Even if the ads only pertain to a commercial transaction," i.e. seeking out Hillary: The Movie on a video-on-demand service, "the public has an interest in knowing who is speaking about a candidate shortly before an election." Id. The Court thus concluded that "the informational interest alone [was] sufficient to justify application" of disclosure requirements to the ads. Id.

Following ***Citizens*** United I, the Court of Appeals for the

Second Circuit has upheld disclosure statutes in two decisions of significance to the discussion below. In Vermont Right to Life Committee, Inc. v. Sorrell (VRLC II), the Second Circuit considered a version of the Vermont statute that had been revised since VRLC I. *758 F.3d 118, 122 (2d Cir. 2014)*. The ***new*** statute contained a definition of "electioneering communication," encompassing "any communication that refers to a clearly identified candidate for office and that promotes or supports a candidate for that office **[**48]** or attacks or opposes a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate." Id. (citation omitted). Such communications were required to include the name and address of the person or entity who funded them. Id. The statute also defined "mass media activity" to include "television commercials, radio commercials, mass mailings, literature drops, newspaper advertisements, robotic phone calls, and telephone banks, which include the name or likeness of a clearly identified candidate for office." *Id. at 123* **[*501]** (citation omitted). A person who made expenditures of at least $500 on mass media activity was required to file a report with the Vermont Secretary of State and "send a copy of the report to each candidate whose name or likeness is included in the activity without that candidate's knowledge." *Vt. Stat. Ann. tit. 17, § 2971(a)*; see also *VRLC II, 758 F.3d at 133-34*.

Finally, the statute defined a "political committee" as:

> any formal or informal committee of two or more individuals or a corporation, labor organization, public interest group, or other entity, not including a political party, which accepts contributions of $1,000.00 or more and makes expenditures of $1,000.00 or more in any **[**49]** two-year general election cycle for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question in any election, and includes an independent expenditure-only political committee.

VRLC II, 758 F.3d at 123 (citation omitted). Political committees were required to file certain disclosures with the Vermont Secretary of State, which then would be made publicly available. *Id. at 123-24*; see also *Vt. Stat. Ann. tit. 17 § 2961(a)(2)*.

The Second Circuit rejected vagueness and *First Amendment* challenges to all three disclosure requirements. The panel noted that under ***Citizens*** United, it was clear that disclosure requirements need not be limited to express advocacy. *VRLC II, 758 F.3d at 132*. The Court of Appeals found that the disclosures triggered by electioneering communications and mass media activity were "within the scope of regulation permitted under ***Citizens*** United." *Id. at 133*. The former would "only apply during a campaign for public office" and therefore had "a substantial relation to the public's "interest in knowing who is speaking about a candidate shortly before an election." Id. (citation omitted). The latter would "identify the source of election-related information and encourage candidate response." *Id. at 134*.

The Second Circuit likewise **[**50]** upheld Vermont's "political committee" disclosures. *Id. at 139*. Under the statute, such political committees were only required to "disclose transactions that have the purpose of supporting or opposing a candidate." *Id. at 137*. The panel distinguished Vermont's regime from a "Wisconsin regulation struck down by the Seventh Circuit that imposed a disclosure regime 'on every independent group that crosses the very low $300 threshold in express-advocacy spending,'" *id. at 138* (quoting *Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 841 (7th Cir. 2014)*), and from "perpetual reporting and organizational requirements that raised concern for the Eighth Circuit," id. (citing *Minn. **Citizens** Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 867-69, 872-73 (8th Cir. 2012)* (en banc)). In short, the disclosures were "substantially related to the recognized governmental interest in providing the electorate with information about the sources of election-related spending." Id.

In ***Citizens*** United II, the eponymous group challenged ***New York***'s yearly reporting requirements for 501(c)(3) and (c)(4) organizations. *882 F.3d at 379-80*. The state requires that each nonprofit submit to the Attorney General an IRS Form 990, which includes a Schedule B listing "the organization's donors, the donors' addresses, and the amounts of their donations." *Id. at 379*.[16] ***Citizens*** United refused **[*502]** to submit the portion of the Schedule B including **[**51]** its list of donors. *Id. at 379-80*. The Attorney General was prohibited from publicizing donor lists, but ***Citizens*** United contended

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[16] In 2018, the IRS attempted to eliminate the Schedule B requirement for 501(c) groups except 501(c)(3)s, but that action was set aside on *Administrative Procedure Act* grounds. See *Bullock v. Internal Revenue Serv., No. CV-18-103-GF-BMM, 401 F. Supp. 3d 1144, 2019 U.S. Dist. LEXIS 126921, 2019 WL 3423485, at *2, *11 (D. Mont. July 30, 2019)*.

that "by collecting lists of names associated with political preferences that he could release at any time, the Attorney General holds the unconstitutional power to intimidate donors from paying for the communication of their views." *Id. at 380, 384*.

The Second Circuit found that filing the Schedule B with the Attorney General served "important government interests" of "preventing fraud and self-dealing in charities," and that "the small extent of speech chilling is more than commensurate with the government's goals." *Id. at 384*. Of particular relevance to the present case, the panel wrote that it "would be dealing with a more difficult question if these disclosures went beyond the officials in the Attorney General's office . . . . Certainly if that office were to publicize donor lists, it would raise the stakes . . . ." Id.

C. Cases Finding Disclosure Requirements Unconstitutional As Applied to Particular Plaintiffs

In NAACP v. Alabama ex rel. Patterson, the Court evaluated a state court order for an organization to produce the names and addresses of all its **[**52]** members in the state. *357 U.S. at 451*. The Alabama attorney general had sought a state-court injunction prohibiting the NAACP from operating in Alabama, alleging that it had failed to comply with a statute that required out-of-state corporations to register before doing business there. *Id. at 451-52*. The NAACP admitted that it had engaged in the activities identified in the attorney general's complaint, such as opening a regional office in Alabama and supporting the Montgomery bus boycott, but the NAACP contended that it was exempt from the registration statute. *Id. at 452-53*. The attorney general sought production of various NAACP records, including membership lists, arguing that they were necessary to determine whether the organization engaged in activity that subjected it to the registration statute. *Id. at 453*. The NAACP produced "substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure," but was nonetheless held in contempt by the state court. *Id. at 454*.

The Court observed that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id. at 460*. **[**53]** The Court then found that the NAACP had "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." *Id. at 462*. "Under these circumstances," the Court found it "apparent that compelled disclosure of [the NAACP's] Alabama membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id. at 462-63*. The Court then turned to "the substantiality of Alabama's interest" and found that disclosure of the names of the NAACP's members would not have a "substantial bearing" on the merits of the suit seeking to enjoin the NAACP's activities, since the organization had admitted to **[*503]** its complained-of operations in the state. *Id. at 464-65*. The Court concluded that the government had "fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have" and reversed the contempt judgment. *Id. at 466*.

In Brown v. Socialist **[**54]** Workers '74 Campaign Committee (Ohio), the Court confronted an as-applied challenge to a state statute that required all political parties to report the names and addresses of campaign contributors and recipients of campaign disbursements. *459 U.S. 87, 88, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982)*. The Socialist Workers Party had approximately sixty members in Ohio and had achieved "little success at the polls." *Id. at 88-89*.

Expressing themes familiar from NAACP and Buckley, the Court wrote that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs" and that "[s]uch disclosures can seriously infringe on privacy of association and belief guaranteed by the *First Amendment*." *Id. at 91* (citation omitted). The Court reaffirmed Buckley's "test for determining when the *First Amendment* requires exempting minor parties from compelled disclosures." *Id. at 92-93*. That is,

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. . . . The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the **[**55]** organization itself.

Id. at 93-94 (citation omitted).

The state argued that it had an enhanced interest in disclosure of the identities of recipients of campaign funds (in comparison to the identities of those who contribute funds) because such disclosures were necessary to prevent "corruption" and "misuse of campaign funds." *Id. at 94-95*. The Court rejected this argument, observing that the corruption-prevention interest was weak as applied to minor parties unlikely to win elections. *Id. at 95*. Further, the Court found a substantial *First Amendment* risk in compelling minor parties to disclose campaign disbursements, because "individuals who receive disbursements for 'merely' commercial transactions . . . may well be deterred from providing services by even a small risk of harassment" and therefore compelled disclosures could "cripple a minor party's ability to operate effectively and thereby reduce the free circulation of ideas both within and without the political arena." *Id. at 97-98* (citation omitted).

The Court also affirmed the district court's application of Buckley, finding a reasonable probability of reprisals against the Socialist Workers Party, based on evidence of "numerous instances of recent harassment" and that hostility towards **[**56]** the organization resisting disclosure was "ingrained and likely to continue." *Id. at 100-01*. Thus the Court held that Ohio's disclosure statute could not constitutionally be applied to the Socialist Workers Party. *Id. at 102*.

III. *Section 172-e*

The plaintiffs contend that *§ 172-e* violates the *First Amendment* because it chills speech and burdens donors' rights to free association and privacy. The challenge to the constitutionality of *§ 172-e* is evaluated **[*504]** under the exacting scrutiny standard. Applying that standard, it must be stricken as unconstitutional on its face.

If a 501(c)(3) makes an in-kind donation of greater than $2,500 to a 501(c)(4) engaged in lobbying, *§ 172-e* requires that the 501(c)(3) file a public funding disclosure report that includes the identity of all donors who gave it more than $2,500. Such disclosures are required whether or not the 501(c)(3) donor intended to support a 501(c)(4) or exercised any control over the 501(c)(3)'s donation to the 501(c)(4). The disclosure is required by *§ 172-e* even though, to obtain or retain its 501(c)(3) tax exemption, an entity must have an exempt purpose, which cannot be either campaigning for candidates for office or lobbying elected officials. And, any support the entity provides to a 501(c)(4) must not render **[**57]** lobbying a "substantial part" of its activities, or the entity will lose its status as a 501(c)(3). *26 U.S.C. § 501(c)(3)*.

Section 172-e places a significant burden on the *First Amendment* interest in freedom of association. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP, 357 U.S. at 460*. As the Court more recently observed in Buckley, "The right to join together for the advancement of beliefs and ideas is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective." *424 U.S. at 65-66* (citation omitted). Donors who desire anonymity "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre, 514 U.S. at 341-42*. As a result of such fears, compelled disclosure can place a "substantial restraint" upon the exercise of the right to freedom of association. *NAACP, 357 U.S. at 462*. The "compelled disclosure of political associations and beliefs . . . can seriously infringe on privacy of association and belief guaranteed by the *First Amendment*." *Socialist Workers '74 Campaign Comm., 459 U.S. at 91* (citation omitted).

There is no substantial relation between the requirement **[**58]** that the identity of donors to 501(c)(3)s be publicly disclosed and any important government interest. The government refers briefly to the three interests identified in Buckley to support disclosure laws -- the informational, corruption-deterrence, and violation-detection interests -- but makes no developed argument connecting those interests to *§ 172-e*. Cf. *Buckley, 424 U.S. at 76* (connecting the disclosure requirement in FECA to the three interests). Disclosure laws that have been upheld based on a showing that the disclosures furthered these interests, as described above, have been drawn far more narrowly than *§ 172-e*. They have required disclosure of those contributing to candidates, to campaigns supporting identified candidates, or to direct lobbying of legislators or their staffs. None have approached the tangential and indirect support of political advocacy at issue here.

Besides referring generally to the three interests identified in Buckley, the government justifies the *§ 172-e* disclosure regime by arguing that it furthers the following government interest: *Section 172-e*

> will reveal the funders of issue advocacy communications and coordination among tax-exempt organizations (including donors who seek to funnel money to 501(c)(4)s **[**59]** and then to Super PACs through 501(c)(3)s). This will accomplish the stated goals of providing the public with much-needed information on important **[*505]** issues before executive, legislative, and administrative bodies, and helping to deter corruption and avoid the appearance of corruption.[17]

This informational goal does not justify the burden on *First Amendment* rights created by *§ 172-e*. The disclosure of the identity of a 501(c)(3) donor makes a poor fit with this informational interest. The link between a 501(c)(3) donor and the content of lobbying communications by the 501(c)(4) is too attenuated to effectively advance any informational interest. Cf. *Van Hollen v. Fed. Election Comm'n, 811 F.3d 486, 497, 421 U.S. App. D.C. 36 (D.C. Cir. 2016)* (noting the "intuitive logic" that persons who contribute to the general treasury of a nonprofit corporation "do not necessarily support the corporation's electioneering communications" (citation omitted)). It bears emphasis that, under federal tax law, a 501(c)(3) by definition cannot engage in substantial lobbying activity.

The government places particular emphasis on *Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989*. Harriss is of little assistance to the government. There, the Court upheld a disclosure statute that it construed narrowly to encompass "direct" lobbying of legislators. *Id. at 620-21*. The statute upheld in **[**60]** Harriss required public disclosure of the identities only of those who made contributions to professional lobbyists for their lobbying work. See *347 U.S. at 615 n.2*; see also §§ 305, 308, 60 Stat. 840-42. The ***New York*** Lobbying Act already requires similar public disclosure of those providing direct financial support of lobbying activity. See ***N.Y.*** *Legis. Law § 1-c(c)* (defining "lobbying"); id. *§ 1-h to 1-j* (requiring lobbying-related disclosures).[18] *Section 172-e* is far broader in its impact than the statute at issue in Harriss or the disclosures required by the ***New York*** Lobbying Act. It requires disclosure of the identities of donors to a 501(c)(3), an entity whose primary purpose must be something other than lobbying and that by definition cannot make lobbying a "substantial" part of its activities.

Finally, the government argues that *§ 172-e* places no burden on plaintiffs' *First Amendment* rights at all because the Attorney General may provide an exemption from disclosure upon a showing that such disclosure may cause harassment. See *Socialist Workers '74 Campaign Comm., 459 U.S. at 93-94*; *NAACP, 357 U.S. at 462*. The exemption mirrors the test adopted by the Court for as-applied challenges in donor disclosure cases.

This exemption does not remedy the statute's constitutional deficiencies. First, it does nothing to remedy the poor fit between the **[**61]** statute and the identified government purpose of providing more information about the funding of lobbying. Second, an after-the-fact exemption procedure does nothing to ameliorate the chilling effect on 501(c)(3) donors. The possibility that the Attorney General might in the future approve a disclosure exemption would provide cold comfort to a potential **[*506]** donor asked to run the risk of threats, harassment, or reprisals.

Third, the government speculates that the yet-to-be written exemption regulations may provide a mechanism for exemptions to be granted prior to the reporting period in which donations would be collected. The most natural reading of the statute, however, is to the contrary. See ***N.Y.*** *Exec. Law § 172-e(3)* (describing the exemption after stating a default rule in favor of publication "within thirty days of the close of each reporting period" (emphasis added)). In any event, the chilling effect will exist for whatever period the exemption application is under review. Without a more substantial relation between the government purpose and the disclosure, *§ 172-e* is an unconstitutional burden on *First Amendment* rights.

In sum, none of the government's arguments enable *§ 172-e* to withstand exacting scrutiny. A "substantial number" **[**62]** of the applications of *§ 172-e* are likely

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[17] Plaintiffs argue that any justification for the statute that was not articulated in the legislative history may not be considered. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000)*. Because consideration of each of the government's arguments does not alter the outcome here, it is unnecessary to further grapple with the issue of whether each of them may be properly considered.

[18] See also ***N.Y.*** *State Joint Comm'n on Public Ethics, supra note 11*.

to result in interference with the rights to freely associate and speak. ***Citizens*** *United II, 882 F.3d at 383*. Plaintiffs' facial challenge therefore succeeds, and *§ 172-e* is invalid.

IV. *Section 172-f*

The plaintiffs contend that *§ 172-f* unconstitutionally intrudes on donors' *First Amendment* privacy rights and associational interests, particularly those related to the right to express opinions anonymously. This challenge to the constitutionality of *§ 172-f* is evaluated under the exacting scrutiny standard. Applying that standard, *§ 172-f* must be stricken as unconstitutional on its face.

Section 172-f requires a 501(c)(4) to publicly disclose its donors if it makes a public statement that

> refers to and advocates for or against a clearly identified elected official or the position of any elected official or administrative or legislative body relating to the outcome of any vote or substance of any legislation, potential legislation, pending legislation, rule, regulation, hearing, or decision by any legislative, executive or administrative body.

N.Y. *Exec. Law § 172-f(1)(b), (2)*. Thus, if the entity's public statement refers to the position of an official regarding any potential legislation, the disclosure of its donors is required.

The *First Amendment* rights to publicly discuss and advocate on issues of **[**63]** public interest, and to do so anonymously, have long been recognized. As explained in McIntyre, the "respected tradition of anonymity in the advocacy of political causes . . . is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *514 U.S. at 343*; see also *id. at 357*; *Talley, 362 U.S. at 65* ("It is plain that anonymity has sometimes been assumed for the most constructive purposes.").

Section 172-f sweeps far more broadly than any disclosure law that has survived judicial scrutiny. It is not confined to disclosure where the entity engages in express advocacy for a candidate or electioneering. Cf. *Buckley, 424 U.S. at 79-80* (construing disclosure statute "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" to ensure that the statute's reach was not "impermissibly broad"), ***Citizens*** *United I, 558 U.S. at 369* (upholding disclosure requirements that served the public's "interest in knowing who is speaking about a candidate shortly before an election"). It is not confined to disclosure where the entity engages in direct lobbying of elected officials. Cf. *Harriss, 347 U.S. at 620* (construing statute **[*507]** to apply only to "direct communication with members of Congress on pending or proposed federal **[**64]** legislation"); ***N.Y.*** *Comp. Codes R. & Regs. tit. 19, § 943.6(a)(1)(i)* (reaching "communication or interaction directed to a Public Official"); id. *§ 943.7(a)(1)-(2)* (reaching "attempts to influence a Public Official indirectly" by "solicit[ing] another to deliver a message to a Public Official").

Instead, *§ 172-f* requires disclosure whenever a 501(c)(4) engages in pure issue advocacy before the public. As the government construes the statute, *§ 172-f* applies to communications that "tak[e] a stance on a position espoused by an elected official." And that position need only "relat[e] to . . . potential legislation." ***N.Y.*** *Exec. Law § 172-f(1)(b)*. Given that any matter of public importance could become the subject of legislation and given the range of positions taken by all elected officials, *§ 172-f* reaches a far broader swath of communications than did the lobbying- and election-related statutes that the Supreme Court and Second Circuit have upheld.

The government does not shy away from acknowledging the breadth of the statute. In opposing the plaintiffs' motion for summary judgment, the government acknowledges that the government interest at stake is the interest in revealing "the funders of issue advocacy." The government further argues that its "information interest relates broadly to any undue influence **[**65]** in politics (not just elections) arising from undisclosed contributions."[19] The cases upholding donor disclosure requirements have never recognized an informational interest of such breadth. Indeed, the narrowing constructions adopted in Harriss and Buckley, combined with the protections for anonymous speech articulated in Talley and McIntyre, strongly suggest that compelled identity disclosure is impermissible for issue-advocacy communications. See *Harriss, 347 U.S. at*

[19] The government argues that it bears only a "slight evidentiary burden" and need not "provide studies, reports, hearings, or testimony" to establish the interests served by ***§§ 172-e*** and ***172-f***, because it says the relevant interests have already been recognized by Buckley and its progeny. As discussed above, ***New York*** asserts a far broader informational interest than that recognized in any of the relevant precedent. The government has not provided a "quantum of empirical evidence" sufficient to justify such a novel form of disclosure requirement. *Shrink Mo. Gov't PAC, 528 U.S. at 391*.

621 (suggesting that "broader application to organizations seeking to propagandize the general public" would be impermissible); Buckley, 424 U.S. at 79 (reading statute to avoid "encompassing both issue discussion and advocacy of a political result").

The government argues that the Supreme Court has rejected any distinction between electioneering communications and issue advocacy. This argument rests on a misreading of the relevant cases. In McDonnell, the plaintiffs argued that Buckley had limited disclosure requirements to "express advocacy" communications. *540 U.S. at 190*. The Court rejected this argument, finding BCRA's ***new*** definition of "electioneering" was sufficiently determinate to avoid the vagueness concerns that drove the interpretation in Buckley and that election-related **[**66]** interests justified the application of "disclosure requirements to the entire range of 'electioneering communications.'" *Id. at 194, 196*; see also ***Citizens*** *United, 558 U.S. at 368-69* (rejecting a similar attempt to narrow the definition of "electioneering communication"); *Indep. Inst. v. Fed. Election Comm'n, 216 F. Supp. 3d 176, 187 (D.D.C. 2016)* ("[I]t is the tying of an identified candidate to an issue or message that justifies the Bipartisan Campaign Reform **[*508]** Act's tailored disclosure requirement because that linkage gives rise to the voting public's informational interest in knowing who is speaking about a candidate shortly before an election." (citation omitted)), aff'd, *137 S. Ct. 1204, 197 L. Ed. 2d 243 (2017)*. These cases hold that issue advocacy need not be carved out of BCRA's definition of "electioneering communications." They do not support ***New York***'s argument that it can regulate issue advocacy untethered to any electioneering communication.

New York also argues that *§ 172-f* imposes a limited burden on plaintiffs because the statute allows a 501(c)(4) to maintain a segregated bank account for covered communications and disclose only the donors who contribute to such an account. See ***N.Y.*** *Exec. Law § 172-f(1)(d), (2)(c)*. But this does nothing to remedy the central flaw of *§ 172-f* -- that it encompasses issue advocacy. Even if a 501(c)(4) structured its activities to employ a segregated **[**67]** bank account for covered communications, it would still have to disclose donors who fund communications on nearly any issue of public concern. Thus the segregated bank account provision cannot save *§ 172-f*.

The government's remaining argument concerning *§ 172-f* -- that the possibility of an exemption ameliorates any *First Amendment* burden -- has already been rejected. As with *§ 172-e*, a "substantial number" of the applications of *§ 172-f* are likely to result in interference with the rights to freely associate and speak. ***Citizens*** *United II, 882 F.3d at 383*. Plaintiffs' facial challenge therefore succeeds, and *§ 172-f* is invalid. Because *§§ 172-e* and *172-f* are facially invalid, the Court need not reach plaintiffs' additional as-applied challenges.

Conclusion

The plaintiffs' May 24, 2018 motion for summary judgment is granted, and defendant's June 25, 2018 cross-motion for summary judgment is denied.

Dated: ***New York***, ***New York***

September 30, 2019

/s/ Denise Cote

DENISE COTE

United States District Judge

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NRA of America v. City of Los Angeles

United States District Court for the Central District of California

December 11, 2019, Decided; December 11, 2019, Filed

2:19-cv-03212-SVW-GJS

Reporter
2019 U.S. Dist. LEXIS 231511 *

National Rifle Association of America et al v. City of Los Angeles et al

Counsel: **[*1]** For National Rifle Association of America, Plaintiff: Carl Dawson Michel, Tiffany Dawn Cheuvront, LEAD ATTORNEYS, Sean Anthony Brady, Anna M Barvir, Michel and Associates PC, Long Beach, CA USA.

For John Doe, Plaintiff: Anna M Barvir, Carl Dawson Michel, Sean Anthony Brady, Michel and Associates PC, Long Beach, CA USA.

For City of Los Angeles, Eric Garcetti, in his official capacity as Mayor of City of Los Angeles, Holly Wolcott, in her official capacity as City Clerk of City of Los Angeles, Defendants: Benjamin F Chapman, Los Angeles City Attorneys Office, Los Angeles, CA USA.

Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

CIVIL MINUTES - GENERAL

Proceedings: IN CHAMBERS ORDER GRANTING PRELIMINARY INJUNCTION [19] AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [15]

The National Rifle Association ("NRA") and John Doe (together "Plaintiffs") bring this action for declaratory relief and a preliminary injunction against the City of Los Angles ("City"), Eric Garcetti ("Garcetti") in his official capacity as Mayor of Los Angeles, and Holly L. Wolcott ("Wolcott") in her official capacity as City Clerk (together "Defendants"). Defendants have moved to dismiss **[*2]** the complaint and have opposed the preliminary injunction.

This Court heard oral argument on Defendants' motion to dismiss on August 12, 2019. Dkt. 29. At the hearing, the Court orally denied the motion to dismiss. Dkt. 33. This Order supersedes that denial. Defendants' motion to dismiss is DENIED in part and GRANTED in part. Oral argument on Plaintiffs' motion for preliminary injunction was noticed by this Court for September 9, 2019, but the Court vacated the hearing and took the matter under submission. Dkt. 32. For the reasons stated below, the preliminary injunction is GRANTED.

I. Factual Background

The NRA is a "membership organization" which "provides firearm safety training, recreational and competitive shooting matches . . . and school safety programs." Dkt. 19-1 at 1-2. The NRA also engages in extensive political advocacy to promote "its mission to protect the individual right to keep and bear arms . . . ." *Id.* The NRA is a national organization with "millions of members residing throughout the United States," and it "relies on member dues, sponsorships, and other contributions from businesses and individuals" to continue its operations. *Id.* To incentivize and reward membership, **[*3]** the "NRA has a stable of sponsors that range from large corporations offering discounts to

members to smaller, local retailers who donate their employees' time . . . ." *Id.* Plaintiff John Doe is a business owner in California who has allegedly "maintained contracts with the city of Los Angeles" in the past. Plaintiff Doe is also a "member and supporter of the NRA," and he alleges that he "wishes to continue bidding for and obtaining" City contracts in the future. *Id.*

On February 12, 2019, the City passed City Ordinance No. 186000 ("Ordinance"), which took effect on April 1, 2019. Dkt. 15 at 2-3. The Ordinance requires "a prospective contractor of the City to disclose all contracts with or sponsorship of the National Rifle Association." Dkt. 1-9 at 1. The Ordinance begins with a preamble discussing the history of the NRA's pro-firearm advocacy and "the increasing number of mass shootings throughout the country . . . ." *See* Dkt. 1-9 at 1-2. The Ordinance then continues:

> [T]he City of Los Angeles has enacted ordinances and adopted positions that promote gun safety and sensible gun ownership. The City's residents deserve to know if the City's public funds are spent on contractors that have **[*4]** contractual or sponsorship ties with the NRA. Public funds provided to such contractors undermines the City's efforts to legislate and promote gun safety. . . .

Id. at 2. Finally, the Ordinance concludes its preamble by requiring "those seeking to do business with the City to fully and accurately disclose any and all contracts with or sponsorship of the NRA." *Id.*

Plaintiffs have challenged the Ordinance as an unconstitutional abridgement of their *First* and *Fourteenth Amendment* rights. *See* Dkt. 1. Plaintiff Doe alleges that he is "afraid to come forward to participate" in this action because he "fears retribution from the City and the potential loss of lucrative contracts . . . ." Dkt. 1 at 3. The NRA alleges that the Ordinance will unjustly cut off "revenue streams necessary for the NRA to continue engaging in protected speech and association" by discouraging membership and stigmatizing business relationships and sponsorships with the NRA. *Id.* Plaintiff Doe, on behalf of himself of other potential contractors, alleges that his "rights of free speech and association are being chilled, as the Ordinance forces [him] to choose between their political beliefs and placating the City to secure work with the City." *Id.* at 13. Plaintiff **[*5]** Doe has made this allegation anonymously through the sworn declaration of his attorney. *See* Dkt. 19-6. Defendants have never contested the sincerity or authenticity of Doe's declaration, and no evidentiary hearing was requested by either party. For the purposes of this motion, the Court accepts the Plaintiffs' factual assertions as true.

II. Legal Standard

a. Preliminary Injunction

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing the plaintiff is entitled to such relief." *Winter v. NRDC, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* ("*Winter*"). Under *Winter*, a plaintiff "must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." *Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009)* (applying *Winter, 555 U.S. at 29*) ("*Winter* factors").

In considering the likelihood of success on the merits, the district court is not strictly bound by the rules of evidence, as the "preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*. Because of the extraordinary nature of injunctive **[*6]** relief, including the potential for irreparable injury if not granted, a district court may consider evidence outside the normal rules of evidence, including: hearsay, exhibits, declarations, and pleadings. *Johnson v. Couturier, 572 F.3d 1067, 1083 (9th Cir. 2009)*. "The purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered." *U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010)*. "[I]n the *First Amendment* context, the moving party bears the initial burden of making a colorable claim that its *First Amendment* rights have been infringed . . . at which point the burden shifts to the government to justify the restriction." *Thalheimer v. City of San Diego, 645 F.3d 1109, 1115-16 (9th Cir. 2011)*.

b. Motion to Dismiss

Under *Rule 12(b)(6)*, a motion to dismiss challenges the legal sufficiency of the claims stated in the complaint.

See Fed. R. Civ. P. 12(b)(6). The plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. However, mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.; see also* Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 556 U.S. at 678).

In reviewing a **[*7]** Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

c. Constitutional Challenge

The parties contest whether the Plaintiffs have mounted a facial or as-applied challenge to the Ordinance: Defendants argue Plaintiffs are only capable of raising a facial challenge. Dkt. 15 at 5. Plaintiffs assert that they have raised both a facial and as-applied challenge. Dkt. 24 at 5.

To assert an as-applied challenge in the First Amendment context, the Plaintiffs must show "the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998). The Ordinance applies exclusively to potential contractors who have contracts or sponsorship with the NRA, so it is not clear the Ordinance would or could constitutionally affect anyone except the NRA and its business **[*8]** partners. Establishing an as-applied challenge to this Ordinance requires a circular argument—because the Ordinance facially requires disclosure of "any and all contracts or sponsorship of the NRA," any application of the Ordinance necessarily only applies to potential contractors who have those connections. Dkt. 1-9 at 3. Plaintiffs cannot raise an as-applied challenge without challenging the facial validity of the Ordinance.

Plaintiffs must therefore mount a facial challenge. "An ordinance may be facially unconstitutional in one of two ways: either [ ] it is unconstitutional in every conceivable application, or [ ] it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." First Resort, Inc. v. Herrera, 860 F.3d 1263, 1271 (9th Cir. 2017) (internal quotation marks omitted). Plaintiffs do not argue that the Ordinance is vague or overbroad; they argue it is incapable of constitutional application to any party. Dkt. 1 at 13. This is a facial challenge, and the protected activity is Plaintiffs' pro-firearm political speech. *See* Foti, 146 F.3d at 635 ("the ordinance could never be applied in a valid manner because it . . . impermissibly restricts a protected activity.").

Although facial attacks are generally disfavored because they **[*9]** "threaten to short circuit the democratic process," Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008), facial attacks under the First Amendment are given more permissive consideration. "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 612-13, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *see* Nunez by Nunez v. City of San Diego, 114 F.3d 935, 949 (9th Cir. 1997). "In the First Amendment context, a party bringing a facial challenge need show only that 'a substantial number of [a law's] applications are unconstitutional . . . .'" Knox v. Brnovich, 907 F.3d 1167, 1180 (9th Cir. 2018) (citing U.S. v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)).

III. Discussion of Preliminary Injunction

Plaintiffs seek a preliminary injunction of the Ordinance because it violates their First and Fourteenth Amendment rights. "A party can obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the

public interest.'" Disney Enterprises, Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017) ("*VidAngel*") (quoting Winter, 555 U.S. at 20). In analyzing the Plaintiffs' First Amendment claims for the protection of free speech and association, the *Winter* factors weigh in favor of granting a preliminary injunction. **[*10]** Because the preliminary injunction is granted on the basis of the Plaintiffs' First Amendment speech and association claims, the Court does not fully analyze the likelihood of success for the remaining claims.

a. Likelihood of Success of the Merits

The Ninth Circuit considers the "likelihood of success on the merits" as "the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors." VidAngel, Inc., 869 F.3d at 856 (internal quotation marks omitted). However, even if likelihood of success is not established, "[a] preliminary injunction may also be appropriate if a movant raises 'serious questions going to the merits' and the 'balance of hardships . . . tips sharply towards' it, as long as the second and third *Winter* factors are satisfied." *Id.* (quoting All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011)).

i. ***First Amendment*** **Speech Claims**

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I. "The First Amendment, applied to states through the Fourteenth Amendment, prohibits laws abridging the freedom of speech." Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1193 (9th Cir. 2018) (internal quotation omitted). In effect, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject **[*11]** matter, or its content." United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)).

The first task is to determine whether the Ordinance implicates the First Amendment at all. "If the government's actions do not implicate speech protected by the First Amendment, we need go no further." Animal Legal Def. Fund, 878 F.3d at 1194 (internal quotation mark omitted). A restriction on "nonspeech, nonexpressive conduct . . . does not implicate the First Amendment" and receives rational basis scrutiny. HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 685 (9th Cir. 2019). In contrast to nonexpressive conduct, "expressive conduct is considered speech and implicates the First Amendment." Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1124 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014). Conduct "sufficiently imbued with the elements of communication" is expressive—sometimes called "symbolic speech"—and is analyzed under intermediate scrutiny. Roulette v. City of Seattle, 97 F.3d 300, 302-03 (9th Cir. 1996); *see* Wilson v. Lynch, 835 F.3d 1083, 1095-96 (9th Cir. 2016) ("intermediate scrutiny applies when a law is directed at the non-communicative portion of conduct that contains both communicative and non-communicative elements."). Finally, a law that is intended to regulate speech based on its content or the viewpoint of the speaker is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015) ("*Reed*").

The question before this Court is whether a disclosure requirement is a content-based regulation of speech when the government **[*12]** imposes the requirement with the intent to restrict the political speech of an activist organization and its supporters. Based on the binding precedent of the Supreme Court and the Ninth Circuit, for the reasons explained below, the Court holds the Ordinance is content-based and therefore subject to strict scrutiny.

1. Nonexpressive Conduct

The City's primary contention is that the Ordinance only regulates nonexpressive conduct—"the right to enter into a contract with the NRA or to provide a business discount to the NRA of its members." Dkt. 15 at 7 (emphasis removed). Generally, regulations on nonexpressive conduct do not implicate the First Amendment. *See* Arcara v. Cloud Books, 478 U.S. 697, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986) (closing a book store to enforce anti-prostitution laws did not implicate the First Amendment);[1] Roulette, 97 F.3d at

[1] Significantly, *Arcara* holds "[l]aws aimed only at conduct not traditionally associated with speech, *without the intent to effect speech*, are given rational basis scrutiny even if they have an incidental impact on speech." Arcara, 478 U.S. at 706 (emphasis added). The City's intent in passing the Ordinance is discussed *infra* Part III.a.i.4.

300 (ordinance banning sleeping on sidewalks regulated nonexpressive conduct and did not implicate the First Amendment); Diamond S.J. Enter., Inc. v. City of San Jose, 395 F. Supp. 3d 1202, 2019 WL 2744700 (N.D. Cal., 2019) (First Amendment was not implicated when the city suspended the license of a nightclub following a shooting).

By claiming the Ordinance is a regulation of nonexpressive conduct, the City misframes the Ordinance in two key ways. First, it might be true that "contracts or sponsorship" **[*13]** are nonexpressive conduct, but that is not the pertinent question in this case. Dkt. 1-9 at 3. The City is not regulating "contracts or sponsorships"—it is compelling *disclosure* of "contracts or sponsorship" with the NRA. *Id.* A disclosure requirement is not a regulation of nonexpressive conduct, even if the underlying conduct is assumed to be nonexpressive.[2]

Second, even if the City is regulating conduct or speech unprotected by the First Amendment, the Ordinance will still be subject to strict scrutiny if it discriminates on the viewpoint of the messenger. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 384, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."); First Resort, Inc. v. Herrera, 860 F.3d 1263, 1277 (9th Cir. 2017) ("A regulation engages in viewpoint discrimination when it regulates speech based on the specific motivating ideology or perspective of the speaker."); Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 823 (9th Cir. 2013) ("a content-based law to target individuals for lighter or harsher punishment because of the message they convey while they violate an unrelated traffic law . . . implicates the First Amendment."). Because the Ordinance is already subject to strict scrutiny as a content-based regulation of speech, there is no need to determine if the Ordinance also engages **[*14]** in viewpoint discrimination.[3]

Although the City maintains that "contracts or sponsorship" implicated by the Ordinance are nonexpressive conduct, Dkt. 33 at 7-9, 23-25; Dkt. 15 at 1-2, 6-10, that characterization is not determinative of the constitutionality the Ordinance. The Ordinance does not *regulate* contracts or sponsorship-the Ordinance forces *disclosure* of contracts or sponsorship with the NRA. The Ordinance is therefore not a restriction on nonexpressive conduct.

2. **Symbolic Speech and Expressive Conduct**

Although the parties cite to cases applying intermediate scrutiny, neither party argues for the application of intermediate scrutiny here. The Court has found no authority to indicate that a disclosure requirement should be subject the same intermediate scrutiny used to analyze regulations of expressive conduct. The Court does not apply intermediate scrutiny at this time.

3. **Content Based Regulations of Speech**

Plaintiffs claim the Ordinance "regulate[s] speech based on its substantive content or the message it conveys." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *see* Dkt. 19 at 11. According to Plaintiffs, the Ordinance was enacted with the primary (if not solitary) purpose of punishing the disfavored speech of the NRA. Dkt. **[*15]** 19 at 13. Laws that regulate speech based on the message it conveys are considered "content-based," and are "presumptively invalid." Hoye v. City of Oakland, 653 F.3d 835, 853 (9th Cir. 2011) (citing R.A.V., 505 U.S. at 382). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed, 135 S. Ct. at 2226.

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[2] As discussed *infra* Part III.a.ii, disclosure requirements that burden First Amendment rights are analyzed under "exacting scrutiny." Americans for Prosperity Found. v. Becerra, 903 F.3d 1000, 1008 (9th Cir. 2018). Because this law is a content-based regulation of speech, discussion of the disclosure requirement under exacting scrutiny is a separate and independent ground for granting the preliminary injunction.

[3] Viewpoint discrimination is a particularly "blatant" and "egregious" subset of "content discrimination." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). Although conceptually similar to the analysis for viewpoint discrimination, this Order examines the City's "intent" or "purpose" in passing the Ordinance to determine if the Ordinance is content-based-if it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" Reed, 135 S. Ct. at 2227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). Viewpoint discrimination is typically only invoked when the government is permitted to regulate content but not permitted to favor or disfavor a "specific motivating ideology or . . . opinion or perspective" within the regulated content. Rosenberger, 515 U.S. at 829. Here, the City is not necessarily discriminating within unprotected speech-it is collaterally attacking disfavored speech via a disclosure requirement.

A law can be content-based in several ways. First, a law may make "facial distinctions based on a message . . . defining regulated speech by particular subject matter." *Id. at 2227*. Second, a law may be "more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id. at 2227*. Finally, there is "a separate and additional category of laws . . . that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys . . .'. " *Reed, 135 S. Ct. at 2227* (quoting *Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)*).

The Ordinance does not facially restrict speech based on its content **[*16]** or message; however, it requires disclosure from a select group of people who have "contracts or sponsorship" agreements with the NRA. Dkt. 1-9. Although the Ordinance is facially content-neutral, it will still be subject to strict scrutiny if it was adopted because of the City's disagreement with the message of the NRA's speech. *See also Ward, 491 U.S. at 791* ("The government's purpose is the controlling consideration."); *Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 819 (9th Cir. 2013)* ("A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas"); *DISH Network Corp. v. F.C.C., 653 F.3d 771, 778 (9th Cir. 2011)* ("The Supreme Court has said that the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys.") (internal quotation marks omitted). Because the Ordinance is not facially content-based, we must examine why the City adopted the Ordinance to determine if it is subject to strict scrutiny.

4. **Intent to Suppress Speech**

In this case, the text of the Ordinance, the Ordinance's legislative history, and the concurrent public statements made by the Ordinance's primary legislative sponsor evince a strong intent to suppress the speech of the NRA. Even though **[*17]** the Ordinance only forces disclosure of activity that may not be expressive, the clear purpose of the disclosure is to undermine the NRA's explicitly political speech. We agree with the City that the Ordinance does not appear to regulate speech directly, but a collateral attack on speech is an attack nonetheless. The City adopted the Ordinance "because of disagreement with the message" of the NRA and with the explicit intent to suppress that message—the Ordinance should therefore be considered a content-based regulation of speech. *Reed, 135 S. Ct. at 2227*.

a. **Text of the Ordinance**

To discover the City's intent, the Court need look no further than the text of the Ordinance. The Ordinance's preamble displays a clear animus both towards the NRA and its message. The Ordinance begins by recounting several mass-shootings that have occurred in the past decade, including: "the Sandy Hook Elementary School shooting," the shooting at the "outdoor concert in Las Vegas," the "shooting inside a synagogue in Pittsburg, Pennsylvania," and finally, "[t]he most recent local mass shooting . . . inside a Thousand Oaks' restaurant . . . ." Dkt. 1-9 at 1. The Ordinance then continues to explain that "the National Rifle Association **[*18]** (NRA) has sought to block sensible gun safety reform at every level of government across the nation. The NRA's influence is so pervasive in Congress that no national gun safety legislation has been enacted since the 1994 assault weapons ban, a ban that expired in 2004 . . . ." Dkt. 1-9 at 1. The clear implication from the preamble of the Ordinance is that the NRA is at least partially responsible for the mass shootings because of its continued advocacy for lax gun-safety laws. The City has provided no explanation for this text outside of its stated interest in transparency.

The Ordinance then states precisely how the City intends to undermine the NRA's ability to engage in pro-firearm advocacy, noting that "in 2015, the NRA collected $163 million in membership dues." *Id.* These "membership dues fund the NRA agenda of opposing legislative efforts throughout the country to adopt sensible gun regulations." *Id.* In essence, the Ordinance implies a causal connection between NRA membership dues and mass shootings. Continued membership in the NRA provides funding to the NRA; this funding creates more pro-gun advocacy which in turn creates laxer gun regulations which in turn leads to more mass-shootings. **[*19]** The Ordinance then further connects this causal chain to its disclosure requirement. "The City's residents deserve to know if the City's public funds are spent on contractors that have contractual or sponsorship ties with the NRA" because "funds provided to such contractors undermines the City's efforts to legislate and promote gun safety[.]" *Id.* The City asserts that granting City contracts to contractors with business ties to the NRA invariably creates more NRA membership, which leads to more pro-gun advocacy,

laxer gun laws, and inevitably more mass shootings. Even if this chain of logic was supported by fact,[4] the City is not permitted to restrict political speech as a means of achieving its goal of safer cities.

To justify the required disclosure, the Ordinance states an interest in "promot[ing] gun safety and sensible gun ownership."[5] It is undisputed that the City has a strong interest in protecting its citizens, but this Ordinance has no relationship to achieving that interest. Assuming stricter guns laws would increase the safety of the citizens of Los Angeles, the Ordinance demonstrates an intent to restrict the NRA's ability to *advocate* against those laws. Because the Ordinance's **[*20]** clear purpose is to stifle the message of the NRA, it is a content-based regulation of speech and subject to strict scrutiny.

b. **Legislative History**

The admissibility of the legislative history of the Ordinance as presented is uncontested. Dkt. 33 at 19-20. Review of the legislative record further confirms the Ordinance was adopted because of a disagreement with the NRA's message. When considering the constitutionality of an otherwise-valid statute, courts will not typically look to statements of individual legislators to invalidate the law. *See* O'Brien, 391 U.S. at 384 ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

In determining whether a law is content-based, however, the district court must consider if the law is *intended* to stifle a particular form of speech. *See* Ward, 491 U.S. at 791 ("The principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); Recycle for Change v. City of Oakland, 856 F.3d 666, 673 (9th Cir. 2017) ("we must also ask whether there is evidence that [the City] passed the Ordinance **[*21]** with an intent to burden [Plaintiff's] message."). In that context, it is appropriate for the Court to consider the legislative record of the Ordinance to determine the City's purpose in enacting it. *See* Recycle for Change, 856 F.3d at 674 (examining the City Council's motive for enacting an unattended-donations ordinance and emphasizing that there was no "evidence in the record that anyone in the Oakland City Council disagreed with RFC's message"); Doe v. Harris, 772 F.3d 563, 576 (9th Cir. 2014) (finding the law content-neutral, in part because "nothing in the Act suggests that the Act's purpose was to disfavor any particular viewpoint or subject matter"). In considering a preliminary injunction, a district court may look beyond the typical pleadings of a motion to dismiss. Johnson, 572 F.3d at 1083. In this case, statements on the legislative record are probative of the City's purpose in adopting the Ordinance.

The legislative record of the Ordinance reveals a clear attempt to cut off revenue to the NRA because of its pro-firearm advocacy. On March 28, 2018, City Councilmember Mitch O'Farrell ("O'Farrell") motioned the City to "rid itself of its relationships with any organization that supports the NRA." Dkt. 1-2 at 2. He further moved that the Chief Legislative Analyst "report back with **[*22]** options for the City to immediately boycott those businesses and organizations" that do business with the NRA "until their formal relationship with the NRA ceases to exist." *Id.* In September of 2018, as a means of achieving the goals stated in his previous motion, O'Farrell moved the City "to prepare and present an ordinance directing any prospective contractor with the City of Los Angeles to disclose, under affidavit: (1) any contracts it or any of its subsidiaries has with the National Rifle Association; and (2) any sponsorship it or any of its subsidiaries provides to the National Rifle Association." Dkt. 1-1 at 2. This motion formed the foundation of the present Ordinance. O'Farrell's motion for the City to "rid itself" of the NRA is a direct precursor to the present disclosure requirement in the Ordinance. Dkt. 1-2.

In this context, O'Farrell's off-the-record statements further confirm an overwhelming intent to suppress the message of the NRA.[6] Through his verified Twitter

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[4] The City has provided nothing to demonstrate the causal connection between pro-firearm speech and mass shootings.

[5] The City did not make a "public safety" argument at the hearing. *See* Dkt 33. In its briefs, the City only addressed public safety once in passing. *See* Dkt. 15 at 15.

[6] At oral argument, the parties agreed O'Farrell's statements were accurately represented in the record. Dkt. 33 at 20-21. Per Federal Rule of Evidence 201(b)(2), a "court may take judicial notice of a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court therefore takes judicial notice of O'Farrell's statements via his verified Twitter account. *See* Hawaii v. Trump, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (taking judicial

account, O'Farrell wrote:

> "The @NRA "assault weapons everywhere" agenda can and will be challenged in the City of Los Angeles. It's time for action. @WAGV @MomsDemand @Bradybuzz @eqca @shannonrwatts" Mitch O'Farrell **[*23]** (@MitchOFarrell), Twitter (Mar. 28, 2018, 2:20 PM), https://twitter.com/MitchOFarrell/status/979105947632123904 .
>
> "My #NRA disclosure motion passed unanimously in Budget & Finance committee today. TY Chair @PaulKrekorian for your partnership. Next up; full City Council to draft the Ordinance. @WAGV @Bradybuzz @Everytown @MomsDemand @sandyhook." Mitch O'Farrell (@MitchOFarrell), Twitter (Oct. 1, 2018, 6:27 PM), https://twitter.com/MitchOFarrell/status/1046934711761850368 .
>
> "And by the way, @amazonprimenow @AppleTV @Google -isn't it time to end your relationship with @NRATV & stop aiding and abetting their violent, extremist rhetoric?" Mitch O'Farrell (@MitchOFarrell), Twitter (Oct. 24, 2018, 11:19 AM), https://twitter.com/MitchOFarrell/status/1055161837224783872 .
>
> "I told @FedEx executives earlier this year, 'there is no high road in doing business with the @NRA." Mitch O'Farrell (@MitchOFarrell), Twitter (Oct. 31, 2018, 11:35 AM), https://twitter.com/MitchOFarrell/status/1057702716045058048 .

See also Dkt. 1-3 at 2-32. O'Farrell's statements reinforce an already robust record of anti-NRA animus. The face of the Ordinance, the legislative history of its passage, and the statements of its **[*24]** primary legislative advocate all demonstrate an intent to suppress the political speech of the NRA.

c. **City's Interest**

In response to this record, the City contends it has a valid interest in disclosure for disclosure's sake—the Ordinance is a so-called "sunshine law." Dkt. 33 at 9. In support of its contention, the City directs the Court to the Los Angeles City Charter ("Charter") § 371, *Competitive Bidding: Competitive Sealed Proposals*, Dkt. 17-1. By the City's characterization, the Charter binds the City to "accept the lowest bid for a contract, subject to a few exceptions that are not relevant here." Dkt. 23 at 4. Our review of the Charter confirms the City's contention, at least facially, as the Charter provides: "[c]ontracts shall be let to the lowest responsive and responsible bidder furnishing satisfactory security for performance." Dkt. 17-1 at 1. The gravamen of the City's contention is that it is incapable of discrimination against the NRA because it is bound to accept the lowest conforming bid for City contracts. The fact that the Charter requires the City to accept compliant bids does not immunize subsequent regulations from *First Amendment* challenges: the question **[*25]** is whether the Ordinance is intended to chill the bidding of NRA-affiliated contractors. Plaintiff Doe maintains he and other potential contractors are chilled from engaging in the bidding process because they are reluctant to reveal business ties with the NRA for fear of the stigma the City may attach to their bids and future business ventures. Dkt. 1 at 3. The legislative record establishes Doe's fear of hostility is well-founded. It is well-established that the danger of content-based laws is not only in their legal consequences but also in the preemptive self-censoring of disfavored speech for fear of retaliation. *See* *Ashcroft v. Free Speech Coal., 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*; *Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)*; *Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984)*; *Doe v. Harris, 772 F.3d at 577-78*.

The City's intent, as established by the overwhelming evidence on this record, is to suppress the message of the NRA. Such motivation is impermissible under the *First Amendment* and provides no justification for the Ordinance. We therefore conclude the Ordinance is a content-based regulation of speech, and it must survive strict scrutiny.

5. **Applying Strict Scrutiny**

The City makes no attempt to justify the Ordinance under strict scrutiny. Given the Ordinance's text and legislative history, it is apparent to the Court the City cannot make a reasonable argument that the Ordinance **[*26]** is narrowly tailored to serve a compelling government interest. The City has no interest in the suppression of political advocacy—regardless of how distasteful it finds the content. The Ordinance is therefore incompatible with the Constitution, and Plaintiffs are likely to be successful on the merits of their *First Amendment* speech claims.

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notice of President Trump's tweets regarding the Travel Ban), *vacated on other grounds*, ***138 S. Ct. 377, 199 L. Ed. 2d 275 (2017)***.

ii. Freedom of Association Claims

Plaintiffs argue their First Amendment rights of expressive association are burdened because the Ordinance requires "disclosure of group associations . . . ", Dkt. 19 at 7, and the chilling effect would "ultimately cause [the] NRA to lose necessary funding and possibly members." *Id.* at 15. The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. Jaycees, 468 U.S. 609, 622, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Defendants respond that the Ordinance only requires "disclosure of whether a potential contractor has a contract with the NRA or provides discounts to the NRA or its members." Dkt. 23 at 10. Because "contract[s] and business discounts" are not expressive, the City again argues the First Amendment is not implicated by the Ordinance **[*27]** at all. *Id.*

1. Disclosure of Membership Lists

Plaintiffs argue the Ordinances effectively requires potential contractors to disclosure their membership in the NRA because the "contracts or sponsorship" described in the Ordinance necessarily encompass membership. Compelled disclosure of a membership list in a political organization faces a form of heightened scrutiny. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-62, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963); *United States v. Mayer, 503 F.3d 740, 748 (9th Cir. 2007)*. The City maintains that the Ordinance does not require disclosure of the NRA's membership list or for potential contractors to disclose their membership in the NRA. *See* Dkt. 23 at 9-10; Dkt. 33 at 6. For the purposes of the motion for preliminary injunction, the Court accepts the City's contention that disclosure of membership is not required. *See* Foti, 146 F.3d at 639 ("Although we must consider the City's limiting construction of the ordinance, we are not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance."). As such, the Ordinance does not face strict scrutiny as a disclosure of a membership list. However, compelled disclosure can still face heightened scrutiny when it relates to protected First Amendment activity.

2. Compelled Disclosures in the Interest of Transparency [*28]

Even aside from disclosure of membership lists, the Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 64, 96, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). These disclosures have primarily occurred in the electoral context. *See* John Doe No. 1 v. Reed, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) ("*Doe v. Reed*") ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context."). Election law disclosures are not subject to the same strict scrutiny as restrictive speech laws because, even though they "may burden the ability to speak . . . they . . . 'do not prevent anyone from speaking.'" Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366, 130 S. Ct. 876, 175 L. Ed. 2d 753, (2010) ("*Citizens United*") (citing Buckley, 424 U.S. at 64, 96). These compelled disclosures are therefore subject to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important governmental interest.'" Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1312 (9th Cir. 2015) ("*Competitive Politics*") (citing Buckley, 424 U.S. at 96). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" Americans for Prosperity Foundation v. Becerra, 903 F.3d 1000, 1008 (9th Cir. 2018) ("*Americans for Prosperity*") (quoting Davis v. FEC, 554 U.S. 724, 744, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)).

In the electoral context, the Ninth Circuit used exacting scrutiny to find that "[c]ampaign finance disclosure requirements . . **[*29]** . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas." Human Life of Washington Inc. v. Brumsickle, 624 F.3d 990, 1008 (9th Cir. 2010). Outside of the electoral context, the Ninth Circuit upheld California's law compelling the disclosure of IRS Schedule B disclosures to the state Attorney General because it served the state's "important government interests in preventing fraud and self-dealing in charities . . . by making it easier to police such fraud." Americans for Prosperity, 903 F.3d at 1011 (internal quotation

marks omitted).[7] In *Americans for Prosperity*, the court found that in light of the state's legitimate interest in preventing fraud, the "plaintiffs have not demonstrated that compliance with the state's disclosure requirement will meaningfully deter contributions. Nor, in light of the low risk of public disclosure, have the plaintiffs shown a reasonable probability of threats, harassment or reprisals." *Id. at 1019*.

In contrast, the Supreme Court previously concluded that the government has no legitimate interest in "levelling electoral opportunities" by imposing asymmetrical contribution limits on self-funded and donor-funded **[*30]** Congressional candidates. *Davis v. Fed. Election Comm'n, 554 U.S. 724, 742, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)* ("*Davis*"). Applying the logic from *Davis*, the Ninth Circuit recently used exacting scrutiny to find part of Montana's political committee registration regulation unconstitutional. *Nat'l Ass'n for Gun Rights, Inc. v. Mangan, 933 F.3d 1102, 1121 (9th Cir. 2019)* ("*NAGR*"). In *NAGR*, the Ninth Circuit upheld the majority of Montana's disclosure requirement but found that requiring political committee treasurers to be registered Montana voters was not a lawful "shorthand" for otherwise-valid competency requirements. *Id.* The court concluded the registered voter requirement "does not significantly forward the interests it is said to advance and so violates the *First Amendment*." The Ninth Circuit concluded "Montana identifies no interest served by excluding potential treasurers who are not registered voters but could be if they chose." *Id.* Because there was no connection between the voter requirement and the state's valid interest, "the state burden[ed] the speech rights of such organizations without any justification," and the requirement was found unconstitutional. *Id.*

3. Government Interest in Transparency

Although the government has a legitimate interest in transparency in certain contexts—such as the public elections or tax-exempt charities discussed above—the **[*31]** *First Amendment* is burdened when the disclosure requirement bears no relationship to the stated interest. Disclosure requirements are impermissible where they "become[] a means of facilitating harassment that impermissibly chills the exercise of *First Amendment* rights." *Doe v. Reed, 561 U.S. at 208*. Although not every compelled disclosure is a constitutional injury, the Ninth Circuit recently held that a disclosure requirement intended to chill political speech or harass a certain speaker does create an actual burden on the *First Amendment* right of association.[8] *Competitive Politics, 784 F.3d at 1313* ("compelled disclosure can also infringe *First Amendment* rights when the disclosure requirement is itself a form of harassment intended to chill protected expression."). Relying on *Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989)* ("*Acorn*"), the *Competitive Politics* court reasoned that a disclosure requirement intended to chill expression and unsupported by a reasonable justification is itself a *First Amendment* burden. *Competitive Politics, 784 F.3d at 1313* (describing the holding in *Acorn*: "the disclosure requirement was intended to chill its protected expression, and, given the absence of any reasonable justification for the ordinance, we held that it violated the *First Amendment*.").

The court in *Acorn* had reached a similar conclusion regarding the City of Seattle's "panoram ordinance" that required **[*32]** "peepshow" companies to "disclose the names and addresses of their shareholders" and pay several additional licensing fees. *Acorn, 887 F.2d 225-26*. To justify the shareholder disclosure requirement, Seattle asserted a compelling interest in accountability of enforcement of the panoram ordinance. *Id.* The court found there was "no logical connection between the City's legitimate interest in compliance with the panoram ordinance and the rule requiring disclosure of the names of shareholders." *Id.* The *Acorn* court analogized its situation to a similar Seventh Circuit case, *Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980)*, where the Seventh Circuit focused not on the nature of the information disclosed, but "whether there was any relevant correlation between the asserted governmental interest in obtaining the information and the information required to be disclosed." *Acorn, 877 F.2d at 226*. Without a legitimate government interest, the *Acorn* court concluded that the city could not compel disclosure of shareholder information. *Id.* Together, *Americans for Prosperity, Competitive Politics*, and

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[7] *Americans for Prosperity* has a currently-docketed petition for certiorari before the Supreme Court of the United States. Petition for Writ of Certiorari, *Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000* (No. 19-255).

[8] This compelled-*disclosure* is distinct from the government-compelled *speech* analyzed in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)*. Compelled speech under *Rumsfeld* is addressed *infra* Part IV.e.

Acorn, hold that the First Amendment right of association can be burdened either through an actual chilling effect unsupported by a legitimate government interest or by a governmental intent to harass a certain **[*33]** speaker.

Here, Plaintiff Doe maintains the Ordinance will burden him and other potential contractors by chilling them from either from submitting bids to the City or entering into "contracts or sponsorship" agreements with the NRA. Dkt. 24 at 8-9. The NRA claims the Ordinance will cause them to lose sponsors. The City addresses this argument by asserting that "the court must first determine whether the challenged disclosure requirement actually compels disclosure of ***information protected by the First Amendment***" before proceeding to apply exacting scrutiny. Dkt. 23 at 14 (emphasis in original). As discussed above, the pertinent question is whether the disclosure places a burden on associational rights-not whether the underlying material is independently protected by the First Amendment. *See* Americans for Prosperity, 903 F.3d at 1006 ("[t]o assess 'the possibility that disclosure will impinge upon protected associational activity'. . . we consider 'any deterrent effect on the exercise of First Amendment rights'") (quoting Buckley, 424 U.S. at 65) (internal citation omitted); Acorn, 887 F.2d at 226 (approving the Seventh Circuit's analysis which "did not focus on the nature of the information to be disclosed," but "questioned whether there was any relevant correlation between the asserted governmental interest in obtaining **[*34]** the information and the information required to be disclosed. The burden on association rights alleged in *Americans for Prosperity* was similar to the burden alleged here—deterrence of funding to an advocacy organization. The government motive in *Acorn* is similar to the government motive here—a pretext for harassment. As such, the Ordinance triggers exacting scrutiny.

4. Applying Exacting Scrutiny

This Ordinance is not an election law—it applies to potential City contractors not political candidates—but the City's stated interest is still government transparency. In applying exacting scrutiny, the Ordinance's justification is more akin to *Davis, NAGR*, and *Acorn* than *Americans for Prosperity* and *Competitive Politics*. Much like in *NAGR*, the Ordinance "does not significantly forward the interests it is said to advance . . . . " NAGR, 933 F.3d at 1121. Like the city in *Acorn*, the record here supports Plaintiffs' contention that the purpose of the Ordinance is to deter association with the NRA. Because the City has no legitimate interest in the Ordinance, Plaintiffs will likely be successful on their freedom of association claims. To succeed at trial, Plaintiffs will need to demonstrate that the Ordinance "places **[*35]** an actual burden on First Amendment" rights (either through harassment or chilled association), and that burden is not justified by a "compelling government interest." Americans for Prosperity, 903 F.3d at 1006.

b. Likelihood of Irreparable Harm

Although the Court has already concluded Plaintiffs are likely to be successful on their speech and association claims, we must still analyze the remaining *Winter* factor to determine if a preliminary injunction is appropriate. "Even where a plaintiff has demonstrated a likelihood of success on the merits of a First Amendment claim, it 'must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor.'" Doe v. Harris, 772 F.3d at 582.

Plaintiff Doe has alleged that he and other potential City contractors will be forced to choose between forgoing the City's bidding process or revealing their contracts with the NRA. The NRA itself claims it will suffer a burden on its associational rights because businesses will be less likely to engage in "contracts or sponsorship" with the NRA for fear of eventual disclosure under the Ordinance. In considering a preliminary injunction, the deprivation of First Amendment rights "even for minimal periods of **[*36]** time, unquestionably constitute[s] irreparable injury." Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *see also* Associated Press v. Otter, 682 F.3d 821, 826 (9th Cir. 2012) (adopting the proposition). The Ninth Circuit concluded "a First Amendment claim certainly raises the specter of irreparable harm and public interest considerations . . . ." *DISH Network Corp. v. F.C.C., 653 F.3d 771, 776 (9th Cir. 2011)* (internal quotation marks omitted). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech . . . ." Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009).

In this case, Plaintiffs have sufficiently demonstrated that they are likely to be deprived of their First Amendment rights—the deprivation of which is "well established" to constitute irreparable harm. Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting

Elrod, 427 U.S. at 373). Defendants' primary argument to the contrary is that Plaintiffs have not provided admissible evidence of irreparable harm. Dkt. 23 at 22-23. But Plaintiffs have provided ample evidence of a likely *First Amendment* violation, which is enough to satisfy the *Winter* standard. "A 'colorable *First Amendment* claim' is 'irreparable injury sufficient to merit the grant of relief.'" *Doe v. Harris, 772 F.3d 563, 583 (9th Cir. 2014)* (quoting *Warsoldier v. Woodford, 418 F.3d 989, 1001 (9th Cir.2005))*. Plaintiffs have therefore met their burden in establishing a likelihood of irreparable harm.

Doe further alleges that if he complies with the Ordinance, the City will deny him fair consideration of his bids—potentially creating a long-term stigma against Doe and his **[*37]** business. The NRA maintains that the Ordinance will also cause them to lose sponsors: if companies are forced to disclose their sponsorship of the NRA to the City, those companies will be less likely to provide sponsorship for fear of suffering the same stigma as Doe. Again, the record indicates both fears are well-founded. Stigmatization and loss of sponsorship appear to be exactly the types of irreparable *First Amendment* harm anticipated by *Elrod*, where county employees were fired (or threatened to be fired) for their political affiliations. *Elrod, 427 U.S. at 374*. It is therefore likely that Plaintiffs will suffer irreparable harm by the continued enforcement of the Ordinance. Conversely, the only harm the City will suffer is a lack of knowledge about who contracts with or sponsors the NRA. Under *First Amendment* precedent, the likelihood of irreparable harm is high in this instance.

c. Balance of the Equities

The City correctly states that the burden is on the Plaintiff to demonstrate the need for extraordinary relief. Proving likelihood of success alone does not tip the balance of equities. *Gresham v. Picker, 705 Fed. App'x. 554 (9th Cir. 2017)*. In issuing a preliminary injunction, "the district court must balance the harms to both sides . . . ." *VidAngel, Inc., 869 F.3d at 867*. Plaintiffs allege they are currently **[*38]** unable to bid on City contracts without suffering a potential stigma from the City. Dkt. 19-1 at 1-2. Further, the NRA claims it is losing the benefit of potential sponsorship because contractors do not want to make the disclosures required by the Ordinance. *Id.* As discussed above, these are both cognizable *First Amendment* harms which weigh in favor of enjoining the Ordinance.

The City has failed to demonstrate it will be harmed by an injunction of the Ordinance. The City has presented no evidence or argument that non-enforcement of the Ordinance will have an effect of the City's ability to keep its citizens safe. As we have already established, the connection between the Ordinance and public safety is unsupported. The only harm the City may suffer is not knowing if its contractors have "contracts or sponsorship" with the NRA. Dkt. 1-9 at 1. The City has no legitimate interest in this information, and "harm caused by illegal conduct does not merit significant equitable protection." *VidAngel, 869 F.3d at 867*. We therefore find the City will suffer no injury by injunction of the Ordinance. The balance of the equities tips strongly in Plaintiffs' favor.

d. Public Interest

"Finally, the court must 'pay particular regard for the **[*39]** public consequences in employing the extraordinary remedy of injunction.'" *VidAngel, Inc., 869 F.3d at 867* (citing *Winter, 555 U.S. at 24*). The NRA believes the public is served by protecting *First Amendment* rights. The City believes the Ordinance serves the public interest by creating stricter gun laws through reduced pro-gun advocacy. There is no doubt the City's general interests in public safety and transparent government are legitimate, but the City has only advanced the most attenuated relationship between the Ordinance and these goals. It is not within the public interest to subject potential City contractors to a disclosure requirement motivated by political animus and completely unrelated to their ability to perform the job. If the Ordinance were to continue in effect, the only tangible benefit to the City would be the collection of information it has no legitimate interest in collecting.

Conversely, the citizens of Los Angeles would suffer an abridgement of their *First Amendment* rights by continued enforcement of the Ordinance. There is a "significant public interest in upholding free speech principles," *Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009)* (internal quotation marks omitted). Generally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012)* (internal **[*40]** quotation marks omitted). Weighing the strong interest in protecting Plaintiffs' *First Amendment* rights against the City's stated interest, we conclude the public interest is better served by enjoining the Ordinance than letting it be enforced.

e. Balancing the *Winter* factors

All four *Winter* factors tip in favor of Plaintiffs. Based on the analysis above, we conclude Plaintiffs have met their burden in demonstrating a need for a preliminary injunction of the Ordinance. Plaintiffs' motion for preliminary injunction is therefore GRANTED.

IV. Discussion of Motion to Dismiss

Defendants have moved to dismiss the complaint. Dkt. 15. The motion is denied with regards to Plaintiffs' *First Amendment* speech, association, and retaliation claims, but granted with regard to Plaintiffs' *Fourteenth Amendment* claims and *First Amendment* compelled speech claims. Defendants' motion to dismiss Garcetti and Wolcott as duplicative defendants is also granted.

a. *First Amendment* Speech Claims

As explained above, Plaintiffs are likely to be successful on their *First Amendment* speech claims. The Court has concluded the Ordinance is content-based and therefore subject to strict scrutiny. *See supra* Part III.a.i.4.c. They have consequently sufficiently stated a claim upon which relief can be granted.

b. *First Amendment* Association [*41] Claims

As discussed, Plaintiffs are likely to be successful on their *First Amendment* association claims. The Court has concluded the Ordinance is subject to exacting scrutiny. *See supra* Part III.a.ii.4. Plaintiffs have therefore stated a claim upon which relief can be granted.

c. *First Amendment* Retaliation

A successful *First Amendment* Retaliation claim must allege that the "(1) [Plaintiffs] engaged in constitutionally protected activity; (2) the defendant's actions would 'chill a person of ordinary firmness' from continuing to engage in the protected activity; and (3) the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents, 824 F.3d 858, 867 (9th Cir. 2016)* ("*Arizona Students*") (citing *O'Brien v. Welty, 818 F.3d 920, 933-34 (9th Cir. 2016)*). The defendant must cause the injury through retaliation; "a plaintiff must show that the defendant's retaliatory animus was 'a but-for cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.'" *Capp v. Cty. of San Diego, 940 F.3d 1046 (9th Cir. 2019)* (quoting *Hartman v. Moore, 547 U.S. 250, 260, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006)*). "At the pleading stage, the complaint must simply allege plausible circumstances connecting the defendant's retaliatory intent to the suppressive conduct[,] and motive may be shown with direct or **[*42]** circumstantial evidence." *Koala v. Khosla, 931 F.3d 887, 905 (9th Cir. 2019)* (internal quotations omitted). There is no requirement for a showing of actual suppression of protected speech, just that the defendant's intentional hinderance of plaintiff's *First Amendment* activity resulted in some injury. *Arizona Students, 824 F.3d at 867*.

The Ordinance was officially passed by the City on February 2, 2019 and signed by Garcetti on February 18, 2019. Dkt. 1-9 at 5. "A plaintiff may bring a *Section 1983* claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's *First Amendment* rights." *Arizona Students, 824 F.3d at 867*. Defendants have not alleged any facts to indicate that Garcetti or Wolcott acted with retaliatory intent, so Plaintiffs are unable to sustain a retaliation claim against either Garcetti or Wolcott based on this pleading.[9] However, unlike individual states, organizations such as the City are capable of retaliatory intent under the *First Amendment*. *See Orin v. Barclay, 272 F.3d 1207, 1217 (9th Cir. 2001)* ("A plaintiff properly alleges a *§ 1983* action against a local government entity only if 'the action that is alleged to be unconstitutional implement[ed] or execute[d] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers'") (citing *Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*); *see, e.g.,* ***[*43]*** *Capp v. Cty. of San Diego, 940 F.3d 1046 (9th Cir. 2019)* (plaintiff properly alleged a retaliation claim against the County of San Diego); *Koala, 931 F.3d at 905* (upholding a retaliation claim against an unincorporated student association).

[9] As discussed *infra* Part IV.f, Garcetti and Wolcott are only named in their official capacities and therefore dismissed as duplicative.

Applying the *Arizona Students* test, the Court first conclude Plaintiffs are unquestionably involved in the expressive activity of pro-firearm speech. Core political speech, including issue-based advocacy, is well-established as a constitutionally protected activity that triggers "the First Amendment's highest level of protection." Arizona Students, 824 F.3d at 868; *see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (handing out leaflets in the advocacy of a politically controversial viewpoint was "the essence of First Amendment expression").

In response, Defendants rehash their speech and association defenses, arguing that "there is simply no First Amendment associational right attached to contracting or providing discounts, nor is either activity protected speech." Dkt. 23 at 17. However, "to prevail on such a claim, a plaintiff need only show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights, " not that the method of interference was expressive. Arizona Students, 824 F.3d at 867 (citing Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999)). Plaintiffs are undisputedly engaged in the protected First Amendment activity of pro-firearm speech. This activity is also undisputedly the reason the City enacted the Ordinance. The **[*44]** City does not need to attack the protected activity directly to implicate the First Amendment-the *means* of retaliation is less important than the *impetus* for retaliation. *See* O'Brien v. Welty, 818 F.3d at 932 ("Otherwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment."); *See also* Arizona Students, 824 F.3d at 868 ("the Supreme Court and [the Ninth Circuit] have recognized a wide variety of conduct that impermissibly interferes with speech. For example, the government may chill speech by threatening or causing pecuniary harm . . . withholding a license, right, or benefit . . . prohibiting the solicitation of charitable donations . . . prohibiting the solicitation of charitable donations . . . or conducting covert surveillance of church services . . . .") (internal citations omitted). Plaintiffs have demonstrated satisfied the first prong of the *Arizona Students* test.

Second, the Court must determine "if a person of ordinary firmness" would be deterred by the City's actions from continuing in the protected activity. Arizona Students, 824 F.3d at 867 (internal quotation marks omitted). "Importantly, the test for determining whether the alleged retaliatory conduct chills free speech is objective; it asks whether the **[*45]** retaliatory acts 'would lead ordinary [persons]... in the plaintiffs' position' to refrain from protected speech.'" *Id.* (citing O'Brien v. Welty, 818 F.3d at 933). Plaintiffs allege that the Ordinance has the effect of dissuading support (through sponsorships and paid membership) of the NRA. The City has asserted multiple times there are no additional consequences to disclosure and has noted that several City contractors have already complied with the Ordinance without facing negative consequences from the City. Dkt. 33 at 8-9. "Our inquiry, however, is not whether Defendants' actions actually chilled" Plaintiffs or other contractors, "but rather whether the alleged retaliation 'would chill *a person of ordinary firmness* from continuing to engage in the protected activity.'" *Capp, 940 F.3d at 1046* (citing O'Brien v. Welty, 818 F.3d at 933). Plaintiffs maintain that the Ordinance "[threatens] the livelihood of NRA as retaliation for engaging in political speech and expression with which the City disagrees." Dkt. 19-1 at 17. Plaintiffs claim complying contractors will either be spurned from City contracts and/or face social and financial harm as a result of their disclosure. Dkt. 19-1 at 15. Given the overwhelming animus against the NRA displayed by the City alone, it is **[*46]** plausible that the Ordinance would chill a person of ordinary firmness from either submitting bids to the City or engaging in contracts or sponsorship with NRA. *See supra* Part. III.a.4. Even if the City is barred from rejecting a bid explicitly because of the contractor's ties to the NRA, Plaintiffs have presented enough evidence to show they will plausibly be dissuaded from participating in the bidding process for fear of ostracization from the City. Plaintiffs have satisfied the second prong of the *Arizona Students* test.

Finally, Plaintiffs satisfy the third prong of the *Arizona Students* test because there is a strong "nexus between defendant[s] actions and the intent to chill speech." Arizona Students, 824 F.3d at 867 (internal quotation marks omitted). The City adopted the Ordinance in direct response to the NRA's speech and with the overt intent to silence it. *See supra* Part III.a.ii.4.b. The factual record establishes that the City's only non-pretextual interest in the Ordinance is the suppression of the NRA's political activity. It is impossible to separate the Ordinance from the City's intent to suppress the NRA's speech. Plaintiffs have satisfied all three prongs of the *Arizona Students* test, and the Defendants' **[*47]** motion to dismiss Plaintiffs' retaliation claim is DENIED.

d. *First Amendment* Compelled Speech

Plaintiffs claim the Ordinance violates their right to be

free from government-compelled speech. Dkt. 19-1 at 14. The Supreme Court has "established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)* ("*Rumsfeld*"). "This Court has found compelled-speech violations where the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld, 547 U.S. at 49* (citing *Hurley v. Irish—American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)*). Compelled-speech is implicated only when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." *Id. at 63*. Plaintiffs have alleged no facts to indicate they are forced to speak or accommodate any message except their own. Plaintiffs are required to disclose the contracts or sponsorship which they have freely undertaken with the NRA; they are not required to incorporate anyone else's message into their own. This regulation is better analyzed as a disclosure requirement than a traditional compelled-speech claim. *See supra* Part III.a.ii. Plaintiffs have therefore failed to state a compelled speech claim, and Defendants' motion is GRANTED **[*48]** in part.

e. *Fourteenth Amendment* Claims

Plaintiffs claim the City has violated their *Fourteenth Amendment* rights by "penalizing a class of potential contractors based on their protected beliefs, expression, and associations . . . ." Dkt. 19-1 at 18. But Plaintiffs cannot claim they are members of a "suspect classification" so as to require heightened scrutiny under the *Fourteenth Amendment's Equal Protection clause*. *N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008)* ("When an equal protection claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' claim."). In this circumstance, pro-firearm advocates cannot be recognized as protected class under the *Fourteenth Amendment*. *Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993)* (explaining that a "class" under Equal Protection "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the . . . defendant disfavors."). Without a suspect classification, "the *Equal Protection Clause* is satisfied so long as there is a plausible policy reason for the classification." *Crawford v. Antonio B. Won Pat Int'l Airport Auth., 917 F.3d 1081, 1095 (9th Cir. 2019)*. Although this record would likely support a finding that the City has offered no rational basis for the Ordinance, the Court has already concluded that strict scrutiny applies, and there is no need to apply rational basis scrutiny at this time.

Further, Plaintiffs cannot plead an Equal **[*49]** Protection claim without reference to their *First Amendment* rights. Such definitively *First Amendment* claims are not well suited to Equal Protection analysis and are usually dismissed as duplicative. *See Orin v. Barclay, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001)* ("we treat [plaintiff's] equal protection claim as subsumed by, and co-extensive with, his *First Amendment* claim."). There is non-binding authority to support dismissal of Equal Protection claims when they are entirely duplicative of alleged *First Amendment* Claims. *See Vukadinovich v. Bartels, 853 F.2d 1387, 1391-92 (7th Cir. 1988)* ("we think of the *Equal Protection Clause* as forbidding the making of invidious classifications—classifications on the basis of such characteristics as race, religion, or gender. Here, plaintiff is not claiming that he was classified on the basis of some forbidden characteristic, only that he was treated differently because he exercised his right to free speech."); *AIDS Healthcare Found. v. Los Angeles Cty., No. CV1210400PAAGRX, 2013 U.S. Dist. LEXIS 202573, 2013 WL 12134048, at *8 (C.D. Cal. Mar. 18, 2013)* ("Plaintiffs cannot simply recharacterize their *First Amendment* retaliation claim as a violation of the *Equal Protection Clause*."); *Webber v. First Student, Inc., No. CIV. 11-3032-CL, 2011 U.S. Dist. LEXIS 88238, 2011 WL 3489882, at *3 (D. Or. July 12, 2011)* ("Although the Ninth Circuit has not dealt directly with whether instances of retaliation for the exercise of free speech may implicate equal protection, a number of other Circuit Courts of Appeals have found that such a claim implicates **[*50]** the *First Amendment*, not the *Equal Protection Clause*.").

Outside of the *First Amendment* context, an Equal Protection claim to vindicate another enumerated right "is subsumed by, and coextensive with the [latter], and therefore not cognizable under the *Equal Protection Clause*." *Rhode v. Becerra, 342 F. Supp. 3d 1010, 1016 (S.D. Cal. 2018)* (quoting *Teixeira v. County of Alameda, 822 F.3d 1047, 1052 (9th Cir. 2016) vacated in part by, 854 F.3d 1046 (9th Cir. 2016))* (dismissing plaintiffs' Equal Protection challenge as entirely duplicative of their *Second Amendment* claim). In this case, Plaintiffs' Equal Protection claims are entirely duplicative of the *First Amendment* claims Defendants' motion to dismiss Plaintiffs' Equal Protection claims is

therefore GRANTED.

f. Dismiss City Official Defendants

In addition to the City, Plaintiffs have named Mayor Garcetti and City Clerk Wolcott as defendants in their official capacities. Dkt. 1. "The Court follows other District Courts in holding that if individuals are being sued in their official capacity as municipal officials and the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed." *Vance v. Cty. of Santa Clara, 928 F. Supp. 993, 996 (N.D. Cal. 1996)*; *see Chavez v. City of Petaluma, No. 14-CV-05038-MEJ, 2015 U.S. Dist. LEXIS 142556, 2015 WL 6152479, at *4 (N.D. Cal. Oct. 20, 2015)*, *aff'd*, *690 F. App'x 481 (9th Cir. 2017)* (directly adopting the proposition). There are no allegations against either Garcetti or Wolcott that cannot be attributed to the City as a whole.[10] Defendants' motion to dismiss Garcetti and Wolcott **[*51]** as defendants is therefore GRANTED.

V. **Conclusion**

For the reasons provided above, Plaintiffs' motion for preliminary injunction is GRANTED. Defendants' motion to dismiss is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

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[10] As discussed *supra* Part IV.c, Plaintiffs have not alleged any facts which indicate Garcetti or Wolcott took any action outside of their official capacities or took any official action with retaliatory intent.