

20-1944

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**United States Court of Appeals  
for the First Circuit**

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GASPEE PROJECT;  
ILLINOIS OPPORTUNITY PROJECT

*Plaintiffs-Appellants,*

v.

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

*Defendants-Appellees.*

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

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**APPENDIX**

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

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**CERTIFICATE OF SERVICE**

I certify that on December 10, 2020, I electronically filed the foregoing Appendix with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel R. Suhr  
Daniel R. Suhr

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

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**The Gaspee Project and Illinois  
Opportunity Project,**

Plaintiffs,

v.

**Diane C. Mederos, et al.,**

Defendants.

---

Case No. 1:19-cv-00609-MSM-LDA

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

**INTRODUCTION**

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

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

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

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

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

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

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

## **PARTIES**

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

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

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

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

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

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

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

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

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

### **JURISDICTION AND VENUE**

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

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

### **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35. Plaintiffs are concerned that compelled disclosure of their members and supporters could lead to substantial personal and economic repercussions.

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

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

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

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

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

39. Plaintiffs have no remedy at law.

## COUNT I

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

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

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

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

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

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

## COUNT II

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

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

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

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

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

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

### **COUNT III**

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

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

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

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

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

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

### **PRAYER FOR RELIEF**

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

- a. Declare that 17 R.I.G.L. 25.3, to the extent that it compels member and supporter disclosure for organizations engaged in issue advocacy, violates the Plaintiffs' right to freedom of speech and association under the First and Fourteenth Amendments;
- b. Declare that 17 R.I.G.L. 25.3-1, in so far as it compels sponsor reporting for issue advocacy, violates the Plaintiffs' right to engage in anonymous speech under the First and Fourteenth Amendments;

- c. Declare that 17 R.I.G.L. 25.3-3, to the extent that it compels sponsor disclosure for issue advocacy, violates the Plaintiffs' right to engage in anonymous speech under the First and Fourteenth Amendments;
- d. Declare that 17 R.I.G.L. 25.3-3, to the extent that it compels in-adonor disclosure for issue advocacy, violates the Plaintiffs' right against government compelled speech and government compelled disclosure of association;
- e. Enjoin the Board from enforcing 17 R.I.G.L. 25.3-1 against Plaintiffs and other organizations that engage solely in issue advocacy;
- f. Enjoin the Board from enforcing 17 R.I.G.L. 25.3-3 against Plaintiffs and other organizations when they sponsor issue advocacy;
- g. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and
- h. Award any further relief to which Plaintiffs may be entitled.

Dated: March 6, 2020

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

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

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

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1 (VIA VIDEO CONFERENCE)

2 21 JULY 2020

3 THE COURT: Good morning. We're on the record  
4 in the Gaspee Project and Illinois Opportunity Project  
5 vs. Diane C. Mederos, et al. And that is civil action  
6 19-609. I'm going to ask that counsel identify  
7 themselves for the record, first on behalf of the  
8 plaintiffs, and then the defendants. And then if you  
9 could just let me -- identify who will be speaking for  
10 each.

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

12 THE COURT: Sure.

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

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

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

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

22 (Brief pause)

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

1 although technical difficulties usually cost me a few  
2 minutes.

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

10 MR. SUHR: Good morning, your Honor.

11 THE COURT: Good morning.

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

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

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

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

24 MR. MARCACCIO: Good morning, your Honor.

25 THE COURT: Good morning. So a couple of things

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

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

18 MS. SADECK: Thank you, your Honor.

19 THE COURT: You're welcome.

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

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

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

6 (Brief pause)

7 MS. SADECK: In particular, the First Circuit's  
8 2011 decision in *NOM vs. McKee* is directly on point,  
9 and it provides a roadmap in a lot of ways for this  
10 case. And it also makes clear that the First Circuit  
11 has already expressly considered and rejected the same  
12 arguments that plaintiffs present to this Court today.  
13 What I'd like to do is briefly talk about how exact  
14 scrutiny is a relevant standard of review and what that  
15 means, and then apply that to the provisions that are  
16 being challenged in this case.

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

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

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

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

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

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

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

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

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

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

25 With regard to the main statute that the court

1 in *McKee* examined, that applied even more broadly than  
2 the Rhode Island statute. It covered expenditures over  
3 \$100 as opposed to the thousand dollars here. And the  
4 First Circuit held that this factor, this second  
5 substantial relationship factor, was satisfied because  
6 the modest amount of information requested is not  
7 unduly burdensome and ties directly and closely to the  
8 important government interests.

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

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

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

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

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

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

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

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

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

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

1 case is still good law. So my question is sort of at a  
2 motion-to-dismiss level standard, taking all  
3 allegations as alleged by the plaintiffs, is there a  
4 point where -- is this a bright line or is it a sliding  
5 scale? Because clearly what the NAACP was alleging in  
6 1958, I believe, or 1950, whatever it was, was a very  
7 extreme sort of backlash.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The disconnect between that case and this case

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

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

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

1 First Circuit and both soundly rejected.

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

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

25 The court found that the United States Supreme

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

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

18 Well, Rhode Island disclosure laws and the  
19 relevant court precedent I just discussed recognized  
20 this for what it is; it's an electioneering  
21 communication. And plaintiffs' complaint at paragraph  
22 5 admits as much. They say that plaintiffs, quote,  
23 "intend to engage in issue advocacy in Rhode Island  
24 concerning referenda and legislators up for votes in  
25 2020."

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

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

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

1 disclosure laws, can do so.

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

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

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

18 Your Honor's question earlier asked about the  
19 appropriateness of resolving this on a  
20 motion-to-dismiss level. And the Supreme Court spoke  
21 about that in the case of *Neitzke vs. Williams*, 490  
22 U.S. 319. And in that case, the court said that Rule  
23 12(b)(6) authorizes a court to dismiss a claim on the  
24 basis of dispositive issue of law.

25 The court went on to say, "This procedure,

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

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

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

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

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

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

5 THE COURT: Right.

6 MR. SUHR: Yes.

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

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

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

20 MR. SUHR: Thank you, ma'am.

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

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

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

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

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

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

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

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

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

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

17 MR. SUHR: Sure.

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

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

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

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

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

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

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

1 THE COURT: Do you have the cite?

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

4 THE COURT: Thank you.

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

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

25 Again, I really think Justice Alito's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. SUHR: No.

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

23 MR. SUHR: That's true.

24 THE COURT: And *NIFLA* was.

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Is the California case still good  
2 law?

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

7 THE COURT: Okay.

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

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

24 MR. SUHR: Of course.

25 THE COURT: Because your summary there at the

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

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

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

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

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

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

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

22 MR. SUHR: Fair enough, ma'am.

23 THE COURT: All right. Thank you.

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

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

3 THE COURT: Sure.

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

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

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

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

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

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

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

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

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

1 scenario.

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

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

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

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

20           THE COURT: Thank you.

21           Mr. Suhr, anything briefly?

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

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

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

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

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

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

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

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

19 THE COURT: Thank you.

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

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

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

5 THE COURT: All right. Thank you.

6 MR. SUHR: Thank you, your Honor.

7 MS. SADECK: Thank you, your Honor.

8 THE COURT: Okay.

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

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

6  
7 /S/ Lisa Schwam

8 Lisa Schwam, CRR-RPR-RMR  
9 Federal Official Court Reporter

November 17, 2020

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

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**The Gaspee Project and Illinois  
Opportunity Project,**

Plaintiffs,

v.

**Diane C. Mederos, et al.,**

Defendants.

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Case No. 1:19-cv-00609-MSM-LDA

**NOTICE OF APPEAL**

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

Dated: September 26, 2020

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