20-1944

United States Court of Appeals
for the First Circuit

GASPEE PROJECT;
ILLINOIS OPPORTUNITY PROJECT

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

APPELLANTS' PRINCIPAL BRIEF AND ADDENDUM

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DISCLOSURE STATEMENT

1. The full name of every party that the undersigned attorney represents in the case: Appellants The Gaspee Project and the Illinois Opportunity Project.

2. The name of all law firms whose partners or associates have appeared on behalf of the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: the Liberty Justice Center[1] and Larisa Law.

3. If the party or amicus is a corporation: The Gaspee Project, Inc. is a nonprofit, nonstock corporation registered in the State of Rhode Island. The Illinois Opportunity Project is a nonprofit, nonstock corporation registered in the State of Illinois.

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[1] Liberty Justice Center is technically not a law firm, but a legal aid foundation.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the United States Constitution, and pursuant to 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. The District Court granted a motion to dismiss, which is a final order and judgment disposing of all of plaintiffs' claims, on August 28, 2020 (Dkt. 30 & 31). Plaintiffs filed a timely notice to appeal on September 28, 2020 (Dkt. 32). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. May the State of Rhode Island compel speakers to disclose their identity on pure speech run near in time to an election?
2. May the State of Rhode Island compel private, nonprofit social-welfare organizations to disclose their general-fund donors because they sponsor non-electoral advocacy communications run near in time to an election?
3. May the State of Rhode Island compel speakers to speak the names of their financial supporters within pure speech run near in time to an election?

STATEMENT OF THE CASE

A. Rhode Island imposes burdensome regulations on issue advocacy run near in time to an election.

Rhode Island law defines an electioneering communication 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." R.I. Gen. Laws § 17-25-3(16).

If any person or organization spends at least $1,000 on electioneering communications in a calendar year, it becomes an independent-expenditure entity subject to a number of regulatory requirements enforced by the Defendants. R.I. Gen. Laws § 17-25.3-1(b). Three are relevant to this case. Count I: the entity must file with the Defendants reports disclosing the identity of all donors to the organization's general fund who gave $1,000 or more if the general fund was used to pay for the ad. R.I. Gen. Laws § 17-25.3-3(h). Count II: the entity must register with the Defendants and report the name and address of the entity, R.I. Gen. Laws § 17-25.3-1(f), and include on the communication a disclaimer identifying the entity's sponsorship, R.I. Gen. Laws § 17-25.3-3(a) & (c). Count III: the entity must include on all electioneering communications a list of its top-five donors during the one-year period preceding the communication. R.I. Gen. Laws § 17-25.3-3(a). The information must be displayed or spoken in all television, mail, radio, or internet advertising. *Id.* If anyone fails to comply with these laws, they are subject to civil penalties and potentially criminal prosecution. R.I. Gen. Laws § 17-25.3-4(a)-(b).

B. Applicants are nonprofit social-welfare organizations seeking to engage in issue advocacy when voters are paying attention.

Plaintiffs are nonprofit social-welfare organizations that wished to exercise their First Amendment rights to speak about public issues in the months leading up

to the election this November.[2] The Gaspee Project is a Rhode Island-based organization that "engages in issue advocacy communications around its mission to return government to the people." Amended Compl. ¶ 26. The Illinois Opportunity Project is a Chicago-based organization that "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." *Id*. at ¶ 27.

Both groups planned to spend more than $1,000 on issue advocacy materials mailed to Rhode Island voters in the weeks before the fall 2020 election. Gaspee intended to mail information to voters about the effect of referenda proposals on local taxes. *Id*. at ¶ 28. IOP planned to inform voters "about how their legislators voted on a bill expanding the power of government unions (2019 Senate Bill 712)." *Id*. at ¶ 29. Both Plaintiffs "have received donations over $1,000 in the past and intend to solicit and accept donations over $1,000 in the future." *Id*. at ¶ 31.

Because of these facts, both Plaintiffs would be required to fully comply with Rhode Island's independent-expenditure statute, including reporting their donors to the Defendants (count I), registering their organizations with the Defendants and disclosing their sponsorship on their messages (count II), and naming their donors in

[2] Though the November 2020 election has come and gone, this case is not moot because Plaintiffs are institutional, repeat players in elections. *See* Amended Compl. ¶ 30. Thus, they qualify for the "capable of repetition, yet evading review" exception frequently applied to litigants in election-related cases. *See, e.g., Becker v. FEC*, 230 F.3d 381, 389 (1st Cir. 2000); *id*. at 404 n.23 (Torruella, C.J., concurring).

their messages (count III). This they do not wish to do, and so have chilled their speech and brought this pre-enforcement challenge. *Id*. at ¶¶ 37-38.

SUMMARY OF ARGUMENT

A recent national poll found that 42 percent of Democrats would support firing a business executive from her job if it became known that she had privately donated to Donald Trump's campaign for president. Similarly, 26 percent of Republicans said they would support firing a Biden donor. Small wonder, then, that fully one-third of respondents overall were worried about losing their job if their political opinions became public. Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," CATO Institute (July 22, 2020).[3]

This case is brought for that third of Americans fearful that the cost of supporting ideas they believe in is the loss of their job. This is, in fact, "the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." *Powell v. Alexander*, 391 F.3d 1, 16 (1st Cir. 2004) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995)).

The State of Rhode Island, however, has enacted a statute which coerces private, nonprofit, social-welfare organizations into disclosing their financial information as the price for access to the public square. This law puts these organizations and their donors at risk and fundamentally fails to respect the First Amendment's guarantees.

[3] Available at https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share.

"The first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech." *Faucher v. Fed. Election Com.*, 928 F.2d 468, 472 (1st Cir. 1991). This right to speak about issues and politics is burdened when Rhode Island (1) forces speakers to forgo their right to anonymous speech (*McIntyre v. Ohio Election Commission*), (2) compels them to disclose their donors (*NAACP v. Alabama*); and (3) compels them to speak messages that they don't want to say (*National Institute of Family & Life Advocates v. Becerra*). Because the State lacks a sufficient interest to overcome the burden these laws impose, the statute is unconstitutional and the District Court erred in granting the motion to dismiss for failure to state a claim.

ARGUMENT

At the 12(b)(6) stage, all the plaintiff must do in the complaint is "frame a viable constitutional claim." *Morales-Tanon v. P.R. Elec. Power Auth.*, 524 F.3d 15, 18 (1st Cir. 2008); *accord Banco Cooperativo de P.R. v. Herrera (In re Herrera)*, 589 B.R. 444, 451-52 (B.A.P. 1st Cir. 2018) ("A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'"). As will be demonstrated in this brief, Plaintiffs have alleged three clear legal theories grounded in applicable U.S. Supreme Court precedent; all are sufficiently viable to survive Rule 12(b)(6).

The Court should also bear in mind this circuit's guideposts for cases on political speech: "[A]ny law that burdens the rights of individuals to come together for political purposes is suspect and must be viewed warily" and "measures which

hinder group efforts to make independent expenditures in support of candidates or ballot initiatives are particularly vulnerable to constitutional attack." *Vote Choice v. DiStefano*, 4 F.3d 26, 34 (1st Cir. 1993).

I. Rhode Island's statute violates Plaintiffs' First Amendment right to speaker privacy.

When the City of Cambridge (Massachusetts) passed an ordinance requiring persons who wish to distribute literature on the streets of the city to first register and wear a badge, volunteers for a political party promptly sued. Even though the distributors were political activists, this Court never the less upheld their right to distribute their party's literature anonymously, reasoning: "printed materials distributed anonymously 'have played an important role in the progress of mankind.'" *Wulp v. Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972) (*quoting Talley v. California*, 362 U.S. 60, 64 (1960)). This Court further recognized "the consequent fear of reprisals that such identification may well entail" if the activists were forced to disclose their identities to authorities or the recipients of their messages. *Id.*

This Court's approach in *Wulp* was validated by the U.S. Supreme Court several decades later in *McIntyre*. There, Ms. McIntyre was upset that her school district was planning to raise her taxes at an upcoming referendum. So she did that most American of things — she showed up at a meeting with a bunch of fliers in hand to convince her neighbors to join her cause. *McIntyre*, 514 U.S. at 337. To the horror of Ohio's Elections Commission, she did not first file paperwork, create a committee, secure a treasurer, open a separate bank account, disclose her donors, and then put all that information on her fliers. For this flagrant violation of Ohio's campaign-

finance statutes she was censured, condemned, and ordered to pay a fine. *Id.* at 338. She took her cause all the way to the U.S. Supreme Court, arguing that if the right to anonymous speech was good for the founding fathers debating the Constitution, it was good for her too.

The Supreme Court agreed, saying "[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id.* at 347. The Court honored the nation's long heritage of anonymous speech in the public square. *Id.* at 342; *id.* at 359-70 (Thomas, J., concurring); *accord* Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 CATO SUPREME COURT REVIEW 57, 58-61 (recounting founding era history).

The Supreme Court reaffirmed *McIntyre* in *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002), and the Fourth Circuit used it to decide an important free-speech case in December. *Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019); *accord Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 24 (1st Cir. 2020) (describing the holding of *McIntyre*: "anonymous speech is constitutionally protected"); *United States v. Moloney (In re Price)*, 685 F.3d 1, 20 (1st Cir. 2012) (Torruella, J., concurring) ("It is . . . well-settled that the First Amendment's protections will at times shield 'information gatherers and disseminators,' from others' attempts to reveal their identities," citing *McIntyre*).

The Plaintiffs here are looking to do much the same thing as Mrs. McIntyre.[4] The Gaspee Project wishes to provide voters with taxation information as they think

[4] The opinion never reveals why Ms. McIntyre wanted to be anonymous, saying

about whether they want to vote to raise their taxes at referendum. Compl., Dkt. 1, ¶ 28. In fact, Gaspee's advocacy differs from Mrs. McIntyre's in only immaterial two respects: it will mail the information rather than distribute it by hand, and it will not encourage people to vote for or against the referenda it references. Illinois Opportunity Project wishes to mail information about how incumbent legislators voted on a particular bill rather than information on referenda, but it too will not encourage recipients to vote one way or the other on those incumbents. Compl. ¶ 29. The fact that the speech is undertaken by a group rather than an individual is of no constitutional consequence. *ACLU of Nev. v. Heller*, 378 F.3d 979, 989-90 (9th Cir. 2004).

Below, the District Court decided that the disclaimer laws are constitutional because *Citizens United* abolished any line between "issue advocacy" and "express advocacy." Addendum at 7. While that is a dubious proposition,[5] it is an irrelevant one here. Ms. McIntyre was engaged in express advocacy regarding an election, and

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instead, "The decision in favor of 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. Nevertheless, this court may well wonder why these two plaintiffs, both of which are established institutions, desire their privacy.
The best answer is James Madison's: "we must consider the possibility that anonymity promotes a focus on the strength of the argument rather than the identity of the speaker; this is a reason why Madison, Hamilton, and Jay chose to publish *The Federalist* anonymously. Instead of having to persuade New Yorkers that his roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit." *Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

[5] *See McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (Roberts, C.J., plurality).

the volunteers in *Wulp* were distributing literature advocating their political party. Yet both of them were entitled to anonymity.

Moreover, Ms. McIntyre engaged in her anonymous express advocacy close in time to an election, as in the window covered by the independent-expenditure statute *McIntyre*, 514 U.S. at 337 (before an "imminent" election). In the Court's words: "That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *Id.* at 347; *accord Citizens United v. FEC*, 558 U.S. 310, 334 (2010) ("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."); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 821 (Wash. 2000).

The District Court also distinguished *McIntyre* because the Ohio law flatly outlawed anonymous campaign literature, whereas this law only "requires certain disclosures from organizations that meet specific contribution thresholds." Addendum at 17. Rhode Island's statute has the effect of prohibiting anonymous literature when the circulator spends at least $1,000. If the circulator spends more than $1,000 on the literature and fails to include the required identifier, the circulator commits a violation punishable by a civil penalty. 17 R.I. Gen. Laws 25.3-4 (b). Knowing and willful violations are a criminal misdemeanor. *Id.* at (a). Thus, Rhode

Island's statute has the practical effect of outlawing anonymous literature if the circulator spends at least $1,000 in a calendar year producing such literature.

The $1,000 threshold does not distinguish *McIntyre* for two reasons. First, nothing in the opinion's text or logic says that the size of the advocacy matters to the level of protection it receives. The opinion never provides an amount associated with Ms. McIntyre's advocacy, though we know she "paid a professional printer to make additional copies." 514 U.S. at 337. Rather, the Court simply tells us that anonymous speech "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." *Id.* at 357. That holding does not dissipate beyond a certain dollar limit: anonymous speech protects both 20 black-and-white copies of a controversial circular printed on one's home ink-jet and 2,000 color copies of the same message printed at OfficeMax. If anything, the rationale in the majority opinion and Justice Thomas's concurrence both embrace commercial printing or publishing of anonymous books and newspapers, which obviously require a substantial monetary investment to produce. *Id.* at 341, n.4.; *id.* at 359-67 (Thomas, J., concurring). This fits the conclusion of the 9th Circuit, which decided that nothing in *McIntyre* limited its application to the lone citizen rather than a group acting on a broader scale, such as the ACLU of Nevada. *ACLU of Nev.*, 378 F.3d at 989-91.

Second, Justice Ginsburg wrote a concurrence suggesting exactly what the District Court argues here, that *McIntyre* only applies to "an individual leafleteer

who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id*. at 358 (Ginsburg, J., concurring). But this concurrence was written by Justice Ginsburg alone; five other justices joined the majority in full without feeling the need to adopt Justice Ginsburg's qualification concerning "larger circumstances." Taken independently or together, these two observations from *McIntyre* disprove the District Court's distinguishing rationale.

The District Court further minimized *McIntyre* by suggesting it is simply dated, even implicitly overruled by *Citizens United*, which "upheld the federal disclaimer provision without so much as mentioning *McIntyre*." Addendum at 17 (*quoting Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399 (D. Vt. 2012), *aff'd*, 758 F.3d 118 (2d Cir. 2014)). This would be news to the Supreme Court; just five months after the issuance of *Citizens United*, *McIntyre's* majority was cited approvingly in three separate opinions in *Doe v. Reed*. 561 U.S. 186, 213 (2010) (Sotomayor, J., concurring) (using *McIntyre* to distinguish regulations on pure speech like disclaimer requirements from non-speech regulations on the electoral process); *id*. at 218 (Stevens, J., concurring) ("From time to time throughout history, persecuted groups have been able to criticize oppressive practices and laws either anonymously or not at all."); *id*. at 238-39 (Thomas, J., dissenting) (discussing the informational interest in *McIntyre*). All of which is to say *McIntyre* remains good law after *Citizens United*, and the District Court erred in tossing it aside.

Only a few years ago, a citizen of Rhode Island "distributed anonymous written materials expressing his views on issues of social and political concern." *Blakeslee v. St. Sauveur*, 51 F. Supp. 3d 210, 211 (D.R.I. 2014). A nearby Rhode Island statute prohibited mailing or otherwise distributing any material "designed or tending to injure or defeat any candidate for nomination or election to any public office, by criticizing the candidate's personal character or political action" unless it contained "in a conspicuous place the name of the author and either the names of the chairperson and secretary, or of two (2) officers, of the political or other organization issuing the poster, flier, or circular . . ." *Id.* (quoting R.I. Gen. Laws § 17-23-2.). The Attorney General of Rhode Island in that case conceded that the statute was unconstitutional under *McIntyre*, and the district court granted summary judgment to the plaintiff. *Id.* at 212. That is also the right outcome here.

II. Rhode Island's statute violates Plaintiffs' First Amendment right to organizational privacy.

When asked whether a gated community could insist that a leafleteer disclose his or her identity at a guard house, this Circuit reasoned that "giving a guard a name and identification is a narrower and less threatening imposition on privacy than requiring one to register for a permit, to wear an identification badge in distributing literature, *or to disclose membership information*." *Watchtower Bible & Tract Soc'y of N.Y., Inc v. Jesus*, 634 F.3d 3, 14 (1st Cir. 2011) (emphasis added). And even then, the court continued, "the safer course would be to ask for names and identification only where cause exists," such as "a reasonable suspicion (based on objective circumstances) that a non-resident visitor may engage in criminal activity . . . " *Id.*

This statute not only requires Plaintiffs to register for a permit before speaking in the public square, and to put identification on their literature (as explained above), it also requires them to disclose their membership information. *See, e.g.,* R.I. Gen. Laws. § 17-25.3-3(a). This is equally unconstitutional.

It is unconstitutional because, "[i]n a line of cases beginning with *NAACP v. Alabama*, 357 U.S. 449 . . . (1958), the Supreme Court has held that compelling a private organization to reveal the identities of its members where such disclosure will result in the harassment of existing members and the discouragement of new members can constitute a violation of the right to freedom of association." *United States v. Comley*, 890 F.2d 539, 543 (1st Cir. 1989). *See Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 57 (1st Cir. 1990) (quoting in part from *NAACP v. Button*, 371 U.S. 415, 429-30 (1963)).

The NAACP of the 1950s was without a doubt an issue-advocacy organization. The National Association for the Advancement of Colored People had been founded decades earlier, in New York, as a nonprofit organization dedicated to supporting the success of African-Americans. In the era of Jim Crow, it sponsored rallies, organized demonstrations, and talked a lot about issues, frequently mentioning elected officials by name. *See* Gilbert Jonas, FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1906-1969, 169-230 (Routledge 2005); Patricia Sullivan, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT, 385-428 (New Press 2009).

The NAACP's issue advocacy did not sit well with the entrenched interests in state capitals across the South. So using several different tools and tactics, government officials tried to get access to the NAACP's membership list, anxious to know who had the temerity to contribute money to the group that was making their lives so miserable. The Supreme Court put its foot down and stopped the State of Alabama's ham-handed effort to get the list. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *accord Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 539 (1963). The Court held that the freedom-of-association embedded in the First Amendment included a right to private association. *Id.* at 466. And this right is especially important for groups that take controversial stands on issues in the public square which may engender backlash, the Court said. *Id.* at 460.

In the original NAACP case, the Court confronted the question how to square its holding with a prior case, *Zimmerman*, where it had held that the State of New York could compel the Ku Klux Klan to turn over its membership list. Only the Klan's violent criminality was a sufficiently compelling state interest to override that organization's right to private association, the Court reasoned. *Id.* at 465 (discussing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928)). The Court returned to this criminality standard in its Red Scare cases, *Uphaus v. Wyman*, 360 U.S. 72, 80 (1959), and *Barenblatt v. United States*, 360 U.S. 109, 128 (1959). Later circuit court decisions follow this same pattern, *Dole v. Service Employees Union*, 950 F.2d 1456, 1461 (9th Cir. 1991); *Trade Waste Mgmt. Ass'n v. Hughey*, 780 F.2d 221, 238 (3d Cir.

1985), or recognize it explicitly, *Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980).

The District Court dismissed the *NAACP* case in this matter, reading that decision as only covering those organizations that could prove, on an as-applied basis, that they would be subject to substantial levels of harassment and retaliation. Addendum at 19. This, however, fails to read the entire line of cases stemming from *NAACP*. In later cases, the Supreme Court clarified that though the NAACP had a legitimate fear of harassment, it was not the NAACP's burden to prove the likelihood of harassment; rather it was the *government's* burden to prove the necessity of its access to private information. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6-7 (1971) ("When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest."); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974). In a free society, citizens' privacy is the presumption, and the burden is on the government to show its need — not on the citizens to show likely victimization if their names are exposed. *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960). *See McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). All organizations, popular and unpopular, are entitled to their privacy from government's prying eyes. *Gibson*, 372 U.S. at 555-56 ("all legitimate organizations are the beneficiaries of these protections"); *id.* at 569-70 (Douglas, J., concurring) ("Unpopular groups (*NAACP v. Alabama, supra*) like popular ones are protected. . . .[W]hether a group is popular or

unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter."); *Britt v. Superior Court*, 20 Cal. 3d 844, 854, 574 P.2d 766, 772 (1978); *Paralyzed Veterans of Am. v. McPherson,* No. C 06-4670 SBA (JL), 2007 U.S. Dist. LEXIS 64813, at *15 n.5 (N.D. Cal. Aug. 22, 2007) ("the non-offensiveness of an advocacy group does not diminish the degree of First Amendment protection it deserves.").

Again, the Plaintiffs stand in the same stead as the NAACP. They are legitimate, legal, nonprofit organizations that wish to speak out on issues. They are private associations of members and supporters who pool their resources to talk about the issues that are important to them and their communities, just like the NAACP. They are not campaign committees or political parties. Their membership lists should receive the same protection as the NAACP.

III. The right not to be compelled to speak protects plaintiffs.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Compelled speech happens when "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). When the government compels speech, "an individual must personally speak the government's message," which often times means "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47,

63 (2006). "[T]he Supreme Court has long treated compelled speech as abhorrent to the First Amendment." *Clifton v. FEC*, 114 F.3d 1309, 1313 (1st Cir. 1997).

"Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny [as other content-based laws]." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 642 (1994). Such content-based regulations of speech "are 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,* 135 S. Ct. 2218, 2226 (2015), *i.e.*, strict scrutiny. *Id*. at 2233 (Alito, J., concurring); *accord Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) ("In such a case, the state, to justify its law, would have to advance a compelling state interest and also show that the means chosen to accomplish that interest are narrowly tailored.").

The U.S. Supreme Court's recent decision in *NIFLA* is directly on point to the Plaintiffs' situation. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). There, the Court considered a California statute which compelled clinics licensed to serve pregnant women to post a notice about the women's abortion rights. Unlicensed clinics were required to post a notice that they were not licensed to provide medical services. NIFLA, a trade association for pro-life crisis pregnancy centers, sued to stop the compelled speech. *Id.* at 2368. The Court quickly concluded the required notices were compelled speech: "licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion —

the very practice that petitioners are devoted to opposing." *Id.* at 2371. Because the law changes the content of the clinics' speech, forcing them to post notices with statements they deeply oppose, the Court subjected the law to strict scrutiny. *Id.*

Compare California's notice statute to Rhode Island's requirement that Plaintiffs list their sponsorship and their top donors on the face of their advocacy messages. The requirement is a "government drafted script" about the sponsoring organization and donors behind the advertisement, whose exact wording is set out in statute. R.I. Gen. Laws § 17-25.3-3. Plaintiffs are compelled to alter their speech to incorporate the government's message just like the pregnancy centers were forced to alter their speech to incorporate the government's notice. Plaintiffs obviously are organizations that believe strongly in the right to privacy for citizens and would not include this information otherwise. *See Acevedo-Delgado v. Rivera*, 292 F.3d 37, 44 n.9 (1st Cir. 2002) ("strong opposition to an ideological cause heightens the burden imposed by compelling speech."). If anything, Plaintiffs' case is stronger because they are being forced to alter their own pure speech, while NIFLA's members were only required to post a government-provided, government-branded notice.

The District Court distinguished *NIFLA* by saying that the California law compelled the crisis pregnancy centers to speak a particular ideological message, whereas the Rhode Island law compels the Plaintiffs to speak a content-neutral, non-ideological message. Addendum at 21.

This makes two mistakes. First, the District Court misunderstands the Supreme Court's holdings on compelled speech. The Rhode Island statute is content-

based not because it compels the speaker to communicate a particular content, but because the regulation is triggered based on the content of the Plaintiffs' speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Rhode Island's independent-expenditure statute is obviously content-based: it only applies because of the topic discussed, namely because a message mentions a candidate for public office close in time to an election. R.I. Gen. Laws § 17-25.3-1(e). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. *Reed*, 576 U.S. at 163. Rhode Island's law makes just such a facial distinction, defining the class of regulated speech based on its particular subject matter (again, messages which mention a candidate for office).

Admittedly, in this sense *all* of Rhode Island's independent-expenditure statute is content-based and should be subject to strict scrutiny, including the disclaimer and disclosure provisions along with the compelled-speech provision. However, prior precedent from the Supreme Court and this Court have used exacting scrutiny when analyzing disclosure provisions. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011). That may well be wrong, at least as to media-based independent expenditures, for the reasons discussed above and because these are non-electoral organizations. *See Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1179 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing *en banc*); *Calzone v. Summers*, 2019 U.S. App. LEXIS 32776, *18-21 (8th Cir. Nov. 1, 2019) (Grasz, J.,

concurring). And it isn't entirely clear that there is a difference in the Supreme Court's mind between exacting and strict scrutiny. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015) (using the terms interchangeably). But those are primarily arguments for *en banc* or the Supreme Court itself.

Here, it suffices that the on-ad disclosure is subject to strict scrutiny for a second, independent reason: because compelled speech is content-*altering*. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988); *accord Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) ("A regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent."). And because it is content-altering, it is subject to strict scrutiny. *McConnell v. FEC*, 540 U.S. 93, 140 (2003) (succinctly describing holding of *Riley*: "treating solicitation restriction that required fundraisers to disclose particular information as a content-based regulation subject to strict scrutiny because it necessarily altered the content of the speech.").

This change in content is the problem, even if the mandated content is neutral, factual, or otherwise non-ideological. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[The] general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact"); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 822-23 (1996) (Thomas, J., dissenting); *accord*

Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Balt., 721 F.3d 264, 303 (4th Cir. 2013) (Neimeyer, J., dissenting) ("strict scrutiny applies even in cases where the compelled disclosure is limited to factually accurate or non-ideological statements."); *Minn. Voters All. v. City of Saint Paul*, No. 19-cv-0358 (WMW/HB), 2020 U.S. Dist. LEXIS 35423, at *11 (D. Minn. Mar. 2, 2020). *See Clifton*, 114 F.3d at 1314 ("there is a strong First Amendment presumption against content-affecting government regulation of private citizen speech, *even where the government does not dictate the viewpoint*." Emphasis added).

Riley is very on-point here. After listing a number of the Court's previous precedents against compelled speech, the Court says:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

487 U.S. at 797-98. The requirement to state during every advertisement the candidate's donors is just like the requirement to state during every solicitation the candidate's recent travel budget. It may be factual and even potentially relevant to the listener, but it is all the same compelled, content-altering speech regulation.

And here the standard of review really *does* make a difference. Though Plaintiffs believe the informational interest is insufficient to survive exacting

scrutiny in filed donor disclosure, here we have a requirement that the organization disclose the names of its donors within the content of the ad itself: it alters the content of the organization's speech in the messages it buys (in a way in which an informational filing is not really "speech"), and therefore is subject to strict scrutiny. And strict scrutiny means "presumptively unconstitutional." *Reed*, 576 U.S. at 163.

This is the essential difference between a regulation of "pure speech" and a regulation of "the mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. *See Doe*, 561 U.S. at 212-13 (Sotomayor, J., concurring); *accord ACLU of Nev.*, 378 F.3d at 992-94 ("Campaign regulation requiring off-communication reporting of expenditures made to finance communications does not involve the direct alteration of the content of a communication."). A regulation requiring filings with a state agency concerns the mechanics of the electoral process; a regulation requiring a speaker to read a state-mandated script affects pure speech, and therefore is subject to much greater scrutiny.

Second, the Plaintiffs believe that the on-ad disclosure of donors *does* betray their principles. Plaintiffs believe strongly in the privacy of their organizations and their donors. Amended Compl. ¶¶ 6, 40. Compelling them to speak this "government-drafted script" during messages they've paid for forces them to violate their deeply held, ideologically based commitment to privacy and philanthropic freedom. For organizations committed to limited government and personal freedom, saying the names of donors in your ad is abhorrent just as forcing pro-life groups to share factual information about abortion access is abhorrent.

IV. This Court's *National Organization for Marriage* and the Supreme Court's *Citizens United* decisions do not compel a different result.

Before rejecting the Plaintiffs' three arguments, the District Court accepted the campaign finance framework offered by the State as the appropriate lens for viewing this case. Addendum at 8. The court below relied primarily on two cases: the Supreme Court's decision in *Citizens United v. FEC* and this court's decision in *National Organization for Marriage v. McKee*.

Plaintiffs prevail for two powerful reasons. First, they are engaged in genuine issue advocacy, *not* electioneering communications.[6] Plaintiffs are not engaged in electioneering because their ads do not "support, oppose, promote, or attack" a candidate. *Vermont Right to Life Committee, Inc. v. Sorrell,* 758 F.3d 118, 122 (2nd Cir. 2014) (quoting Vermont's independent-expenditure statute). Instead, Plaintiffs are providing information for voters' consideration without supporting or attacking: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose — uninvited by the ad — to factor it into their voting decisions." *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 470 (2007) (plurality).

As such, their claim should be analyzed under the *NAACP* line of cases for issue groups, not *Buckley v. Valeo* and its progeny, which apply to campaigns, parties, and PACs. *See Ams. for Prosperity Found.*, 919 F.3d at 1180-81 (Ikuta, J., dissenting

[6] "[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell v. FEC,* 540 U.S. 93, 206 n.88 (2003); *see FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 469-70 (2007) (plurality).

from denial of rehearing *en banc*) (*Buckley* only applies in the "electoral context," otherwise the higher strict scrutiny standard set by *NAACP* and its progeny govern compelled disclosure of non-electoral, nonprofit activity).[7]

Second, even if the Court disagrees and believes that the *Buckley* cases govern, Plaintiffs still prevail. When the court considers a compelled disclosure regime (the second, *NAACP* count) in the electoral context, it must survive exacting scrutiny, which means it must be justified by a "sufficiently important government interest," and there must be a "substantial relation" tailoring the requirement to the interest. *McKee*, 649 F.3d at 55.[8] In *Vote Choice*, this Court identified three such compelling interests: "forced disclosure may be warranted when the spotlighted information enhances voters' knowledge about a candidate's possible allegiances and interests, inhibits actual and apparent corruption by exposing large contributions to public view, or aids state officials in enforcing contribution limits." *Vote Choice*, 4 F.3d at 32; *accord Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000).

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[7] Interestingly, the law at issue in *Buckley* contained a provision designed to force campaign-style disclosure onto non-electoral issue groups such as Common Cause, the American Conservative Union, the American Civil Liberties Union and the environmental groups. The DC Circuit struck it down, and this part of the opinion below was not appealed to the Supreme Court. *Buckley v. Valeo*, 519 F.2d 821, 877-78 (D.C. Cir. 1975). *See* Lilian BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and* Buckley v. Valeo*: A Response to Professor Hasen*, 48 UCLA L. REV. 285, 291 (2000).

[8] As noted above, Plaintiffs believe strict scrutiny is the appropriate standard and that no difference between strict and exacting scrutiny exists, but reserves these arguments for their further appeals.

A. Defendants have a single, weak interest justifying their invasion of Plaintiffs' privacy.

Of those interests identified in *Vote Choice*, two do not apply here: there are no contribution limits for Plaintiffs because they are not campaign committees, political action committees, or political parties; and Plaintiffs are not candidate committees, and thus pose no threat of quid pro quo corruption. *Citizens United*, 558 U.S. at 357; *Buckley v. Valeo,* 424 U.S. 1, 26 (1976).

Thus, there is only the voters' informational interest. That informational interest is the weakest of the government's interests in campaign finance. Consider *McIntyre*: "The 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. . . . Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement." 514 U.S. at 348-49. The Supreme Court generally treats the informational interest with less heft than the anti-corruption and anti-limit-avoidance interests. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); *McIntyre*, 415 U.S. at 348 n.11 (favorably quoting *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (1974)). A candidate's stance on issues is likely more relevant information to voters than who contributed to support an organization sharing such information. Lilian BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and* Buckley v. Valeo*: A Response to Professor Hasen*, 48 UCLA L. REV. 285, 303 (2000).

As Judge Noonan asked rhetorically, "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $ 76 to this cause. I must be against it!'" *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1036 (9th Cir. 2009) (Noonan, J., concurring). Judge Noonan's pithy observation is backed up by social science showing that donor information is substantially less useful information for voters than party affiliation and major endorsements. Dick Carpenter and Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: what does social science research tell us about the benefits and costs of campaign finance disclosure in non-candidate elections?*, 40 FORDHAM URB. L.J. 603, 618-23 (2012).

The informational interest is not an unlimited warrant for government to require any information from any person or organization that speaks about politics broadly defined. *Doe*, 561 U.S. at 206-08 (Alito, J., concurring). The government cannot successfully assert an informational interest in funders of issue advocacy; such an interest must be tightly tied to electioneering to be constitutional. *Citizens Union of N.Y. v. AG of N.Y.*, 408 F. Supp. 3d 478, 507-08 (S.D.N.Y. 2019).

Moreover, if the Court disagrees with Plaintiffs on the speaker privacy (*McIntyre*) count, then the informational interest in donor disclosure is significantly lessened because the sponsoring organization will be apparent on the face of every advertisement. Who sponsored the ad "will signify more about the candidate's loyalties than the disclosed identity of an individual contributor will ordinarily convey." *Vote Choice*, 4 F.3d at 35.

Considering these arguments, the Tenth Circuit would say of disclosure of express advocacy for ballot measures, "Perhaps [the Supreme Court's] view can be summarized as 'such disclosure has some value, but not that much.'" *Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010). The compelled disclosure of donors to Plaintiffs has even *less* value, as they seek to engage only in *non-express* advocacy. In short, Defendants have only one shaky pillar on which to base their invasion of Plaintiffs' privacy, and it's worth is "some, but not that much," and certainly not enough to prevail here.

B. The Rhode Island statute is not tailored to the government's actual interest.

i. Rhode Island's filing requirements are not sufficiently tailored.

To survive exacting scrutiny, the law must show a "substantial relation" or "substantial nexus" between the asserted interest and the ends used.[9] *McKee*, 649 F.3d at 56; *Vote Choice*, 4 F.3d at 32. Rhode Island's lack of tailoring is evident from the expansive scope of its statute compared to those in other states cited in the briefing. Rhode Island's statute, unlike Maine's, has no presumption or escape hatch. *McKee*, 649 F.3d at 43. Unlike Vermont's, it has no qualifier for "supports, promotes, opposes, or attacks" — mere mention of a candidate or referendum is sufficient. *Sorrell*, 758 F.3d at 122. Unlike the federal regulation, Rhode Island's statute covers general fund donors. *Independence Institute v. FEC*, 216 F. Supp. 3d 176, 185 (D.D.C.

[9] Circuit courts disagree about whether exacting scrutiny in the disclosure context requires narrow tailoring. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 (8th Cir. 2013) (discussing different circuit opinions).

2016). Finally, unlike the laws in Vermont and Delaware, it applies to both candidates and ballot initiatives. *Sorrell*, 758 F.3d at 122; *Del. Strong Families v. AG of Del.*, 793 F.3d 304, 307 (3d Cir. 2015).

The fact that Rhode Island covers general fund donors is especially problematic. As the D.C. Circuit has pointed out, donors to a general fund for an issue organization may not support the organization's issue advocacy even if they support the totality of the organization's activities. *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016). This reflects both the weakness of the governmental interest (because the government is providing voters with poor quality information, as many of the donors may not actually support the particular ad) and the weakness of the fit (because many of the donors being disclosed may not actually support the ad, but the law scoops them into disclosure anyway).

As a result, in a host of ways, Rhode Island's law is the most all-encompassing, most aggressive, most speech-regulating of all the examples offered by Defendants. It cannot stand.

ii. Rhode Island's on-ad disclosure requirements are not narrowly tailored.

The requirement to disclose the sponsor and top donors on the face of any advocacy message must survive not exacting scrutiny, but strict scrutiny. *Supra* at 15-16; *accord ACLU of Nev.*, 378 F.3d at 987 ("[N]othing in *McConnell* [*v. FEC*] undermines *McIntyre's* understanding that proscribing the content of an election communication is a form of regulation of campaign activity subject to traditional

strict scrutiny."). Strict scrutiny is "a standard imposing a strong presumption of invalidity." *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004).

The 9th Circuit's decision in *ACLU of Nevada* is an excellent guide to the appropriate resolution of this claim. There, the 9th Circuit draws a strong line between regulations that requiring filings and disclosures to agencies and regulations that require disclaimers and disclosures on the face of the communication itself. *ACLU of Nev.*, 378 F.3d at 987. The 9th Circuit described it as a "constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements." *Id*. at 991. This is so because "requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money. The former necessarily connects the speaker to a particular message directly, while the latter may simply expose the fact that the speaker spoke." *Id*. at 992 (9th Cir. 2004). This regulation is even more intrusive because it requires on-message disclosure not only of the speaker directly, but financial supporters behind the speaker.

The U.S. District Court for the Eastern District of California struck down a very similar on-ad donor-disclosure requirement in that state for several reasons related to tailoring. *Cal. Republican Party v. Fair Political Practices Comm'n*, No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS 22160, at *17 (E.D. Cal. Oct. 27, 2004).[10]

[10] A different federal district court judge later stated that *California Republican Party*

First, presuming the rest of the statute is constitutional, contributor information is already available online from the Defendants, such that adding it to the advocacy message itself significantly affects the content of the message while adding very little additional informational value. Journalists, opponents, and citizens can already access the same information at the board's website. *Id.* at *17.

Second, cutting the standard off at the top five donors "require[s] [advocacy] committees to single out on the face of the document [five] out of tens of thousands of contributors, many of whom also make sizeable contributions. This 'visual byte' provides a limited and potentially distorted picture of a [committee's] contributors." *Id*. at *17-18.

Third, the information may "mislead voters because these contributors may not endorse the message in the advertisement. Contributions are made to [committee's] for many reasons, including agreement with a [committee's] general philosophy, support of certain platform positions, or simply opposition to the competing party. The [committees] in turn use this funding to support a wide variety of activities, including dissemination of advertisements in support of, or opposition to, myriad candidates and ballot measures. It is not difficult to imagine a situation in which the contributor will be identified as a major donor on an advertisement

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was no longer good law because it used strict scrutiny, whereas in a later case the Supreme Court clarified that only exacting scrutiny was appropriate for disclosure requirements. *Yes on Prop B v. City & Cty. of S.F.*, No. 20-cv-00630-CRB, 2020 U.S. Dist. LEXIS 29200, at *7 n.4 (N.D. Cal. Feb. 20, 2020). However, this confuses disclosure laws that require filings with a state agency, which are subject to exacting scrutiny, with content-altering laws that require disclosure on the face of the advocacy message itself, which are subject to strict scrutiny under *NIFLA*.

containing a political message with which the contributor does not agree. To the contrary, it seems nearly inevitable in light of the plethora of positions advocated by the political parties in a given year." *Id*. at 18-21.

All of these concerns are equally present in the Rhode Island setting. If the Plaintiffs are unsuccessful on counts I and II (which were not at issue in the California case because the political party was engaging in direct advocacy), then their organizational and contributor records would already be available for anyone to access on the Board's website. Zeroing in on the top five contributors to the general fund potentially provides irrelevant information, especially for a national organization like Illinois Opportunity Project. Such a group's top five donors may be from different states, but its sixth largest donor may be from Rhode Island but won't be listed on the ad. And many donors may give for reasons unrelated to the particular ad. If a donor was motivated to give to support issue advocacy in another state, or because of Plaintiffs' work on another issue, or to support general office operations rather than issue-oriented advertisements, all this would be disclosed, yet none of it would provide Rhode Islanders with particularly interesting or relevant information. *See* Allison Hayward, "Junk Disclosure," Institute for Free Speech (Feb. 11, 2011), https://www.ifs.org/blog/junk-disclosure-a-series-on-stupid-disclaimers/. This Court should follow the *California Republican Party* decision in concluding that the on-ad disclosure flunks strict scrutiny.[11]

[11] *Citizens United's* paragraphs on on-ad disclaimer are not determinative. There, the Supreme Court only considered an on-ad statement that "____ is responsible for the content of this advertising" and that "the communication 'is not authorized by any

C. The Rhode Island statute is not automatically acceptable under existing binding precedent.

Within a campaign-finance framework, the case most directly relevant is this court's decision in *National Organization for Marriage v. McKee*.[12] The Maine statute at issue in *McKee*, however, is distinguishable on several points.[13]

First, and most importantly, the challenge in *McKee* was based on an entirely different legal theory. There, the plaintiffs argued that the statute was "unconstitutionally vague and overbroad." 649 F.3d at 40. The plaintiffs in *McKee* did not base their arguments on *McIntyre* or *NAACP*; neither case is even mentioned in the decision.[14] This is a new challenge, raising new legal theories, and though *McKee's*

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candidate or candidate's committee.'" 558 U.S. at 366. And it only considered them under exacting scrutiny as a disclosure requirement. *Id*. The Supreme Court did not consider or decide a compelled-speech challenge to the on-ad disclosure, and so its holding should not be read as deciding an argument that was not even presented to it. *See, e.g., Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020). And the state interests or narrow tailoring may be different for direct sponsor identification or independent-expenditure identification as opposed to on-ad donor disclosure.

[12] At the same time this Court decided *McKee*, it also decided a similar challenge to Rhode Island's campaign-finance statute, upholding it. *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 116 (1st Cir. 2011). One year later, the Rhode Island legislature amended its campaign-finance law to substantially expand the scope of regulation beyond that upheld in *Daluz*.

[13] To the extent that this Court concludes that *McKee* cannot be distinguished, Plaintiffs reserve the right to argue on appeal *en banc* or at the Supreme Court for it to be overturned.

[14] Of course, a statute that may be constitutional after challenge on one legal theory may be unconstitutional after challenge on a different legal theory. *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring). And a decision on one argument should not be read as deciding other possible claims that are not presented, briefed,

language may in some instances have relevance, its holdings as to one set of challenges are not dispositive of the issues presented in this case.

Second, the Maine statute only established a *presumption* that an issue ad that mentioned a candidate close to an election was an electioneering communication; the ad sponsor could rebut the presumption through an administrative hearing. *Id*. at 43. Rhode Island, by contrast, automatically and irrefutably classifies *all* such speech as electioneering communication, with no opportunity to show that an ad should not be so classified. One can suppose any number of circumstances when an advertisement may mention a candidate for office without intending electioneering; as just one example, if an American Legion post puts up fliers or sends out post-cards inviting people to attend a Veterans Day ceremony, and lists the local congressman as the keynote speaker — then the Legion is engaging in an electioneering communication and must register and disclose its donors. In Maine, such a group could prove its innocence to the relevant authorities; in Rhode Island no such option exists. This distinction significantly undermines Rhode Island's supposedly narrow tailoring.

Third, the Maine statute only applied to speech mentioning candidates. The Rhode Island statute covers speech about both candidates *and* ballot referenda. Though Illinois Opportunity Project wishes to share information about incumbents who may be candidates for reelection, Gaspee Project wishes only to share information relevant to ballot referenda. The government's interest in regulating

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argued, or decided by the district court. *See, e.g., Bernardo v. Johnson*, 814 F.3d 481, 484 n.5 (1st Cir. 2016); *De Jesus v. LTT Card Servs.*, 474 F.3d 16, 18 n.2 (1st Cir. 2007).

speech about ballot issues is lower than for speech about candidates. *McIntyre*, 514 U.S. at 356; *see Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999).

Fourth, the District Court overstates *McKee's* holding that there is no difference between express advocacy and issue advocacy. Addendum at 7. To the contrary, *McKee* recognizes: "The division between pure 'issue discussion' and 'express advocacy' of a candidate's election or defeat is a conceptual distinction that has played an important, and at times confounding, role in a certain set of modern Supreme Court election law precedents." *McKee* at 35. This Court took a pass on resolving any of these confounding concerns: "We ultimately conclude, however, that the distinction is not important for the issues addressed in this appeal" because of the specific vagueness and overbreadth challenges before the court. *Id*. Here, however, this distinction is front and center for the *NAACP* claim.

The other cases cited by the District Court are also distinguishable. The Vermont statute at issue in *Sorrell* defined an electioneering communication as one which "refers to a clearly identified candidate for office and that promotes or supports a candidate for that office or attacks or opposes a candidate for that office." 758 F.3d at 122. Thus, the hypothetical American Legion postcard would not have been covered by the Vermont statute because it did not "promote, support, attack, or oppose" a candidate. Many other forms of issue communication, such as a legislative scorecard that presented straightforward information on an incumbent's record, would also likely not fall within that statute's ambit. *See Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 U.S. Dist. LEXIS 170793, at *57 (D.N.J. Oct. 2, 2019)

(discussing Americans for Prosperity issue-based legislative scorecard). In Rhode Island, however, all these communications would be covered for merely *mentioning* an incumbent legislator's name. Finally, *Independence Institute v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016), *summarily aff'd* 137 S. Ct. 1204 (2017), required disclosure only for donors who supported the particular advertisement. *Id*. at 185. Rhode Island's law reaches donors of at least $1,000 to the organization's general fund, regardless of whether any of the money actually even paid for the particular advertisement. R.I. Gen. Laws § 17-25.3-1(h).

The statutes at issue in both *Sorrell* and *Delaware Strong Families* covered only candidates; neither case speaks to the Gaspee Project's issue advocacy focused on *referenda*. *Sorrell*, 758 F.3d at 122; *Del. Strong Families*, 793 F.3d at 307. Like *McKee* both *Sorrell* and *Delaware Strong Families* focused on overbreadth and vagueness — with no mention of *McIntyre* or *NAACP*. The Montana statute at issue in *Mangan* required registration and disclaimer, but did not necessarily mandate donor disclosure for issue advocacy groups. *N.A. for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1110 (9th Cir. 2019). In sum, the cases cited by Defendants all reviewed different types of challenges brought against laws that were more narrowly constructed than the all-encompassing Rhode Island statute at issue here. As such, none resolve the issues presented in this particular case.

Citizens United is the final case relied upon by the District Court and Defendants. *Citizens United* concerned "pejorative" ads nationwide promoting *Hillary: the Movie,* which was itself a critique of a sitting U.S. Senator running for

President. *Citizens United v. FEC*, 558 U.S. 310, 320 (2010). Citizens United, which produced the movie, also would pay to "make *Hillary* available [for free] on a video-on-demand channel called 'Elections '08.'" *Id.* The content of the movie "depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton." *Id.*

In short, *Hillary: the Movie* was political commentary about a political candidate.[15] Thus, it differs from Plaintiffs' advocacy in three substantial ways: (1) it was targeted to voters nationwide because she was a candidate. Plaintiff IOP's advocacy is targeted to citizens specific to their legislative districts because of their incumbent representatives. Plaintiff Gaspee Project's advocacy is targeted to citizens specific to their municipalities because of their referendum choices. If *Hillary: the Movie* had only run in New York, the Court may have seen it in a different light, as Clinton represented New York in the U.S. Senate at the time, and thus it could have been genuine issue advocacy specific to the legislator's district; (2) it was clearly "critical" and "pejorative," whereas Plaintiffs' advocacy will be primarily informational; and (3) perhaps most importantly, Citizens United argued the movie was issue advocacy, but nothing in the record indicated that it talked about a specific policy, vote, or legislative initiative as opposed to a candidate. Plaintiffs' advocacy, by contrast, will be specific to particular policy questions important in these

[15] Additionally, the Seventh Circuit identified the paragraph on disclosure as dicta, entitled to respect but not binding. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824-25 (7th Cir. 2014).

communities. For all these reasons, *Citizens United* does not support Defendants' motion.

Indeed, when the Seventh Circuit reviewed a Wisconsin statute which labeled all issue advocacy that made references to a candidate as an electioneering communication when run close in time to an election, the state regulators leaned heavily on the same paragraph from *Citizens United*. The Seventh Circuit replied: "It's a mistake to read *Citizens United* as giving the government 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." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014). The Seventh Circuit said such a rule regulating ads run in the 30/60-day preelection period would put "a serious chill on debate about public issues, which does not stop during election season." *Id.* at 837. The opinion then provides a number of examples of groups engaging in such advocacy; Judge Sykes could just as easily could have written, "A local free-market group wants to provide voters with information about comparative tax burdens in advance of a local referendum to raise taxes. Or a national labor-reform group wants to mail out fliers with a legislative scorecard on an important union-related bill." All would have fallen within the scope of Wisconsin's disclosure statute that the court enjoined.

Discussing a similar independent-expenditure statute in Minnesota, an *en banc* 8th Circuit similarly cautioned against allowing states to use *Citizens United* to "sidestep strict scrutiny by simply placing a 'disclosure' label on laws imposing the

substantial and ongoing burdens typically reserved for PACs[, as this] risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012). This Court should prevent similar mislabeling in this case.

D. The Court should also consider the burden on the Plaintiffs in this analysis.

The Supreme Court sometimes phrases "exacting scrutiny" as a balancing test, wherein "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe,* 561 U.S. at 196 (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)); *accord Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 204 (D. Me. 2009); *Moderate Party of R.I. v. Lynch*, 764 F. Supp. 2d 373, 377 (D.R.I. 2011). In other words, the test also requires the Court to consider the burden on the Plaintiffs' speech and association rights to weigh against the governmental interest.

While the state has one interest that is relatively weak, Plaintiffs and other issue-advocacy organizations and their members face burdens that are numerous, specific, and substantial: loss of privacy, fear of official retaliation, fear of activist harassment, greater difficulty at charitable solicitation, and an undermining of their messages' effectiveness. Such burdens are very compelling and outweigh the government's interest.

i. Plaintiffs and their members have a substantial interest in maintaining their privacy.

The first burden that Plaintiffs will suffer from the law is the loss of privacy. A desire for anonymity when speaking on issues may be motivated "by a desire to

preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 342. A business or association as well as an individual might wish to maintain that privacy. *ACLU of Nev.*, 378 F.3d at 990. "[D]epriving individuals of this anonymity is a broad intrusion" into their private affairs. *Id.* at 988. The protections of the *NAACP* cases apply to popular and unpopular groups alike because they all have an interest in privacy. *Gibson*, 372 U.S. at 556-57; *accord id.* at 569-70 (Douglas, J., concurring).

Privacy is no less important for being ephemeral. It "has always been a fundamental tenet of the American value structure." *California v. Byers*, 402 U.S. 424, 450 (1971) (Harlan, J., concurring) (quoting Robert McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 210). Privacy is an end in itself that courts must respect and protect. *United States v. Connolly*, 321 F.3d 174, 188 (1st Cir. 2003). Privacy interests are especially pronounced when private financial information is involved. *See Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 695 n.8 (9th Cir. 1995). "[O]ur nation values individual autonomy and privacy," *United States v. Valdes-Vega*, 738 F.3d 1074, 1076 (9th Cir. 2013), and the loss of that privacy is in itself a substantial burden.

ii. Plaintiffs and their members have a reasonable fear of official retaliation.

The second burden that Plaintiffs' members and contributors will suffer as a result of the law is the fear of official retaliation. *Buckley* recognized that compelled disclosure may lead to "threats, harassment, or reprisals from … Government officials." 424 U.S. at 293. Similarly, *McIntyre* said, "[t]he decision in favor of

anonymity may be motivated by fear of … official retaliation." 514 U.S. at 341. Companies or individuals could reasonably worry that their contributions to issue-advocacy groups could harm their standing with Rhode Island's decision-makers. *Nat'l Rifle Ass'n (NRA) v. City of Los Angeles*, 2:19-cv-03212-SVW-GJS, at *13 (C.D. Cal. Dec. 19, 2019) ("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. The legislative record establishes Doe's fear of hostility is well-founded."). There are a variety of formal and informal ways that officials could retaliate. Officials could look unfavorably on requests for meetings with the governor or other senior decision-makers, discount a company's lobbying position on legislation or regulations, and otherwise close the door to the governor's administration. That is a high price to pay for any person or entity that also wishes to financially support issue advocacy. Privacy and protection from disclosure is the best way to avoid the possibility of an official "enemies list." *See Lake v. Rubin*, 162 F.3d 113, 115 (D.C. Cir. 1998).

iii. Plaintiffs and their members have a reasonable fear of harassment from activists outside government.

Though official retaliation is likely more informal and *sub rosa*, the reality of public retaliation is very visible and very real for companies and individuals.

Harassment by those outside government was the fear at the heart of *NAACP*, where members who were exposed would face "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at

462-63. Thankfully there is no longer a segregated South with church bombings and burning crosses, but public hostility is still a characteristic of polarized politics. *Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, at *61. Unfortunately, "disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights." *Doe*, 561 U.S. at 207-08 (Alito, J., concurring).

Members and contributors may have a real fear that all these repercussions may follow from a decision to support issue advocacy. Newspapers are filled with examples from the past decade where publicly disclosed issue activities have led to substantial harassment.[16]

a. Disclosed donors suffer from economic retaliation.

Corporations that support issue-advocacy groups like Plaintiffs may find that disclosure forces them into unanticipated hot water. Target and Best Buy were subject to boycotts and brand damage when they gave money to a Chamber of Commerce affiliate that praised a candidate for governor in Minnesota who supported business-friendly policies. That candidate also supported traditional marriage. When their donations became public, they faced substantial backlash from customers and shareholders and were forced to apologize. *See* Taren Kingser & Patrick Schmidt,

[16] Though a motion to dismiss is limited to complaint itself, briefs at this stage may still rely on facts available in the public record. *O'Brien v. Deutsche Bank Nat'l Tr. Co.*, 948 F.3d 31 (1st Cir. 2020) ("Because this appeal arises from an order of dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, we draw the operative facts primarily from the complaint. We may also incorporate facts from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.").

Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure, 11 ELECTION L.J. 21, 29-32 (2012). "The Target episode and other instances of attempted consumer boycotts aimed at companies that donate to controversial causes suggest the potential for reputational risk and resulting harm to investors when a company's political donations become known." Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U.L. REV. 397, 427-428 (2015).

In another instance, retailers were protested for stocking carrots from a company whose owner donated to the Proposition 8 campaign in California. Maria Ganga, "Carrot firm's olive branch," L.A. Times (Oct. 9, 2008).[17] A Hyatt hotel and a self-storage company were also targeted for boycotts based on their owners' donations supporting Proposition 8. *Id*. Prominent executives also lost their jobs after their donations became public. Joel Gehrke, "Mozilla CEO Brendan Eich forced to resign for supporting traditional marriage laws," Wash. Examiner (April 3, 2014)[18]; Jesse McKinley, "Theater Director Resigns Amid Gay-Rights Ire," N.Y. Times (Nov. 12, 2008).[19]

Though these examples all related to fights over the definition of marriage, many may reasonably fear precipitating the wrath of organized labor thru such disclosure. A union-backed group in Washington State has targeted the board

[17] Available at https://www.latimes.com/archives/la-xpm-2008-oct-09-me-juice9-story.html.
[18] Available at https://www.washingtonexaminer.com/mozilla-ceo-brendan-eich-forced-to-resign-for-supporting-traditional-marriage-laws.
[19] Available at https://www.nytimes.com/2008/11/13/theater/13thea.html.

members for the free-market Freedom Foundation. *See, e.g., Will your next home purchase support the extremist right-wing movement in the Northwest? A shocking look at the dark side of Conner Homes*, Northwest Accountability Project (May 24, 2018), https://nwaccountabilityproject.com.

During the massive fight over the collective-bargaining reforms in Wisconsin, campaign donors to Governor Scott Walker were subject to union retaliation. Lindsay Beyerstein, "Massive Protest in Wisconsin Shows Walker's Overreach," Huffington Post (May 25, 2011)[20] (union encourages members to withdraw funds from a local bank, many of whose executives were campaign donors to the governor); *accord* Don Walker, "WSEU circulating boycott letters," Milwaukee J. Sentinel (March 30, 2011).[21] *See* Roy Wenzl, "Charles Koch, employees reveal e-mailed threats from past year," Wichita Eagle (Feb. 17, 2012).[22]

In another situation, a coalition of gun-control and climate-change groups targeted corporations that supported the American Legislative Exchange Council (ALEC), a 501(c)(3) organization, after internal documents listing donors were leaked to the media. Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What* Citizens United *Invites*, 68 RUTGERS L. REV. 1297 (2016). Over 80 companies have ended their financial support due to activist and shareholder pressure. *See id.* at n.382.

[20] Available at https://www.huffpost.com/entry/weekly-audit-massive-prot_b_835966.
[21] Available at http://archive.jsonline.com/newswatch/118910229.html.
[22] Available at https://www.kansas.com/news/article1086445.html.

In polarized times, taking sides on difficult topics in the public square often prompts a harassing response from activists of the opposite view. *See* Katie Rogers and Annie Karni, "Trump's Opponents Want to Name His Big Donors. His Supporters Say It's Harassment," N.Y. Times (Aug. 8, 2019).[23]

b. Disclosed donors may be subject to physical retaliation.

When Mayor Mitch Landrieu of New Orleans decided to remove the city's four Confederate monuments, he found himself blacklisted among construction companies. When he finally did secure a crane, opponents poured sand in the gas tank and interfered with its operation. According to the Mayor, "We were successful, but only because we took extraordinary security measures to safeguard equipment and workers, and we agreed to conceal their identities." Mitch Landrieu, IN THE SHADOW OF STATUTES: A WHITE SOUTHERNER CONFRONTS HISTORY, 2-3 (Penguin 2018). The owner of a contracting company that agreed to remove monuments and his wife received death threats, and his car was set ablaze in the parking lot of his office. *Id*. at 187. The City had to keep secret the identities of the companies that bid on the work and promised law enforcement protection to the winners. *Id*. at 192.

Sometimes, public hostility against people associated with controversial views is manifested as property crimes such as graffiti. *See, e.g.,* Savannah Pointer, "Man Arrested After Allegedly Vandalizing Chick-fil-A with Political Messages," Western J. (Oct. 3, 2018)[24]; Anna Almendrala, "Chick-Fil-A In Torrance, Calif., Graffitied With

[23] Available at https://www.nytimes.com/2019/08/08/us/politics/trump-donors-joaquin-castro.html.
[24] Available at https://www.westernjournal.com/man-arrested-vandalizing-chick-fil/.

'Tastes Like Hate,'" Huffington Post (Aug. 4, 2012).[25] Other times, crime is more destructive, such as arson or bombing. William K. Rashbaum, "At George Soros's Home, Pipe Bomb Was Likely Hand-Delivered, Officials Say," N.Y. Times (Oct. 23, 2018).[26]

c. Disclosed donors are subject to other forms of hostility.

In many instances, intimidation tactics stop short of physical violence but still cross legal and social lines from legitimate protest into illegitimate harassment, especially as the Internet adds a whole new level of possibilities for harassment. Posting donor information online, including one's home address, opens the door to harassment on a heretofore unimaginable scale, where an activist in one state can target a someone in minute detail. *Doe*, 561 U.S. at 207-08 (Alito, J., concurring); *accord Frank v. City of Akron*, 303 F.3d 752, 753 (6th Cir. 2002) (Boggs, J., dissenting from denial of rehearing *en banc*). Any donor may reasonably fear that activists who care passionately about the environment, labor rights, gun rights, or any other issue may target them over the Internet.

iv. Plaintiffs face a burden from the increased difficulty of their charitable solicitation.

Charitable solicitation is a form of free speech protected by the First Amendment. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611-12 (2003). The law makes it harder for Plaintiffs and any other issue-advocacy group to

[25] Available at https://www.huffpost.com/entry/chick-fil-a-graffiti-torrance_n_1738807.
[26] Available at https://www.nytimes.com/2018/10/23/nyregion/soros-caravan-explosive-bomb-home.html.

raise the funds they need to undertake their missions. *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 200 (D.R.I. 1993) (donor disclosure makes fundraising more difficult); *United States Servicemen's Fund v. Eastland,* 488 F.2d 1252, 1265-67 (D.C. Cir. 1973), *vacated on other grounds,* 421 U.S. 491 (1975); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc.*, 556 F.3d at 1036 (Noonan, J., concurring); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 379 (Tex. 1998); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1312 n.13 (S.D. Ala. 2002); *Nat'l Rifle Ass'n*, 2:19-cv-03212-SVW-GJS, at *18; *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968). Compelled disclosure makes people less likely to donate, and that increases Plaintiffs' difficulty in fundraising to support their mission.

v. The law will decrease the effectiveness of Plaintiffs' messages.

Finally, Plaintiffs fear the disclosure of their donors will decrease the effectiveness of their messages. Their members and supporters may fear that disclosure will make the messages their donations support less effective. "Nondisclosure could require the debate to actually be about the merits of the proposition on the ballot. Indeed, the Supreme Court has recognized 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.'" *Sampson*, 625 F.3d at 1256-57 (quoting *McIntyre*, 514 U.S. at 342); *accord Wash. Post*, 944 F.3d at 515 ("many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their

makers."). Social science backs up what courts have already concluded. Travis N. Ridout, et al., *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RESEARCH Q. 154 (2015) (viewers respond more positively to an ad from an unknown group than to an ad from a known group or campaign); *id*. at 163 (disclosure leading to news reports about a group's big donors reduces that group's message effectiveness).

Plaintiffs reasonably believe disclosure of their donors may distract from the effectiveness of their message. If people do not like political donors generally, or certain political donors in particular, they may fixate on the donors behind the speaker rather than the content of the message. Plaintiffs believe the content of the message itself, the power of the idea it conveys, should command our attention.

Plaintiffs, then, face multiple burdens from the law: their privacy is invaded, they have well-founded fears of official and activist retaliation, their charitable solicitation will be more difficult, and their messages may be less effective. All of this must be weighed against the one weak government interest offered.

CONCLUSION

From the Federalist Papers forward, this nation has enjoyed a long history of anonymous advocacy in the public square. Government regulations requiring authors to alter their pure speech — to identify themselves and now their financial supporters as well — are unconstitutional, even in the context of express electoral advocacy. And though government may compel donor disclosure on campaigns, it may not do so for issue advocacy organizations like the NAACP and these Plaintiffs. The District

Court's decision granting the motion to dismiss for failure to state a claim should be reversed.

Dated: December 10, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 12,763 words in 12-point proportionately spaced Century Schoolbook font.

/s/ Daniel R. Suhr
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2020, I electronically filed the foregoing Appellants' Brief 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
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ADDENDUM

Contents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE GASPEE PROJECT and ILLINOIS OPPORTUNITY PROJECT, Plaintiffs, v. DIANE C. MEDEROS, STEPHEN P. ERICKSON, JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM WEST, in their official capacities as members of the Rhode Island State Board of Elections, Defendants.	C.A. No. 1:19-CV-00609-MSM-LDA

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge.

The plaintiffs, the Gaspee Project and Illinois Opportunity Project, have filed this action under 42 U.S.C. § 1983 asserting that the disclosure and disclaimer provisions of Rhode Island's Independent Expenditures and Electioneering Communications for Elections Act, R.I.G.L. § 17-25.3-1 *et seq.* ("the Act"), are facially violative of the First and Fourteenth Amendments to the United States Constitution. The defendants, the members of the Rhode Island Board of Elections (collectively, "the Board"), have filed a Motion to Dismiss the plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the Act's requirements contested

here—the disclosure of donations in excess of a certain threshold, the disclaimer of sponsorship of electioneering, and the disclosure of top donors—are constitutionally permissible.

The avowed governmental purpose for these requirements is for an electorate that is informed and aware of who or what is spending money in its elections. It is for the Court to determine whether this state interest is sufficiently important to impose the Act's burdens on political speech and whether those burdens are substantially related to achieving that end.

The Court determines that the Act meets the applicable standard of constitutional review and, for the following reasons, GRANTS the Board's Motion to Dismiss (ECF No. 22).

I. BACKGROUND

A. The Rhode Island Independent Expenditures and Electioneering Communications Act

Passed in 2012, the Act makes clear that it is lawful for a person, business entity, or political action committee to spend money in elections. R.I.G.L. § 17-25.3-1(a). But any "independent expenditure" or "electioneering communication" where the money spent exceeds $1,000 within a calendar year, must be reported to the Board, along with certain specified information about the entities and the donors. R.I.G.L. § 17-25.3-1(b), (h). The Act defines these two key phrases as follows:[1]

[1] These definitions are found in a companion statute, the Rhode Island Campaign Contributions and Expenditures Reporting Act, R.I.G.L. § 17-25-3, but are expressly incorporated into the Act at issue here. *See* R.I.G.L. § 17-25.3-1(a) ("All terms used in this chapter shall have the same meaning as defined in § 17-25-3.").

- "Independent expenditure" is as any spending that "when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat of a referendum…." R.I.G.L. § 17-25-3(17).
- "Electioneering communication" is print, broadcast, cable, satellite, or electronic media communication that "unambiguously identifies a candidate or referendum" and is made "sixty (60) days before a general or special election or town meeting" or "thirty (30) days before a primary election" and "is targeted to the relevant electorate." R.I.G.L. § 17-25-3(16). A communication is "targeted to the relevant electorate" if it "can be received by two thousand (2,000) or more persons in the district the candidate seeks to represent or the constituency voting on the referendum." R.I.G.L. § 17-25-3(16)(i).

The required report to the Board for independent expenditures and electioneering communications where spending exceeds $1,000 in a calendar year must include the name, street address, city, state, zip code, occupation, and employer of the person responsible for the expenditure, the date and amount of each expenditure, and the year to date total. R.I.G.L. § 17-25.3-1(f). The report must also include a statement identifying the candidate or referendum that the expenditure is intended to promote along with an affirmative statement that the expenditure is not coordinated with the campaign in question. R.I.G.L. § 17-25.3-1(g). Additionally, the report must disclose the identity of all donors of an aggregate of $1,000 or more. R.I.G.L. § 17-25.3-1(h). This report must be filed after each time the person, business entity, or political action committee makes an independent expenditure or

electioneering communication of, in the aggregate, an additional $1,000. R.I.G.L. § 17-25.3-1(d).

The Act also requires independent expenditures and electioneering communications to include disclaimers stating who paid for the communication. R.I.G.L. § 17-25.3-3(a). This includes a message stating "I am ___ (name of entity's chief executive officer or equivalent), and ___ (title) of ____ (entity), and I approved its content." R.I.G.L. § 17-25.3-3(c). Additionally, tax-exempt organizations under § 501(c) of the Internal Revenue Code and other exempt nonprofits[2] that "make or incur or fund an electioneering communication for any written, typed, or printed communication" must include on the communication a list of their top five donors during the one-year period prior to the date of the communication. R.I.G.L. § 17-25.3-3(a).

Only money contributed for the purposes of independent expenditures or electioneering communications must be reported as such.[3] Should a donor prefer; donations can be expressly conditioned on non-use for independent expenditures or electioneering communications. R.I.G.L. § 17-25.3-1(i). The receiving entity must

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[2] These other exempt nonprofits are "any organization described in § 501(c)(4) of the Internal Revenue Code that spends an aggregate annual amount of no more than ten percent (10%) of its annual expenses or no more than fifteen thousand dollars ($15,000), whichever is less, on independent expenditures, electioneering communications, and covered transfers as defined herein and certifies the same to the board of elections seven (7) days before and after a primary election and seven (7) days before and after a general or special election." R.I.G.L. § 17-25-3(21).

[3] The Act also applies to "covered transfers" but the plaintiffs only are concerned with independent expenditures and electioneering communications. *See* ECF No. 20 ¶¶ 18-24.

then certify that the donation will not be used as such and the donor "will not be required to appear in the list of donors." R.I.G.L. § 17-25.3-1(i)(2); *see also* R.I.G.L. § 17-25.3-3(a) (exempting opt-out donors from being listed as a top five donor).

B. The Plaintiffs' Amended Complaint

The plaintiffs are 501(c)(4) organizations that plan to spend thousands of dollars on Rhode Island elections. (ECF No. 20 ¶¶ 7, 8, 28, 29.) The plaintiffs wish to do so anonymously, without the required disclosures, because they "are concerned that compelled disclosure of their members and supporters could lead to substantial personal and economic repercussions" such as "harassment, career damage, and even death threats for engaging and expressing their views in the public square." *Id.* ¶ 35.

The plaintiffs therefore have filed suit against the Board under 42 U.S.C. § 1983, asserting the following:

Count I: That R.I.G.L. § 17-25.3-1(h), requiring the plaintiffs to disclose to the Board their members and supporters contributing $1,000 or more, is a violation of their First Amendment right to organizational privacy;

Count II: That R.I.G.L. §§ 17-25.3-1, 3, requiring the plaintiffs to disclose their sponsorship, is a violation of their First Amendment right to anonymity in their free speech; and

Count III: That R.I.G.L. § 17-25.3-3, requiring the plaintiffs to disclose their top five donors, violates their First Amendment right against compelled speech.

The plaintiffs confirmed at oral argument that their claims are a facial challenge to the constitutionality of the Act. *See also* ECF No. 20 at 14 (plaintiffs' Amended Complaint seeking to enjoin the Board from enforcing the Act "against Plaintiffs *and other organizations* that engage solely in issue advocacy") (emphasis

added). A facial challenge is not limited to a plaintiff's particular case and can only succeed where the plaintiff establishes "that no set of circumstances exists under which the Act would be valid." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *United States v. Salerno*, 481 US. 739, 745 (1987); *see also Naser Jewelers, Inc. v. City Of Concord, N.H.*, 513 F.3d 27, 33 (1st Cir. 2008) ("In a facial attack case, it is plaintiff's burden to show that the law has no constitutional application."). A facial challenge requires from a court a cautious approach because it "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

II. MOTION TO DISMISS STANDARD

To survive a motion to dismiss, a complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court assesses the sufficiency of the plaintiff's factual allegations in a two-step process. *See Ocasio-Herandez v. Fortuno-Burset*, 640 F.3d 1, 7, 11-13 (1st Cir. 2011). "Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz v. Republican State Leadership Comm.*, 699 F.3d 50, 55 (1st Cir. 2012). "Step two: take the complaint's well-pled (*i.e.,* non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* "The relevant question … in assessing plausibility is not whether the complaint makes any particular factual allegations but, rather, whether 'the complaint warrant[s]

dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 55 (1st Cir. 2013) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007)).

III. DISCUSSION

There are two preliminary issues the Court must decide to guide its constitutional analysis of the Act. First, woven into their Amended Complaint and their arguments on this motion, the plaintiffs seek to make a constitutional distinction between "express advocacy" and "issue advocacy." (The plaintiffs consider themselves "issue advocacy" organizations.) Express advocacy "encompasses 'communications that expressly advocate the election or defeat of a clearly identified candidate,' *Buckley*, 424 U.S. at 80, while [issue advocacy communications] are communications that seek to impact voter choice by focusing on specific issues." *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015). "[T]he core premise is that regulation of speech expressly advocating a candidate's election or defeat may more easily survive constitutional scrutiny than regulation of speech discussing political issues more generally." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 52 (1st Cir. 2011) (hereinafter, "*NOM*").

But, "in light of *Citizens United* [*v. Federal Election Com'n*, 558 U.S. 310 (2010)] … the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *Id.* at 54-55. *See also Del. Strong Families*, 793 F.3d at 308 ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely

repudiated by *Citizens United*."); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 132 ("The Supreme Court has consistently held that disclosure requirements are not limited to 'express advocacy' and that there is a not a 'rigid barrier between express advocacy and so-called issue advocacy."); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 178 (D.D.C. 2016) (holding that "the Supreme Court and every court of appeals to consider the question" had "largely, if not completely, closed the door to the … argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate"), *summarily aff'd*, 137 S. Ct. 1204 (2017).

The second preliminary issue is the question of which framework the Court should employ to guide its analysis—or more specifically, what line of precedents this Court ought to follow. The Board argues that cases that considered disclosure and disclaimer laws similar to the Act at issue here, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), *Citizens United*, 558 U.S. at 310, and their progeny in the lower courts, provide the most recent, useful, and directly controlling analysis. The plaintiffs take a different tack. They instead challenge the Act under three different theories of First Amendment jurisprudence: the right to speaker privacy, the right to organizational privacy, and the right against compelled speech.

As explained below, the Court is persuaded that the Board's analysis is directly applicable and therefore will first analyze the Act under that framework before discussing the plaintiffs' distinguishable theories.

A. The Act Is Subject To An Exacting Scrutiny.

"Generally, '[l]aws that burden political speech are 'subject to strict scrutiny'"—that is, they must be narrowly tailored to further a compelling government interest." *Nat'l Assoc. for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019) (quoting *Citizens United*, 558 U.S. at 340). But while "[d]isclaimer and disclosure requirements may burden the ability to speak, … they 'impose no ceiling on campaign-related activities … and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. Federal Election Com'n*, 540 U.S. 93, 201 (2003)). Because disclosure and disclaimer laws are a "less restrictive alternative to more comprehensive regulations of speech," they are subject to "exacting scrutiny," a test that requires the Court to consider whether the law bears a "substantial relation" to a "sufficiently important" governmental interest. *Id.* at 366-67. *See also Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011) (reviewing a First Amendment challenge to Rhode Island's campaign finance disclosure laws under the "exacting scrutiny" test). Compared to strict scrutiny, exacting scrutiny is a lower standard for the government to meet. It does not require the government to select the least restrictive means of achieving its goal. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 309 n.4 (3d Cir. 2015).

B. Is the Act Supported By A Sufficiently Important Governmental Interest?

The Board argues that the governmental interest at issue, an informed electorate, is achieved by the disclosure of who is financing political speech. This is

an interest the Supreme Court has determined is sufficiently important with respect to disclosure and disclaimer laws. *See Citizens United,* 558 U.S. at 371 (holding that "disclosure permits citizens to react to the speech of corporate entities in a proper way … [and] to make informed decisions and give proper weight to different speakers and messages"); *Buckley*, 424 U.S. at 66-67 ("[D]isclosure 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.").

Indeed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *NOM*, 649 F.3d at 57 (quoting *Buckley*, 424 U.S. at 14-15). This informational interest, however, "is not limited to informing the choice between candidates for political office." *Id.* "As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages." *Id.* The First Circuit has held that the informational interest is particularly important today:

> "In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the 'marketplace of ideas' has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus 'enables the electorate to make informed decisions and give proper weight to different speakers and messages.'"

Id. (quoting *Citizens United*, 558 U.S. at 371).

The Board argues that the Act furthers the state's informational interest by requiring the disclosure of independent expenditures in excess of $1,000 within a calendar year and electioneering communications in excess of $1,000 in the sixty days

before a general election and thirty days before a primary election. The required reports detail who and what is spending the money, including who donated $1,000 or more, providing the public with an understanding "as to where the political campaign money comes from." *See Buckley*, 424 U.S. at 66-67.

The Act also furthers the state's "equally compelling interest in identifying the speakers behind politically oriented messages" by requiring those who spend more than $1,000 during that window to disclose their sponsorship on all electioneering communications, including—for 501(c)(3) and exempt nonprofits only—their top five donors. *See NOM*, 649 F.3d at 57; R.I.G.L. § 17-25.3-3. The state's informational interests are also advanced by the Board's publication of these disclosures on its website. *See NOM*, 649 F.3d at 58 (noting that the state interest in disclosure is evidenced by internet publication).

The plaintiffs, on the other hand, argue that the state only has a "single, weak interest justifying their invasion of Plaintiffs' privacy." But nothing in the binding Supreme Court or First Circuit precedents indicate that the informational interest is weak; in fact, they express the opposite. *NOM*, 649 F.3d at 57 (describing the interest in "identifying the speakers behind politically oriented messages" as "compelling"); *see also Citizens United*, 558 U.S. at 371 (holding that "disclosure permits citizens … to make informed decisions and give proper weight to different speakers and messages"). Moreover, the plaintiffs' position depends upon there being a distinction

between issue advocacy and express advocacy.[4] As noted, however, the First Circuit has held that "the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *NOM*, 649 F.3d at 54-55.

The Court finds that the State's interest in an informed electorate is sufficiently important to justify the Act's disclosure and disclaimer requirements under the exacting scrutiny standard. *See Citizens United*, 558 U.S. at 368-69. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

C. Is the Act Substantially Related to the State's Sufficiently Important Governmental Interest?

The Court finds that the Act's disclosure and disclaimer requirements are substantially related to the State's interest, serving as a balanced means of informing Rhode Island voters about who is spending large sums of money in elections. First, the Act is only triggered when certain expenditure thresholds are met, ensuring that "the government does not burden minimal political advocacy." *Nat'l Ass'n for Gun Rights, Inc.*, 933 F.3d at 1118. For independent expenditures, the Act applies when expenditures exceed $1,000 in a calendar year; for electioneering communications, the Act applies when expenditures exceed $1,000 in the sixty days before a general

[4] Specifically, the plaintiffs argue that the State cannot successfully assert an informational interest in who may fund issue advocacy; such an interest must be tightly tied to electioneering (that is, promoting or attacking a specific candidate) to be constitutional.

or special election or thirty days before a primary election.[5] R.I.G.L. §§ 17-25.3-1(b); 17-25-3(16). The $1,000 threshold also applies to individuals whose donations meet or exceed that limit during an election cycle. R.I.G.L. § 17-25.3-1(h).

The timing limitations also narrow the Act's reach. "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." *Citizens United*, 558 U.S. at 334. As noted, for independent expenditures, only those that exceed $1,000 within a calendar year trigger the reporting requirement. R.I.G.L. § 17-25.3-1(b). For electioneering communications, the Act only covers communications made sixty or thirty days before an election, depending on the election type. R.I.G.L. § 17-25-3(16) The Court therefore agrees with the Board that Rhode Island's disclosure and disclaimer obligations for electioneering communications are "tied with precision to specific election periods," and are "therefore carefully tailored to pertinent circumstances." *Nat'l Ass'n for Gun Rights*, 933 F.3d at 1117.

Similarly, the Act is tailored only to those electioneering communications likely to influence Rhode Island elections. That is, those that "can be received by two

[5] The actual dollar amount of a monetary threshold is afforded "'judicial deference to plausible legislative judgments' as to the appropriate location of a reporting threshold" and such "legislative determinations" are upheld "unless they are 'wholly without rationality.'" *NOM*, 649 F.3d at 60 (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32-33 (1st Cir. 1993)).

thousand (2,000) or more persons in the district the candidate seeks to represent or the constituency voting on the referendum." R.I.G.L. § 17-25-3(16)(i).

Moreover, the Act only applies to speech used in Rhode Island elections. By definition, for instance, "electioneering communication" is any "print, broadcast, cable, satellite, or electronic media communication … that unambiguously identifies a candidate or referendum." R.I.G.L. § 17-25-3(16). Both "independent expenditure" and "electioneering communication" are carefully limited to exclude news stories, commentaries, editorials, candidate debates or forums, and communications made by a business entity to its members or employees. R.I.G.L. §§ 17-25-3(16)(ii); 17-25-3(i).

Importantly, the Act provides an opt-out for donors who wish to support an organization but want to remain anonymous. Donors can designate that their contributions are not to be used for independent expenditures or electioneering communications and, after the person or entity certifies as such, "the donor will not be required to appear in the list of donors." R.I.G.L. §§ 17-25.3-1(i)(1),(2). Thus, the Act narrowly targets only those donations specifically intended to be used for election communications.

It is noteworthy that the Act here is similar to Maine's independent expenditure and disclaimer statute, which the First Circuit held to be constitutional under the exacting scrutiny test. *See NOM*, 649 F.3d at 61. The Maine statute, similarly to the Act's requirements for independent expenditures, required reporting to the state election commission for any entity that "receives contributions or makes expenditures of more than $5000 annually" for the purpose of "promoting, defeating

or influencing" a candidate's election. *Id.* at 58. Additionally, the Maine statute required reporting for "anyone spending more than an aggregate of $100 for communications expressly advocating the election or defeat of a candidate." *Id.* at 59. These provisions, the First Circuit held, "pose[] no First Amendment concerns." *Id.* Indeed, the First Circuit noted that "the information that must be reported under this subsection is … 'modest,' and it bears a substantial relation to the public's 'interest in knowing who is speaking about a candidate shortly before an election.'" *Id.* at 60 (quoting *Citizens United*, 558 U.S. at 369). Maine's disclaimer requirements, like the Act here, were "minimal" and "unquestionably constitutional," calling only for a statement of whether the message was authorized by a candidate and disclosure of the name and address of the person who made or financed the communication. *Id.* at 61.

The plaintiffs attempt to distinguish *NOM* on four grounds: that the Maine statute was challenged under different legal theories (vagueness and overbreadth); that the Maine statute provided an administrative hearing to rebut the presumption that an ad was an electioneering communication; that the Act covers general fund donors; and that the Maine statute applied only to candidates and not ballot referenda.

None of these grounds is persuasive as the holding in *NOM* did not depend upon the legal theory advanced. The *NOM* court applied an exacting scrutiny analysis to the law at issue, holding that "each of the challenged statutes pass muster under the First Amendment." *Id.* at 61. This Court does the same. In any event, the

plaintiffs' alternate legal theories, as discussed below, are not applicable to the instant dispute.

Further, the factual differences that the plaintiffs highlight are not fatal to the Act's constitutionality. The *NOM* holding did not depend on the possibility of an administrative hearing or that the statute did not mention ballot referenda. The Act here provides clear definition on what is, and is not, an independent expenditure or electioneering communication, properly tailoring the Act to the state's informational interest. *See* §§ 17-25-3(16), (17). Moreover, while the Act may cover general fund donors, it provides a method by which a donor can contribute anonymously. R.I.G.L. §§ 17-25.3-1(i)(1),(2).

The plaintiffs also attempt to distinguish *Citizens United*, but this falls flat because it depends again on a constitutional distinction in the express/issue advocacy dichotomy, which the Court holds is irrelevant to this analysis. *See NOM*, 649 F.3d at 54-55.

In all, the Court finds that the Act is substantially related to the state's interest of an informed electorate. The disclosure and disclaimer obligations are carefully limited to apply only to those who spend a significant sum to use traditional methods of political communication that are likely to reach a wide swath of the electorate during specific time periods.

D. The Plaintiffs' Constitutional Theories

1. The Right to Speaker Privacy

The plaintiffs assert that the Act's disclosure and disclaimer requirements are

an unconstitutional violation of speaker privacy, relying primarily on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In that case, the plaintiff, acting alone, violated an Ohio campaign-finance statute when at a public meeting she handed out fliers in opposition to an upcoming referendum without her name and address on the literature. *Id.* at 337. The Ohio statute at issue, which the Supreme Court held was an unconstitutional restriction on political speech, was in fact a blanket prohibition on all anonymous campaign literature. *Id.* at 338.

McIntyre is distinguishable, however, because it included an absolute fiat against the distribution of *any* campaign literature that did not contain the name and address of the person issuing the literature, which in effect "indiscriminately outlaw[ed]" anonymous political speech. *See id.* at 357. Here, the Act does not prohibit individual anonymous literature; it instead requires certain disclosures from organizations that meet specific contribution thresholds.[6]

Moreover, *McIntyre* does not provide the most recent framework under which to analyze the Act's disclosure and disclaimer requirements. It is noteworthy that *Citizens United* "upheld the federal disclaimer provision without so much as mentioning *McIntyre*, noting that while disclaimer provisions 'burden the ability to speak,' they do not limit speech." *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399 (D. Vt. 2012), *aff'd*, 758 F.d 118 (2d Cir. 2014).

[6] The plaintiffs also point to *Blakeslee v. St. Sauveur*, 51 F. Supp. 3d 210 (D.R.I. 2014), another case, like *McIntyre*, that involved an absolute regulation of "pure speech," prohibiting all anonymous political pamphleteering.

2. The Right to Organizational Privacy

The plaintiffs assert that the Act, because it would require them to disclose donors of $1,000 or more, unconstitutionally infringes on their right to organizational privacy. The plaintiffs rely upon *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), where the Supreme Court struck down an Alabama state court order that required the NAACP to reveal the names and addresses of its members. In that case, the NAACP "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." 357 U.S. at 462. The Court therefore held that "disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it…." *Id.* at 462-63.

Here, the plaintiffs argue that they are "in the same stead as the NAACP." (ECF No. 23-1 at 14.) "They are private associations of members and supporters who pool their resources to talk about issues … [and] speak on issues important in their communities, just like the NAACP." *Id.* They allege that they are concerned about disclosing their sponsors because "[a]cross the country, individual and corporate donors and staff of political candidates and issue causes are being subject to harassment, career damage, and even death threats." (ECF No. 20 ¶ 35.) Further, they believe disclosure "will lead to declines in their membership and fundraising,

impacting their organizations' bottom lines and ability to carry out their missions." *Id.* ¶ 36.

While the plaintiffs do make these conclusory allegations about a concern of reprisals, they are "a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018). But more importantly, it is undisputed that the plaintiffs levy a facial challenge to the Act. A Court considering a facial challenge must determine if the statute at issue is unconstitutional in any application, not because of a party's particular circumstance. *See Hightower v. City of Boston*, 693 F.3d 61, 77-78 (1st Cir. 2012) (holding that for the plaintiff's "facial attack to succeed" he "would have to establish … that the statute lacks any 'plainly legitimate sweep'"). Only when a plaintiff makes an "as applied" constitutional challenge—that is, "to demonstrate that the statute, as applied to *his or her particular situation*, violates" constitutional principles—would the Court consider a plaintiff's individual burden. *Hall v. INS*, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) (emphasis added). Having found that the Act meets the standard of exacting scrutiny, the plaintiffs' facial challenge cannot "establish that no set of circumstances exist under which the Act would be valid." *See Salerno*, 481 U.S. at 745.

The result may be different had this been an as-applied challenge. Indeed, the Supreme Court, in rejecting a facial challenge to a disclosure requirement of the Bipartisan Campaign Reform Act of 2002, did not "foreclose possible future

challenges to particular applications of that requirement" if a plaintiff could show a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threat, harassment, or reprisals from either Government officials or private parties." *McConnell v. Federal Election Com'n*, 540 U.S. 93, 197-98 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 310.

3. The Right Against Compelled Speech

The plaintiffs also argue that the Act's on-ad, top-five donor disclaimer requirement is a form of compelled speech in violation of the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"). The plaintiffs principally rely upon *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (hereinafter, "*NIFLA*"). There, the Supreme Court struck down a California statute that required medical clinics licensed to serve pregnant women to post a notice about their abortion rights. The Court concluded that the required notices were compelled speech: "licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing." *Id.* at 2371.

The plaintiffs likewise call Rhode Island's requirement to list their top donors a "government drafted script." Thus, they claim, the Act compels them to alter their speech to incorporate the government's message just like the pregnancy centers were forced to alter their speech to incorporate the government's notice.

NIFLA (and the strict scrutiny analysis it requires) is distinguishable, however, because the speech compelled in that case was content based. Here, the disclosure requirements are content neutral. *See Schneiderman*, 882 F.3d at 382 ("Disclosure requirements are not inherently content-based nor do they inherently discriminate among speakers."); *see also Mass. Fiscal Alliance v. Sullivan*, 2018 WL 5816344 at *3 (D. Mass. Nov. 6, 2018) (holding that a disclosure law passed constitutional muster and that "[*NIFLA*] does not command a different result, given the content-neutral nature of the [disclaimer] requirement in this case and the minimal burden placed on plaintiff's speech"). The plaintiffs do not need to alter the meaning of their political messaging or support a position contrary to their views. They, and all similarly situated organizations, must disclose their top five donors in order to meet the state's sufficiently important interest in informing the electorate of who "money comes from." *Buckley*, 424 U.S. at 66-67. Under the exacting scrutiny standard by which the Act is properly analyzed, the minimally burdening disclosure and disclaimer requirements are substantially related to the state's informational interest.

IV. CONCLUSION

The Act's disclosure and disclaimer requirements are justified by the sufficiently important state interest of an informed electorate and any burdens on political speech that they may cause are substantially related to that state interest. The plaintiffs, therefore, cannot state a plausible claim that the Act is facially

violative of First and Fourteenth Amendment rights. The Board's Motion to Dismiss the plaintiffs' Amended Complaint (ECF No. 22) therefore is GRANTED.

IT IS SO ORDERED.

Mary S. McElroy
United States District Judge
August 28, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE GASPEE PROJECT, et al.
Plaintiff,

v. 1:19-cv-00609-MSM-LDA

DIANE C. MEDEROS, et al.
Defendant.

JUDGMENT

This action came to be heard before the Court and a decision has been rendered. Upon consideration whereof, it is now hereby ordered, adjudged and decreed as follows:

Pursuant to this Court's order entered on August 28, 2020, this civil action is hereby dismissed in accordance with Fed. R. Civ. P. 58.

It is so ordered.

August 28, 2020

By the Court:

/s/ Hanorah Tyer-Witek.
Clerk of Court