No. 20-1944

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GASPEE PROJECT;
ILLINOIS OPPORTUNITY PROJECT

Plaintiffs – Appellants

v.

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

Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND IN CASE NO. 1:19-cv-00609, JUDGE MARY S. MCELROY

BRIEF OF THE DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The operative Amended Complaint ("Complaint") filed by Plaintiffs-Appellants, the Gaspee Project and the Illinois Opportunity Project ("Plaintiffs"), asserted three counts pursuant to 42 U.S.C. § 1983, each alleging that certain aspects of Rhode Island's election expenditure disclosure statute facially violate the First and Fourteenth Amendments of the United States Constitution. The District Court granted Defendants-Appellees' ("Defendants")[1] Motion to Dismiss with prejudice and entered final judgment dismissing the Complaint on August 28, 2020. On September 28, 2020, Plaintiffs filed notice of this appeal, over which this Court has jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly concluded that election expenditure disclosure laws that "simply require disclosure of information by those engaging in political speech" are subject to exacting scrutiny, as this Court held in *National Organization for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) ("*NOM*"), rather than the more demanding strict scrutiny standard.

[1] Defendants-Appellees are Diane C. Mederos, Stephen P. Erickson, Jennifer L. Johnson, Richard H. Pierce, Dr. Isadore S. Ramos, David H. Sholes, and William E. West, each sued in their official capacities only as members of the Rhode Island State Board of Elections ("Defendants").

2. Whether the District Court correctly held that Rhode Island's commonsense election disclosure laws, which in pertinent part only require disclosure of certain limited information by individuals or entities expending over $1,000 on independent expenditures or electioneering communications, are substantially related to important government interests and are therefore constitutional.
3. Whether the District Court was correct to determine, as this Court did in *NOM*, that it does not constitute compelled speech or violate the First Amendment to simply require that certain independent expenditures or electioneering communications include a disclaimer regarding who is responsible for the communication.
4. Whether the District Court correctly rejected Plaintiffs' attempt to differentiate between issue and express advocacy, which "the Supreme Court has explicitly rejected" in this same context. *NOM*, 649 F.3d at 54.

INTRODUCTION

Both this Court and the United States Supreme Court have recently upheld election expenditure disclosure requirements that are strikingly similar to the commonsense requirements contained in Rhode Island's statute. Indeed, in *NOM*, this Court already expressly considered and rejected many of the very same legal arguments raised by Plaintiffs in this appeal. Plaintiffs' Brief invites this Panel to do no less than overturn this Court's 2011 decision in *NOM* and ignore the United States Supreme Court's repeated affirmation of the constitutionality of disclosure requirements, including in *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 371 (2010). The decisions in both *NOM* and *Citizens United* were grounded in a broad judicial recognition of the government's important interest in ensuring that the electorate charged with voting on this nation's future can identify the people and interests behind the often-ambiguously-named entities spending large sums of money attempting to sway their votes. There is absolutely no reason to abandon *stare decisis* or forsake the government's ability to safeguard an informed electorate.

Plaintiffs' Brief portrays Rhode Island's disclosure requirements as ushering in a parade of horribles, but the sweeping, hyperbolic rhetoric of Plaintiff's Brief bears little resemblance to the actual text and modest requirements of the statute. Plaintiffs — seemingly recognizing that their position has already been rejected by

recent, directly applicable, binding precedent — rely on inapplicable jurisprudence. Tellingly, much of the legal "authority" cited in Plaintiffs' Brief consists of dissenting and concurring opinions, and non-binding caselaw from other jurisdictions. The District Court's decision, which eschewed Plaintiffs' invitation to follow irrelevant caselaw and instead closely followed this Court's decision in *NOM*, should be affirmed.

STATEMENT OF THE CASE

A. Undisputed Factual Background

Plaintiffs' lawsuit challenges commonplace, commonsense Rhode Island laws that require disclosure of limited information regarding certain election-related expenditures. The challenged Independent Expenditures and Electioneering Communications Act ("Act") was passed in 2012, after *Citizens United*, when the Rhode Island Legislature re-vamped its campaign disclosure regime. The Act promotes transparency in elections by enabling voters to identify who is responsible for independent expenditures and electioneering communications over $1,000. *See* R.I. Gen. Laws § 17-25.3-1, *et seq.*

The Act begins by noting, consistent with *Citizens United*, that it is lawful for a person, business entity, or political action committee to spend money in elections. R.I. Gen. Laws § 17-25.3-1(a). However, any person or entity aggregately expending over $1,000 "within a calendar year" making independent

expenditures or electioneering communications must provide the Board of Elections with certain information. *See* R.I. Gen. Laws § 17-25.3-1(b).[2] An "independent expenditure" is an expenditure which, "when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat or a referendum[.]" R.I. Gen. Laws § 17-25-3(17). An "electioneering communication" is any message that unambiguously identifies a candidate or referendum and is made either within sixty (60) days before a general election or thirty (30) days before a primary election. R.I. Gen. Laws § 17-25-3(16).

For both independent expenditures and electioneering communications where a person or entity aggregately expends over $1,000 in a calendar year, they must submit a campaign finance report that includes the name, street address, city, state, zip code, occupation, and employer of the persons responsible for the expenditure; the name, street address, city, state, and zip code of the person receiving the expenditure; the date and amount of each expenditure; and the year to date total. R.I. Gen. Laws § 17-25.3-1(f). The report must also include a statement identifying the candidate or referendum that the expenditure is intended to promote (or defeat), along with an affirmative statement that the expenditure is not coordinated with the campaign in question. R.I. Gen. Laws § 17-25.3-1(g). This

[2] The Act also applies to "covered transfers[,]" but Plaintiffs do not challenge that aspect of the statute. *See* Appendix ("Appx."), p.4-7(¶¶18, 25-27).

information must be provided 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. Gen. Laws § 17-25.3-1(d).

Further, the report must identify all donors of an aggregate of $1,000 or more within the current election cycle, unless the person, business entity, or political action committee has established a separate campaign-related account for independent expenditures and electioneering communications. R.I. Gen. Laws § 17-25.3-1(h). Notably, a person, business entity, or political action committee and a donor may mutually agree that the donation will not be used for any independent expenditures or electioneering communications, in which case the donor will not be listed in any report required by the Act. R.I. Gen. Laws § 17-25.3-1(i).

The Act also requires independent expenditures and electioneering communications to include disclaimers indicating who paid for the communication. R.I. Gen. Laws § 17-25.3-3(a). This includes the familiar end of message disclaimer "I am . . . (name of entity's chief executive officer or equivalent), . . . (title) of . . . (entity), and I approved its content." R.I. Gen. Laws § 17-25.3-3(c)(2). For 501(c) and exempt nonprofits as defined in the statute, the disclaimer must also disclose the top five persons or entities making the largest aggregate donations during the twelve-month period before the date of the

communication. *See* R.I. Gen. Laws § 17-25.3-3(a). As with the reports discussed above, disclaimers need not list any donors who have opted-out of having their donations utilized for independent expenditures or electioneering communications. *Id.*

The statute further narrows the scope of these provisions by referencing a companion statute that exempts various types of communications from the definition of independent expenditure or electioneering communication. *See* R.I. Gen. Laws § 17-25.3-1(a) ("All terms used in this chapter shall have the same meaning as defined in § 17-25-3."). "Independent expenditure[s]" expressly do not include news stories, commentaries, editorials, candidate debates or forums, or any communications made by any business entity to its members or employees, or communications over the internet except in certain circumstances. R.I. Gen. Laws § 17-25-3(17)(i)(A)-(D).

"Electioneering communication(s)" include only those mediums typically used in elections: "print, broadcast, cable, satellite, or electronic media communication[.]" R.I. Gen. Laws § 17-25-3(16). The definition only applies to communications that "unambiguously identif[y] a candidate or referendum" within the narrow time frame of "sixty (60) days before a general or special election" and "thirty (30) days before a primary election[.]" *Id.* The definition is further confined in that the communication must be "targeted to the relevant electorate[,]"

which means "the communication can be received by two thousand (2,000) or more persons" in the relevant constituency. R.I. Gen. Laws § 17-25-3(16)(i). As with independent expenditures, the definition of electioneering communication expressly does not include news stories, commentaries, editorials, candidate debates or forums, or any communications made by any business entity to its members or employees, or communications over the internet except in certain circumstances. R.I. Gen. Laws §§ 17-25-3(16)(ii)(A)-(D).

In sum, Rhode Island's carefully crafted Act is targeted at traditional election communications, and only if the amount expended exceeds $1,000. Moreover, any donor who spends over $1,000 but does not wish to be included in disclosures may simply opt out of having their donations used for independent expenditures or electioneering communications.

B. Procedural History

In 2019, Plaintiffs filed a lawsuit seeking to upend Rhode Island's election disclosure laws, nearly eight years after the Legislature implemented these carefully-crafted requirements and after numerous elections had already been conducted with them in place. On March 6, 2020, Plaintiffs filed the operative Amended Complaint. Appx., p.1. Both Plaintiffs pled that they are 501(c)(4) organizations and intended to spend over $1,000 on sending "paid issue-advocacy communications by mail to thousands of Rhode Island voters in advance of the fall

2020 elections." Appx., p.7-8(¶¶28, 29).[3] Specifically, Gaspee Project asserted that it intended to send mailings regarding pending local referenda that will impact property taxes in order to "inform voters of the impact of the referenda on taxes." *Id.* ¶28. Illinois Opportunity Project asserted that it intended to send mailings providing "information to voters about how their legislators voted on a bill expanding the power of government unions (2019 Senate Bill 712)." *Id.* ¶29. As this case was dismissed in August, 2020, the record does not indicate whether Plaintiffs actually spent any money on the fall 2020 elections and, if so, whether they met the elements necessary to implicate the Act. Appx., p.8(¶30).[4]

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[3] The Complaint was unclear regarding whether Plaintiffs' lawsuit pertains to independent expenditures as well as electioneering communications. Plaintiffs' Complaint and Brief both emphasize that they wish to engage in so-called "issue advocacy," rather than "express advocacy" that is expressly for or against a candidate or referendum. As such, it appears Plaintiffs' lawsuit does not pertain to independent expenditures, which are defined as communications that expressly advocate for or against a candidate or referenda. *See* R.I. Gen. Laws § 17-25-3(17). Curiously though, Plaintiffs' Complaint also claimed that the Act classifies "issue advocacy communications" as "an independent expenditure," Appx., p.6(¶25), and Plaintiffs' Brief asserts that "[i]f any person or organization spends at least $1,000 on electioneering communications in a calendar year, it becomes an independent-expenditure entity." Plaintiff's Brief ("PB"), p.2. It is unclear what Plaintiffs mean because electioneering communications are distinct from independent expenditures and nothing in the Act turns an entity that makes an electioneering communication into an "independent expenditure entity." Defendants raised this issue in the District Court and in an abundance of caution will continue to address both independent expenditures and electioneering communications in this Brief.

[4] The passage of the fall 2020 election, combined with Plaintiffs' failure to plead any more than a highly generalized intention to engage in similar expenditure

Plaintiffs do not contest that they are free under the Act to engage in making independent expenditures and electioneering communications, but assert that they wish to do so anonymously, vaguely speculating, without asserting any factual allegations, that they could face "harassment, career damage, and even death threats" for their advertisements. *Id.* (¶34). Plaintiffs' Complaint included three counts respectively challenging the aspects of the Act that require: 1) disclosure of certain donors who donate over $1,000 and who do not opt out of having their donation used for independent expenditures or electioneering communications; 2) disclosure of entities that expend over $1,000 on "issue advocacy"; and 3) disclaimers providing the names of the top five donors on certain "issue advocacy" communications. Appx., p.10-13. Plaintiffs' "pre-enforcement" facial[5] challenge sought to have the Court to declare R.I. Gen. Laws § 17-25.3 unconstitutional to the extent it requires the disclosures identified in the three counts of the Complaint, and to enjoin Defendants from enforcing the Act with regard to entities engaged in "issue advocacy." *Id.*, p.13-14.

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activities in the future, make this appeal moot. However, Defendants recognize that this Court has previously determined that election-related lawsuits sometimes implicate mootness exceptions and will focus their arguments on the merits.

[5] The prayer for relief reaches "beyond the particular circumstances of these plaintiffs." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *see* Appx., p.14 (asking the Court to enjoin enforcement of the Act "against Plaintiffs *and other organizations* that engage solely in issue advocacy") (emphasis added). Plaintiffs also confirmed at oral argument that their lawsuit is a facial challenge. *See* Appx., p.36 ("It is a facial challenge, your Honor[.]").

Defendants filed a Motion to Dismiss, asserting that Plaintiffs' facial challenge failed as a matter of law. Defendants cited directly relevant binding precedent from this Court and from the Supreme Court rejecting the same arguments raised by Plaintiffs in this case. A hearing followed on July 21, 2020. Subsequently, on August 28, 2020, the District Court entered a Memorandum and Order ("Order") granting Defendants' Motion to Dismiss and entered judgment in favor of Defendants. *See* Addendum to Plaintiffs' Brief ("Add.").

The Order began by noting that "plaintiffs confirmed at oral argument that their claims are a facial challenge to the constitutionality of the Act" and that "it is plaintiff's burden to show that the law has no constitutional application." Add., p.5-6. The District Court then followed this Court's precedent and rejected Plaintiffs' attempt to distinguish between "issue advocacy" and "express advocacy." *Id.*, p.6-7. The District Court likewise adhered to First Circuit precedent and determined that exacting scrutiny is the applicable standard of review. *Id.*, p.9. Having addressed these preliminary issues, the District Court determined that the Act is supported by a sufficiently important government interest in informing the electorate about where political campaign money comes from and identifying the speakers behind political messages. *Id.*, p.9-12. Next, the District Court concluded that the Act, which is "similar to Maine's independent expenditure and disclaimer statute, which the First Circuit held to be constitutional

under the exacting scrutiny test [in *NOM*]," is substantially related to that important interest. *Id.*, p.12-16. Finally, the District Court concluded that the chief cases and legal theories relied upon by Plaintiffs are distinguishable and inapplicable. *Id.*, p.16-20. The District Court accordingly held that Plaintiffs' case failed as a matter of law.

SUMMARY OF ARGUMENT

Plaintiffs want to spend over $1,000 on Rhode Island elections without identifying themselves or disclosing who or where the money came from. In their venture, the Gaspee Project has teamed up with the Illinois Opportunity Project, a national group that has brought similar lawsuits seeking to dismantle other state election disclosure and disclaimer laws. Appx., p.6-7(¶27). The irony is palpable; the Gaspee Project, which bills itself as a group that seeks "to return government to the people[,]" is attempting to overturn a democratically-passed state statute so its members can anonymously spread messages without fear of being connected to them. *Id.* ¶26.

Directly applicable binding precedent demonstrates the Act's constitutionality. As much as Plaintiffs implore this Court to diverge from precedent, the caselaw is clear that election disclosure laws like the one at issue here must be reviewed under the less-demanding exacting scrutiny standard. *Infra* p.16-19. Applying that standard, this Court and the Supreme Court have

definitively held that the government has important interests in ensuring that voters have access to information regarding campaign-related advertisements directed to them. *Infra* p.20-25. Comparing this case to binding precedent demonstrates that Rhode Island's statute is substantially related to those important interests. *Infra* p. 26-33.

Plaintiffs' argument that the Act's disclaimer requirements constitute compelled speech is contrary to both caselaw and commonsense. *Infra* p.33-38. Plaintiffs' speculation that they may experience harm because of the Act is just that: speculation ungrounded in any alleged facts and irrelevant to this facial challenge. *Infra* p.38-41. Although Plaintiffs attempt in vain to avoid directly relevant precedent by arguing that their case involves "issue advocacy" rather than "express advocacy," that argument too has already been expressly rejected by binding precedent. *Infra* p.41-46. Plaintiffs' attempt to paint this case as being about the disclosure of membership lists or the right to anonymously hand out pamphlets is off-base; try as they might to analogize their case to other lines of jurisprudence, Plaintiffs cannot escape the directly applicable First Circuit and Supreme Court election disclosure caselaw that demonstrates the constitutionality of Rhode Island's commonsense, commonplace disclosure laws. *Infra* p.46-54.

STANDARD OF REVIEW

Appellate courts review the granting of a motion to dismiss de novo. *Segrets, Inc., v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 61 (1st Cir. 2000). To withstand a motion to dismiss, a "complaint must allege 'a plausible entitlement to relief.'" *ACA Fin. Gaur. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). These "minimal requirements are not tantamount to nonexistent requirements. The threshold may be low, but it is real – and it is the plaintiff's burden to take the step which brings his case safely into the next phase of the litigation." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). A court does not need to credit bald assertions or unverified conclusions in a complaint. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

In *Neitzke v. Williams*, the Supreme Court recognized that "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law":

> This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."

490 U.S. 319, 326 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

ARGUMENT

Rhode Island is just one of many states that require disclosures regarding who and what is spending money in its elections. These disclosure laws have a robust, long-standing, and constitutionally sanctioned history. *See, e.g.*, *Citizens United*, 558 U.S. at 371; *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

Consistent with *Citizens United*, Plaintiffs are free to engage in political speech in Rhode Island. What the Act prohibits, and what upsets Plaintiffs, is that they may not spend large sums of money attempting to influence Rhode Island voters about important election issues while remaining in the shadows and not letting voters know who is speaking to them. Plaintiffs may prefer to deliver their election-related advertisements anonymously, but this Court and the Supreme Court have both recognized that the government has an important interest in ensuring that voters have the information they need to assess paid political messages seeking to influence an election. Under the Act, Plaintiffs can speak all they want, and say what they want, but Rhode Island voters get to see the man behind the curtain.

A. The Act is Presumed to Be Constitutional

The starting place for this Court's analysis is the principle that "[a]ll laws regularly enacted by the Rhode Island legislature are presumed to be constitutional." *Driver v. Town of Richmond ex rel. Krugman*, 570 F. Supp. 2d 269, 275 (D.R.I. 2008) (citation omitted). Thus, "as with all state statutes, this statutory provision is presumed to be constitutional." *Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 38 (1st Cir. 2007); *see also Chestnut v. Magnusson*, 942 F.2d 820, 823 (1st Cir. 1991) ("State legislation is presumed to be valid."). As the Seventh Circuit noted:

> just like the state courts, we owe deference to the [state] legislature. Therefore we must first presume this statute to be constitutional, and if possible, interpret it so as to preserve its constitutionality. . . . [E]very presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality. Thus, the plaintiffs must . . . overcome the legal presumption that the Act is constitutional.

Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998) (internal citations and quotations omitted).

B. The Act Must Be Reviewed Under the Less-Demanding Exacting Scrutiny Standard

As a threshold matter, Plaintiffs urge this Court to apply strict scrutiny to some or all aspects of the Act, but acknowledge that their argument has already been rejected by binding precedent.

As this Court has recognized, "the Supreme Court has distinguished in its First Amendment jurisprudence between laws that restrict 'the amount of money a person or group can spend on political communication' and laws that simply require disclosure of information by those engaging in political speech." *NOM*, 649 F.3d at 55 (quoting *Buckley*, 424 U.S. at 19). Rhode Island's Act is decidedly and undisputedly in the latter category. The challenged provisions here, like the Maine provisions in *NOM*, "are all effectively disclosure laws, in that they require the divulgence of information to the public or the [Board], but do not directly limit speech." *Id.* at 54. In *NOM*, this Court noted how "unlike contribution and expenditure limits," disclosure laws like Rhode Island's Act are a "less restrictive alternative to more comprehensive regulations of speech." *Id.* (quoting *Citizens United*, 558 U.S. at 369). Indeed, "[f]ar from restricting speech, electioneering disclosure requirements reinforce democratic decisionmaking by ensuring that voters have access to information about the speakers competing for their attention and attempting to win their support." *Nat'l Assoc. for Gun Rights v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019).[6] This is why the Supreme Court has described

[6] Notably, in asserting that the Act's disclaimer requirement (Count III) impacts speech, Plaintiffs' Brief acknowledges that the Act's reporting requirements (Counts I and II) do not implicate speech. *See* PB, p. 22 ("an informational filing is not really 'speech'"); *id.* ("a regulation requiring a speaker to read a state-mandated script affects pure speech. . . . a regulation requiring filings with a state agency concerns the mechanics of the electoral process"). Moreover, Plaintiffs' attempt to subject the disclaimer requirement to higher scrutiny fails because just

disclosure requirements as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley,* 424 U.S. at 68. "For that reason, disclosure requirements have not been subjected to strict scrutiny, but rather to 'exacting scrutiny, which requires a substantial relation between the disclosure requirement and a 'sufficiently important' governmental interest.'" *NOM*, 649 F.3d at 54 (quoting *Citizens United*, 558 U.S. at 366-67).

As with the disclosure law at issue in *NOM*, Rhode Island's Act should be reviewed under exacting scrutiny rather than strict scrutiny. *See id.* at 56 ("Because Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply. Accordingly, we review each of the laws at issue under the 'exacting scrutiny' standard applicable to disclosure requirements.").

Even Plaintiffs acknowledge that binding precedent defeats their argument and requires applying exacting scrutiny. *See* PB, p.19 ("prior precedent from the Supreme Court and this Court have used exacting scrutiny when analyzing disclosure provisions"); Appx., p.36 ("So for the first two claims [not regarding 'compelled speech'], I think we recognize that [*NOM*] compels exacting

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like the reporting requirements, the disclaimer provision requires disclosing information about the speaker; it does not restrict speech. *See also infra* p.33-38.

scrutiny."). Despite acknowledging that the Supreme Court and this Court require applying exacting scrutiny, Plaintiffs proffer "[t]hat may well be wrong." PB, p.19. In support of their proposition that this Court and the Supreme Court "may well be wrong," Plaintiffs cite a dissenting opinion from the Ninth Circuit and a concurring opinion from the Eighth Circuit. *See id.* p.19-20. It goes without saying that Supreme Court precedent controls even if Plaintiffs or other outliers disagree with it. Seemingly recognizing that their argument regarding applying strict scrutiny, much like Plaintiffs' other arguments, is directly contrary to First Circuit precedent, Plaintiffs note that their arguments "are primarily arguments for en banc or the Supreme Court itself." *Id.*, p.20.[7]

[7] Plaintiffs also seem to question whether there is a difference between exacting and strict scrutiny. *See* PB, p.24 n.8 ("Plaintiffs believe strict scrutiny is the appropriate standard and that no difference between strict and exacting scrutiny exists, but reserves [sic] these arguments for their further appeals.") The caselaw makes clear that whereas strict scrutiny requires that a law be narrowly tailored to achieve a compelling governmental interest, exacting scrutiny only requires that a law be substantially related to an important government interest. *See Citizens United*, 558 U.S. at 340. The very fact that the First Circuit in *NOM* and the Supreme Court in *Citizens United* felt it necessary to analyze whether exacting or strict scrutiny applied clearly demonstrates that the two standards are not the same. Plaintiffs assert that the Court in *Williams-Yulee v. Florida Bar* treated exacting and strict scrutiny interchangeably, but the Court's discussion actually recognized the difference and expressly distinguished between the less-demanding standard applied in the *Buckley* line of disclosure cases and the higher strict scrutiny standard, which the Court deemed appropriate to apply because the Canon at issue in that case limited actual speech. 575 U.S. 433, 443-44 (2015). It is also telling that Plaintiffs are already arguing in anticipation of "their further appeals."

C. The Act Is Substantially Related to Important Government Interests

Plaintiffs' generalized rhetoric ignores the actual modest provisions of the challenged Act, which advances Rhode Island's important interests in an informed electorate. For the Act to even apply, over $1,000 must be aggregately expended on independent expenditures or electioneering communications. R.I. Gen. Laws § 17-25.3-1. Moreover, the names of specific donors need only be disclosed if the donor spends over $1,000, and even then, the donor can avoid inclusion in disclosures simply by opting out of having their donation used for an independent expenditure or electioneering communication. R.I. Gen. Laws § 17-25.3-1(i). Additionally, the specific definitions of independent expenditure and electioneering communication further limit the applicability of the Act.

1. Rhode Island Has an Important Government Interest in an Informed Electorate

Turning to consider the first exacting scrutiny factor — whether there is an important government interest — the Supreme Court has "recognized the goal of 'provid[ing] the electorate with information as to where political campaign money comes from and how it is spent' to be such a 'sufficiently important' governmental interest capable of supporting a disclosure law." *NOM*, 649 F.3d at 57 (quoting *Buckley,* 424 U.S. at 66).

The Supreme Court has noted that groups running election-related advertisements sometimes are "hiding behind dubious and misleading names."

Citizens United, 558 U.S. at 367. In *McConnell v. Federal Election Commission*, the Supreme Court, in the course of upholding laws limiting expenditures, noted how some entities were seeking "to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor)[.]" 540 U.S. 93, 197 (2003). The Court noted how "[g]iven these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." *Id.*

In *Citizens United*, the Court partially overturned *McConnell* and struck down a federal statute barring independent corporate expenditures for electioneering communications. Crucially, the Court's decision in that regard went hand in hand with the second part of the *Citizens United* decision, which vigorously reaffirmed the constitutionality and importance of disclosure requirements. *Citizens United*, 558 U.S. at 365. *Citizens United* did not discount the concerns cited in *McConnell* regarding big spending by anonymous opaque entities. Rather, *Citizens United* emphasized that robust and effective disclosure requirements are the answer to that concern and are one of the reasons justifying the Court's decision to strike down spending limits. *See Citizens United*, 558 U.S. at 370; *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 138

(2d Cir. 2014) (holding that donor "disclosure requirements simply address[] the situation where, for example, a corporation creates an entity with an opaque name—say, 'Americans for Responsible Solutions'—contributes money to that entity, and has that entity engage in speech on its behalf. By requiring that entity to meet reporting and organizational requirements, Vermont can ensure that the underlying speaker is revealed.").

As *Citizens United* noted, "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizens United*, 558 U.S. at 370. Similarly, the Court emphasized that thanks to disclosure requirements, "[s]hareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Id.* The Court envisioned a campaign finance system that "pairs corporate independent expenditures with effective disclosure" and noted that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Id.* at 371.

Citing *Citizens United* and *McConnell*, this Court in *NOM* noted that "[t]he Court's more recent decisions have continued to recognize the importance of this informational interest." *NOM*, 649 F.3d at 57. In a robust line of cases dating

back to *Buckley*, the Supreme Court has "tied the government's interest in the dissemination of information to the functioning of the electoral process, noting that '[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.'" *Id.* (quoting *Buckley,* 424 U.S. at 66) ("The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."); *see also Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 299-300 (1981) ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.").

Additionally, "the informational interest is not limited to informing the choice between candidates for political office":

> As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages. 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."

NOM, 649 F.3d at 57 (quoting 558 U.S. at 371); *see First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 791-92 (1978) ("the people in our democracy are entrusted

with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."); *see also id.* at 792 n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."). As the Supreme Court put it in *Citizens United*, "the public has an interest in knowing who is speaking about a candidate shortly before an election." 558 U.S. at 369; *see also Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 841 (7th Cir. 2014) (describing the government's interest in election disclosure as "well-accepted"); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1005 (9th Cir. 2010) ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.").

Rhode Island's Act requiring reporting and disclaimers related to independent expenditures and electioneering communications of over $1,000 squarely implicates the above-described important governmental interests. As the District Court concluded, "[t]he 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.'" Add., p.11 (quoting *Buckley*, 424 U.S. at 66-67). Further, the District Court found that

"[t]he 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)[] and exempt nonprofits only—their top five donors." *Id.* (citing *NOM*, 649 F.3d at 57). Moreover, the District Court determined that "[t]he state's informational interests are also advanced by the Board's publication of these disclosures on its website [http://www.elections.ri.gov/-finance/publicinfo/]." *Id.* (citing *NOM*, 649 F.3d at 58) (noting that the state interest in disclosure is evidenced by internet publication). In response to Plaintiffs' contention that the government's interest in providing information about election-related communications to voters was "weak," the District Court astutely observed that "nothing in the binding Supreme Court or First Circuit precedents indicate that the informational interest is weak; in fact, they express the opposite." *Id.*

As the District Court concluded, "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." *Id.*, p.12 (citing *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.* (citing *Citizens United*, 558 U.S. at 371).

2. The Act is Substantially Related to Rhode Island's Important Interests

As the District Court determined, "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." Add., p.12. The campaign finance reports and disclaimers required by the Act are directly related to Rhode Island's important interest in promoting "dissemination of information about those who deliver and finance political speech" to the electorate so voters can know "where political campaign money comes from and how it is spent." *NOM*, 649 F.3d at 41, 57 (quoting *Buckley*, 424 U.S. at 66). Similarly, these campaign finance reports and disclaimer requirements allow voters to "identify[] the speakers behind politically oriented messages." *Id*. This Court, citing *Citizens United*, noted the importance of citizens being able to know the identity and affiliations of a speaker disseminating a campaign message so that they may properly contextualize the message they are receiving. *See id*. The Act does just that by enabling voters to know the identity of the entities and individuals behind the expensive advertisements they receive about election-related issues.

Although Plaintiffs' Brief largely ignores this fact, the Act's disclosure requirements are only triggered by certain types of election-related communications and only when the threshold requirements specified in the statute

are met. *See supra* p.20. Even electioneering communications and independent expenditures will only trigger the Act's disclosure requirements if over $1,000 is expended. *See* R.I. Gen. Laws § 17-25.3-1.

Further, a communication only constitutes an "electioneering communication" if it occurs in a specified timeframe shortly before an election and is "targeted to the relevant electorate," meaning if the communication 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. *See* R.I. Gen. Laws § 17-25-3(16). Rhode Island's disclosure obligations for electioneering communications are thus "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; *see also Citizens United*, 558 U.S. at 334 ("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."); *Sorrell*, 758 F.3d at 134 (upholding disclosure provision that was "explicitly limited in time and scope"). In fact, Rhode Island's sixty- and thirty-day time limits for general and primary elections, respectively, are identical to a Delaware statute the Third Circuit upheld. *See Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 307 (3d Cir. 2015).

Moreover, there is absolutely nothing in the Act that requires any entity to turn over its membership lists as Plaintiffs portray it. Rather, the disclosure requirements only apply to any donors who donate over $1,000. *See* R.I. Gen. Laws § 17-25.3-1(h). And even then, any donor may donate as much as they wish and avoid disclosure by opting out of having their contribution be used for an independent expenditure or electioneering communication. *See* R.I. Gen. Laws § 17-25.3-1(i). These tailored limits ensure that "the government does not burden minimal political advocacy[.]" *Nat'l Assoc. for Gun Rights*, 933 F.3d at 1118.

The exact requirements contested here – the disclosure of donations over a certain threshold, the disclaimer of sponsorship of electioneering communications, and the disclosure of top donors – have already been upheld in other circuits, including this one. *See, e.g.*, *NOM*, 649 F.3d at 59 ("Maine's independent expenditure reporting provision poses no First Amendment concerns."); *Delaware Strong Families*, 793 F.3d 304 (upholding Delaware election law that required disclosure of groups that spent more than $500 annually and individual contributors of more than $100); *Sorrell*, 758 F.3d 118 (upholding Vermont election law that required reporting for groups that spent $1,000 or more in a two year election cycle and also required identification of certain donors); *Nat'l Assoc. for Gun Rights*, 933 F.3d 1102 (upholding Montana election law that required disclosure of groups that spent more than $250); *Family PAC v. McKenna*, 685

F.3d 800 (9th Cir. 2012) (upholding Washington election law that required disclosure of contributors to organizations who donated more than $25).

Although the spending amount thresholds may vary somewhat from state to state, courts "have granted 'judicial deference to plausible legislative judgments' as to the appropriate location of a reporting threshold, and have upheld such legislative determinations 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)). Here, where the monetary threshold generally equals or exceeds other states' upheld disclosure requirements, there can be no doubt that the legislative choice is not "wholly without rationality." *Id.*

In *NOM*, this Court reviewed Maine's statute, which obligated anyone spending more than an aggregate of $100 for communications expressly advocating the election or defeat of a candidate to report the expenditure to the Commission, and determined that "the modest amount of information requested is not unduly burdensome and ties directly and closely to the relevant government interests." *Id.* at 59 (quoting *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000)). This Court concluded that those "reporting requirements are well tailored to Maine's informational interest[.]" *Id.* at 58.

This Court likewise upheld the aspect of Maine's statute that did not pertain to express advocacy and that "requir[ed] a report of any expenditure over $100 for communications naming or depicting a clearly identified candidate within a set period prior to any election." *Id.* at 59-60 (noting that disclosure requirements bear a substantial relationship to the public's "interest in knowing who is speaking about a candidate shortly before an election even" if the communication does not expressly advocate for or against that candidate); *see also Citizens United*, 558 U.S. at 369 ("the public has an interest in knowing who is speaking about a candidate shortly before an election"). This Court noted how the Supreme Court upheld "in *Citizens United* a similar provision of federal election law that required disclosure in connection with expenditures for electioneering communications," and how the statute upheld by the Supreme Court in *Citizens United* was even less tailored than the Maine statute because it did not offer an opportunity to rebut the presumption that a communication made shortly before an election and identifying a candidate was intended to influence the election. *NOM*, 649 F.3d at 60; *see also Daggett*, 205 F.3d at 466 (upholding $50 disclosure threshold and finding that "the reporting requirements have a 'relevant correlation' or a 'substantial relation' to the government interests; the modest amount of information requested is not

unduly burdensome and ties directly and closely to the relevant government interests").[8]

Plaintiffs' various attempts to distinguish the Act from relevant precedent fall flat because any differences between the Act and the disclosure statutes at issue in those cases are immaterial.[9] For instance, Plaintiffs assert the Act "has no qualifier for 'supports, promotes, opposes, or attacks' — mere mention of a candidate or referendum is sufficient," PB, p. 27 (citing *Sorrell*, 758 F.3d at 122), but the same was true for the statute upheld in *NOM*, which applied to electioneering communications "naming or depicting a clearly identified candidate within a set period prior to any election." *NOM*, 649 F. 3d at 60. The election disclosure caselaw is clear that the interests behind disclosure laws are implicated by expenditures regarding a candidate or an issue close in time to an election, even

[8] Plaintiffs made clear in the District Court that they were not bringing a vagueness or overbreadth challenge. *See* ECF 23, p. 24. It is irrelevant that the plaintiff in *NOM* asserted different legal theories; at bottom, this Court evaluated Maine's interest and its fit with the law and determined the law passed exacting scrutiny. *NOM*, 649 F.3d at 58-59.

[9] To the extent that Plaintiffs' Opposition relies on *Wisconsin Right to Life,* 751 F.3d 804, it is an outlier and is inconsistent with First Circuit precedent. "*Barland* is out of step with the legal consensus not only because it read nonexistent qualifiers into a Supreme Court opinion, but also because it rested on a flawed premise." *Citizens for Responsibility and Ethics in Washington v. Federal Elec. Comm'n.*, 209 F. Supp.3d 77, 91 (D.D.C. 2016). The statute at issue in *Barland* was also described as outdated, labyrinthian, difficult to decipher, containing clearly unconstitutional limits on spending, and requiring "almost any group that wants to say almost anything about a candidate or election to register as a political committee." 751 F.3d at 808-10.

if the communication does not expressly advocate for or against a candidate or position. *See supra* p.24*; infra* p.41-46 (discussing courts' rejection of distinction between so-called issue advocacy and express advocacy).

Additionally, Plaintiffs argue that unlike the Maine law at issue in *NOM*, Rhode Island's Act does not have an "escape hatch" where entities can rebut the presumption that the advertisement is an electioneering communication. PB, p.27. However, this "escape hatch" was not the basis of the decision in *NOM*, and indeed the Court expressly noted that the statute upheld in *Citizens United* had no such "escape hatch." *See* NOM, 649 F.3d at 60.[10]

Plaintiffs also assert that the Act pertains to "general fund donors" and argue that "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." PB, p.27-28. This argument ignores the Act's express allowance for the creation of a separate campaign-related account and provision that donors may opt out of the disclosure requirements by directing that their funds not be used for

[10] Plaintiffs' hypothetical suggestion that the Act would apply to an American Legion postcard advertising a local event with a politician, PB, p. 33, is inapposite; it seems unlikely such a postcard would meet all the threshold requirements for Rhode Island's Act to apply, including being sent within the timeframe just before an election specified in the Act, costing over $1,000, and targeting the relevant electorate of at least 2,000 people. If it did meet all these requirements, it would seem to be a communication capable of influencing the election.

independent expenditures or electioneering communications. *See* R.I. Gen. Laws §§ 17-25.3-1(h), (i).

Finally, Plaintiffs assert the Act "applies to both candidates and ballot initiatives," PB, p.28, but this factor does not make any legal difference. *See NOM*, 649 F.3d at 57 ("the informational interest is not limited to informing the choice between candidates for political office. As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages").

3. The Act's Disclaimer Requirement Resembles Provisions Upheld in Other Cases and Is Not Compelled Speech

Plaintiffs raise an additional argument against the Act's requirement that independent expenditures and electioneering communications include a disclaimer indicating who paid for the communication, and for 501(c) and exempt non-profits, that the disclaimer disclose the top five persons or entities making the largest aggregate donations during the twelve-month period before the date of the communication. *See* R.I. Gen. Laws § 17-25.3-3. Notably, disclaimers need not list any donors who have opted-out of having their donations utilized for independent expenditures or electioneering communications and no donor shall be listed who would not meet the requirements for being included in a disclosure report. *See id.* Additionally, certain communications are exempted from these requirements, including campaign paraphernalia, news stories and editorials, pins

and hats, as well as signs or banners with a surface area less than 32 square feet. *See id.* Nonetheless, Plaintiffs allege that the Act's disclaimer requirement constitutes "compelled" speech and is subject to strict scrutiny. PB, p.18-19.

Once again, Plaintiffs' argument has already been considered and rejected by binding precedent. In *NOM*, this Court applied exacting scrutiny to disclaimer and attribution requirements and determined that those requirements "bear a close relation to [the state's] interest in dissemination of information regarding the financing of political messages. The disclaimer and attribution requirements are, on their face, unquestionably constitutional." *NOM*, 649 F.3d at 61 ("*Citizens United* has effectively disposed of any attack on Maine's attribution and disclaimer requirements."); *Citizens United*, 558 U.S. at 370-71 (upholding disclaimer requirements).

These disclaimer requirements are also consistent with the Supreme Court's repeated recognition of the danger posed by ambiguously named entities seeking to influence elections while obscuring their true identity and interests. *See supra* p.20-25. The Act's provision requiring disclaimers, that in certain circumstances disclose the names of the top five donors, ensures that voters can discern the people and interests behind campaign-related messages being conveyed to them, even when entities adopt names designed to obscure their true purpose and affiliation.

Plaintiffs try to avoid this precedent by contorting the law and analogizing the Act's disclaimer requirements to *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), where the Supreme Court struck down a law requiring a pro-life pregnancy clinic to post a message containing information about abortion resources. 138 S.Ct. 2361, 2371 (2018) ("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"). The difference between that case and this one is obvious. In *NIFLA*, the government required the clinic to post substantive information about accessing abortions, which was diametrically counter to the clinic's own beliefs. In this case, Plaintiffs are only required to provide content-neutral information to notify voters who is behind their communication.

Multiple courts have already rejected Plaintiffs' argument that simply requiring identification of the speaker constitutes compelled speech. *See Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) ("Disclosure requirements are not inherently content-based nor do they inherently discriminate among speakers."); *cf. Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) ("[t]he idea that *** thousands of routine [disclosure] regulations require an extensive First Amendment analysis is mistaken."). In a persuasive

decision, the Massachusetts District Court – analyzing a similar "top five" donor disclosure requirement and a similar plaintiff organization arguing that *NIFLA* applied – upheld the statute, noting that "[*NIFLA*] does not command a different result, given the content-neutral nature of the [disclaimer] requirement in this case and the minimal burden placed on plaintiff's speech." *Massachusetts Fiscal All. v. Sullivan*, No. CV 18-12119-RWZ, 2018 WL 5816344, at *3 (D. Mass. Nov. 6, 2018) ("'top five contributor' requirement reflects the Commonwealth's permissible determination that on-message disclosure of the source of money behind the speaker is also an effective means for achieving voter understanding and knowledge").[11]

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[11] Demonstrating the tenuous nature of their legal position, Plaintiffs rely on an unpublished 2004 Eastern District of California decision that Plaintiffs' own Brief concedes has been termed "no longer good law[.]" PB, p.29-30 & n.10 (citing *Cal. Republican Party v. Fair Political Practices Comm'n,* No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS 22160 (E.D. Cal. Oct. 27, 2004)). The unpublished nature of the decision, its pre-dating of *Citizens United*, and its lack of binding authority in the First Circuit all undermine its persuasive value. Further, a federal court recently took pains to elucidate *California Republican Party*'s lack of utility. *See Yes on Prop B, Comm. in Support of the Earthquake Safety and Emergency Response Bond v. City and County of San Francisco*, No. 20-cv-00630-CRB, 2020 WL 836748, at *8–9 (N.D. Cal. Feb. 20, 2020) (declining to give *California Republican Party* any persuasive weight). Stunningly, Plaintiffs urge this Court to "follow the *California Republican Party* decision," which even another California federal court recognized is not good law, in place of following the Supreme Court's contrary decision in *Citizens United*. *See* PB, p.31-32 & n.11 ("*Citizens United's* paragraphs on on-ad disclaimer are not determinative.").

Likewise, *American Civil Liberties Union of Nevada v. Heller* is distinguishable because it pre-dated *Citizens United* and other relevant precedent, and because the

Likewise, here, as the District Court concluded, "*NIFLA* (and the strict scrutiny analysis it requires) is distinguishable . . . because the speech compelled in that case was content based. Here, the disclosure requirements are content neutral." Add., p.21. "The plaintiffs do not need to alter the meaning of their political messaging or support a position contrary to their views." *Id.* Indeed, it is Plaintiffs, and any other similarly situated entities, who would supply the content of the disclaimer based on their own entity's pertinent information.

The Act's disclaimer requirements do not alter or inhibit the content of the election-related message; they impose across-the-board neutral requirements on speakers to simply identify themselves.[12] This case bears no resemblance to the precedent relied upon by Plaintiffs where the government supplied or required a

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statute required entities publishing any information relating to an election, candidate, or any question on a ballot, to reveal on the publication the names and addresses of the publications' financial sponsors, without the expenditure limits and other threshold requirements found in Rhode Island's Act. 378 F.3d 979, 981 (9th Cir. 2004).

[12] Plaintiffs argue that the disclaimer requirement is content based because it applies to election-related communications, but then acknowledge that this Court and the Supreme Court have already essentially rejected that argument because, if it were true, all election disclosure laws would be considered content-based and subject to strict scrutiny, a position already repudiated by the Supreme Court and First Circuit. *See supra* p.16-19; PB, p.19 ("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.").

substantive message, factual or otherwise, for the speaker to speak. *Contrast with Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 798 (1988) ("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"). Here, the speaker is simply required to identify itself. Although Plaintiffs grasp for straws in other areas of First Amendment jurisprudence, the election disclosure law precedent cited by Defendants is most directly on point and upholds the government's important interest in simply requiring those delivering election-related messages and meeting the requirements of the Act to identify themselves.[13]

D. Plaintiffs' Generalized Speculation That the Act Could Harm Them is Insufficient and Irrelevant to This Facial Challenge

In the most generalized of terms, Plaintiffs vaguely speculate that the Act's disclosure requirements could harm them or their members, including by leading to retaliation or harassment. PB, p.38-47. Notably, Plaintiffs did not allege any facts

[13] Plaintiffs' Brief raises the new argument that they maintain deeply held beliefs about privacy and that complying with the disclaimer requirements would violate those beliefs. PB, p.22. This argument is meritless and should also be disregarded because Plaintiffs did not plead any factual allegations in the Complaint that would support this contention as to their beliefs. Moreover, as Plaintiffs bring a facial challenge to the statute, their particular beliefs are irrelevant.

regarding either of their organizations being harmed by Rhode Island's disclosure statute, or even any other states' similar disclosure laws.[14]

In *Citizens United*, the Supreme Court rejected the very same argument that Plaintiffs make here. Like Plaintiffs here, the plaintiff in *Citizens United* made the generalized argument that disclosure requirements could lead to harassment and "that disclosure requirements can chill donations to an organization by exposing donors to retaliation." *Citizens United*, 558 U.S. at 371 ("Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some amici point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation."). The Supreme Court rejected those generalized arguments, holding that the plaintiff in that case "has offered no evidence that its members may face similar threats or reprisals." *Id.*[15]

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[14] This failure to identify any particular harm seems to be a recurring theme for the Illinois Opportunity Project. A similar lawsuit it filed in Montana challenging disclosure requirements was dismissed for lack of standing because Plaintiff failed to allege that its current or potential donors have refused to continue their donations or make new donations as a result of the enactment of the challenged executive order. *Illinois Opportunity Project v. Bullock*, No. CV-19-56-H-CCL, 2020 WL 33015, at *2 (D. Mont. Jan. 2, 2020).

[15] Plaintiffs cite *Nat'l Rifle Ass'n (NRA) v. City of Los Angeles*, 441 F.Supp.3d 915 (C.D. Cal. 2019) in support of their argument that disclosure could lead to harassment, but in that case the law at issue expressly targeted the NRA, making it an as-applied challenge, and, unlike in this case, there was evidence in the record that the fear of hostility was well-founded.

Moreover, Plaintiffs' lawsuit asserts a facial challenge to the Act. *See* Add., p.5; Appx., p.36. In order to succeed, Plaintiffs have the "burden to show that the law has *no* constitutional application." *Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27, 33 (1st Cir. 2008) (citations omitted) (emphasis added). For a "facial attack to succeed, [plaintiffs] 'would have to establish ... that the statute lacks any plainly legitimate sweep.'" *Hightower v. City of Bos.*, 693 F.3d 61, 77 (1st Cir. 2012) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). Facial challenges are disfavored since they "often rest on speculation" and "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

Accordingly, even if Plaintiffs *had* pled that themselves or their members have incurred harm as a result of the Act, that would not be a ground for determining that the Act is facially unconstitutional as to all persons and entities. *See Citizens United*, 558 U.S. at 367 (recounting how the Court in *Buckley* facially upheld disclosure requirements but acknowledged that as-applied challenges would be available if a group could show a "reasonable probability" that disclosure of its contributors' names "will subject them to threats, harassment, or reprisals from

either Government officials or private parties"). The Supreme Court and this Court have both held that election-related disclosure laws are constitutional as long as they are substantially related to an important government interest. Rhode Island's laws, just like similar laws that have been upheld by federal courts around the country, easily satisfy that standard.

E. Binding Precedent Rejects Plaintiffs' Attempt to Differentiate Between Issue and Express Advocacy

Seemingly recognizing that binding precedent is squarely against them, Plaintiffs try to distinguish their case by saying that they wish to engage in "issue advocacy" rather than express advocacy. Plaintiffs argue that precedent regarding disclosure laws is inapplicable because their "ads do not 'support, oppose, promote, or attack' a candidate." PB, p.23. This argument not only defies commonsense, it has also been expressly rejected by both the Supreme Court and this Court.

Plaintiffs' argument simply does not withstand scrutiny, as it is obvious they wish to carve out a gaping loophole in election disclosure laws that would put form over substance and render such laws impotent. Plaintiffs described the election-related activity they wished to engage in as follows:

> 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.

PB, p.3. Plaintiffs therefore wish to "spend more than $1,000" communicating with "voters" shortly before an election about matters on which they will be voting, but insist that such communications are "non-electoral advocacy," PB, p.1, because they will not expressly tell the voters how they should vote. As Plaintiffs would have it, they can escape election disclosure requirements by telling taxpayers how a referenda will increase their taxes but not expressly saying that the voters should vote against it. If nameless, faceless entities were able to avoid disclosure laws simply by telling Rhode Islanders how voting yes on Item 1 will have all these negative effects on them but not expressly saying "you should vote no on 1," it would render disclosure laws meaningless. The caselaw and Rhode Island's Act recognize the obvious: that spending over $1,000 communicating with thousands of voters shortly before an election regarding the subject matter on which they will be voting is an electioneering communication subject to disclosure requirements.

This Court has already explained that although some earlier cases distinguished between express advocacy and issue advocacy, that was in the context of statutes limiting contributions, the relevance of which "is limited at best" when considering disclosure statutes like the one at issue in *NOM* and here. *NOM*, 649 F.3d at 54 ("the distinction's primary purview has been cases

scrutinizing limits on independent expenditure," but such cases were definitively resolved in *Citizens United*). Additionally, "more fundamentally, the Supreme Court has explicitly rejected an attempt to 'import [the] distinction' between issue and express advocacy into the consideration of disclosure requirements." *Id.* (quoting *Citizens United*, 558 U.S. at 368-69); *see also Citizens United*, 558 U.S. at 39 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.").

In *Citizens United*, "the Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy,' because disclosure is a less restrictive strategy for deterring corruption and informing the electorate." *Sorrell*, 758 F.3d at 132 (quoting *Citizens United*, 558 U.S. at 369); *see also Delaware Strong Families*, 793 F.3d at 308 ("The Supreme Court has consistently held that disclosure requirements are not limited to 'express advocacy' and that there is not a 'rigid barrier between express advocacy and so-called issue advocacy.'" (quoting *McConnell*, 540 U.S. at 193)).

This Court found it "reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *NOM*, 649 F.3d at 54-55; *see also Delaware Strong Families*, 793 F.3d at 308 ("Any possibility that

the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United*[.]"); *Sorrell*, 758 F.3d at 132 ("*Citizens United* removed any lingering uncertainty concerning the reach of constitutional limitations in this context."). As such, this Court has already expressly rejected the distinction Plaintiffs seek to make here. *See NOM*, 649 F.3d at 55 ("to the extent that [Plaintiff's] arguments turn on the distinction between issue discussion and express advocacy, we reject them"). Similarly, in a case decided the same day as *NOM* and regarding Rhode Island's then-existing disclosure laws, the First Circuit also specifically rejected "the contention that disclosure laws must be limited to regulation of express advocacy." *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011).[16] This Court's broad rejection of the issue versus express advocacy dichotomy was not in any way limited to *NOM* involving vagueness and overbreadth challenges as Plaintiffs allege, *see* PB, p.34, but rather was based on the statute pertaining to disclosure laws.

[16] Plaintiffs cite the non-binding district court decision in *Citizens Union of N.Y. v. AG of N.Y.*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019) for the proposition that the government cannot successfully assert an informational interest in funders of issue advocacy, PB, p.26, but that case was primarily decided based on the Court's determination that the asserted governmental interests simply did not apply to the law at issue in that case, which did not pertain to electioneering communications. Plaintiffs' citation to *Federal Election Commission v. Wisconsin Right To Life, Inc.*, is likewise distinguishable as it pertained to a ban on speech, not disclosure requirements. 551 U.S. 449, 470 (2007) (plurality).

As one federal court put it in a case summarily affirmed by the Supreme Court, "the Supreme Court and every court of appeals to consider the question have already largely, if not completely, closed the door to the [plaintiff's] argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate." *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 187 (D.D.C. 2016), aff'd sub nom. *Indep. Inst. v. F.E.C.*, 137 S. Ct. 1204 (2017). The Supreme Court has closed the door on treating so-called issue advocacy differently when it comes to disclosure laws:

> In *McConnell*, the Supreme Court concluded that First Amendment precedent "amply supports application of [the Act's] disclosure requirements to the *entire range of 'electioneering communications*.'" 540 U.S. at 196, 124 S.Ct. 619 (emphasis added). In so doing, the Court specifically "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy[.]" *Id.* at 194, 124 S.Ct. 619. Likewise, in *Citizens United*, the Supreme Court ruled that advocacy—even if it takes the form of commercial speech—falls within the constitutional bounds of the donor-disclosure rule precisely because that advocacy points a finger at an electoral candidate. *See Citizens United*, 558 U.S. at 369, 130 S.Ct. 876.

Id.

The Supreme Court and the other federal courts could not have been clearer. *See, e.g.*, *Citizens United*, 558 U.S. at 370 ("Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."); *see also e.g., Sorrell*, 758 F.3d at

132 ("[T]he Vermont statutes' extension beyond express advocacy does not render them unconstitutional."). Plaintiffs' invitation for this Court to treat them differently because they allege they are engaged in issue advocacy would run directly afoul of binding precedent, and would create a gaping loophole in Rhode Island's disclosure laws.

F. <u>The Caselaw Relied Upon By Plaintiffs Is Inapplicable</u>

Plaintiffs acknowledge that "[w]ithin a campaign-finance framework, the case most directly relevant is this court's decision in [*NOM*]." PB, p.31. Despite that, Plaintiffs urge this Court to analyze Rhode Island's election-related expenditure Act under inapposite caselaw outside the campaign-finance framework. Plaintiffs seem to anticipate that their argument is futile, noting that "[t]o the extent that this Court concludes that *[NOM]* cannot be distinguished, Plaintiffs reserve the right to argue on appeal en banc or at the Supreme Court for it to be overturned." PB, p.32 n.13.

1. <u>*NAACP* and Jurisprudence Related to Disclosing Membership Lists is Inapplicable.</u>

Primarily relying on inaccurate statements about Rhode Island's Act and the inapposite case *NAACP v. Alabama*, 357 U.S. 449 (1958), Plaintiffs argue that "Rhode Island's statute violates Plaintiffs' First Amendment right to organizational privacy." PB, p.12. Although Plaintiffs assert that the Act "requires Plaintiffs to register for a permit before speaking," PB, p.13, they tellingly do not cite any part

of the Act that requires anyone to register for a permit to speak. Plaintiffs' assertion that the Act "also requires them to disclose their membership information" is likewise incorrect and unsupported. *See* PB, p.13. Only donors who spend over $1,000 in a calendar year and who do not opt out of their donation being used for independent expenditures or electioneering communications need be disclosed. *See supra* p.6. Disclosure of general donors can also be avoided by establishing a separate campaign-related account. *Id.* The Act is targeted at informing voters about the speakers behind expensive political messages, *supra* p.20-38, not at revealing an organizations' membership. As the following colloquy between Plaintiffs' counsel and the District Court makes, clear, the Act does not burden association or organizational membership:

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

Appx., p.49.

After misstating the Act's requirements, Plaintiffs try to analogize themselves to members of the NAACP in 1950's Alabama and argue that Rhode Island's election-disclosure laws are equivalent to the Alabama government forcing the NAACP to "reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions

or functions in the Association." *NAACP*, 357 U.S. at 451. Indeed, Plaintiffs boldly proclaim: "the Plaintiffs stand in the same stead as the NAACP." PB, p.16.

Plaintiffs' reliance on *NAACP* is misplaced for multiple reasons. To begin with, the Act is a targeted election-related expenditure disclosure law and does not seek or require disclosure of Plaintiffs' "ordinary rank-and-file members" lists. *See NAACP*, 357 U.S. at 464. Additionally, in *NAACP*, the organization had "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members (had) exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Buckley*, 424 U.S. at 69. Plaintiffs do not even attempt to plead similar allegations of fear or harm experienced by any of their disclosable donors. *See Buckley*, 424 U.S. at 69 (considering *NAACP* "inapposite" "where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative"); *see also id.* (noting that "[t]he court [of appeals] left open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in *NAACP v. Alabama*. No record of harassment on a similar scale was found in this case."); *supra* p.38-41.[17] Plaintiffs' conclusory speculation that it is

[17] Plaintiffs rely on material that they did not plead in the Complaint or otherwise present to the District Court. For instance, Plaintiffs cite a July 22, 2020 poll from the Cato Institute, *see* PB, p.4, but that poll was neither pled in the Complaint nor

theoretically possible that the Act's disclosure requirements could subject their disclosable donors to harassment or retaliation is "a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Schneiderman*, 882 F.3d at 385.

When similarly faced with only generalized allegations of possible harm, the *Buckley* Court refused to apply *NAACP* to disclosure laws:

> There could well be a case, similar to those before the Court in *NAACP v. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*. Instead, appellants primarily rely on "the clearly articulated fears of individuals, well experienced in the political process." At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure.

Buckley, 424 U.S. at 71-72 (internal citations omitted); *id.* at 74 ("The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be

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argued in Plaintiff's April 2020 Objection to the Motion to Dismiss. Likewise, Plaintiffs' discussion of supposed boycotts or retaliation experienced by other people in other contexts is both irrelevant to this case and outside of the facts pled in the Complaint. *See* PB, p.41-45. Plaintiff also does not explain why these factual assertions about what purportedly happened to other people are susceptible to judicial notice.

sufficient."); *see also Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 22 (D.C. Cir. 2009) ("[T]he [plaintiff] proffers no evidence of any past incidents suggesting that public affiliation with the [plaintiff] leads to a substantial risk of threats, harassment, or reprisals from either Government officials or private parties. . . . This, then, is a case like *Buckley,* not *NAACP*.").

NAACP is irrelevant because it did not pertain to election expenditures and was based on evidence of the particular harm posed to the NAACP members; here Plaintiffs have brought a facial challenge to election-related disclosure laws and demonstrate no similar harm risk. Even assuming arguendo that some entities could demonstrate concrete potential harm and that it would be unconstitutional to apply the Act to them, that does nothing to aid Plaintiffs' facial challenge.

2. The Act Does Not Implicate *McIntyre* and Speaker Privacy

In another desperate attempt to avoid directly applicable election expenditure caselaw, Plaintiffs rely on *McIntyre v. Ohio Elections Commission*, where the Supreme Court determined it was unconstitutional to fine a woman for handing out fliers anonymously. 514 U.S. 334, 337 (1995). Just as Plaintiffs are not the NAACP, neither are they Ms. McIntyre handing out some flyers to neighbors. Plaintiffs are organized entities that "both have received donations over $1,000 in the past and intend to solicit and accept donations over $1,000 in the future." Appx., p.8(¶31). They seek to spend over $1,000 to communicate "by

mail to thousands of Rhode Island voters" about election-related issues. Appx., p.7-8(¶¶28, 29). They are a long way from Ms. McIntyre who "showed up at a meeting with a bunch of fliers in hand to convince her neighbors to join her cause." PB, p.6.

As an initial matter, the statute at issue in *McIntyre* broadly prohibited distribution of anonymous campaign literature; it was not a campaign finance regulation and did not pertain to expenditures. By contrast Rhode Island's Act would not apply to Ms. McIntyre's activities. There is no indication that Ms. McIntyre spent over $1,000 on her flyers or that she intended to reach the "relevant electorate," defined as over 2,000 people. If Plaintiffs wish to print out some flyers and hand them out on a street corner anonymously, nothing in the Act would prevent them from doing so as long as the spending threshold and other requirements of the Act were not met.

In desperately clinging to *McIntyre*, Plaintiffs ignore more recent, more on-point precedent upholding disclosure laws just like Rhode Island's. *See supra* p.20-38. *McIntyre* may remain good law, but Plaintiff's attempt to analogize this situation to *McIntyre* has already been implicitly rejected by *Citizens United* and *NOM*. After *Citizens United*, "*McIntyre* is inapposite to the class of restrictions at

issue." *Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 400 (D. Vt. 2012), aff'd, 758 F.3d 118 (2d Cir. 2014).[18]

McIntyre, in addition to pre-dating *Citizens United*, is readily distinguishable in that the statute imposed a "blanket prohibition on all anonymous campaign literature[,]" unlike the modest election disclosure requirements here. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 421 (6th Cir. 2014); *see also Worley v. Fla. Sec. of State*, 717 F.3d 1238, 1247 (11th Cir. 2013) ("[W]e do not find *McIntyre* to be as helpful to Challengers' case as they suggest" and noting that campaign finance disclosures are a "far cry from compelled self-identification on all election-related writings"). Indeed, *McIntyre* itself recognized the distinction between regulation of a "personally crafted" leaflet and financial disclosure laws:

> Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative

[18] Plaintiffs cite Justice Sotomayor's concurring opinion in *John Doe No. 1 v. Reed*, for the proposition that *McIntyre* is still good law but gloss over the portion of Justice Sotomayor's opinion distinguishing between the type of speech restriction at issue in *McIntyre*, and permissible regulation of the mechanics of the electoral process. As Justice Sotomayor noted, "requiring petition signers to be registered voters or to use their real names no doubt limits the ability or willingness of some individuals to undertake the expressive act of signing a petition. Regulations of this nature, however, stand a step removed from the communicative aspect of petitioning, and the ability of States to impose them can scarcely be doubted." 561 U.S. 186, 213-14 (2010) (Sotomayor, J., concurring) (internal quotations omitted).

> than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

514 U.S. at 355; *see also McCullen v. Coakley*, 573 U.S. 464, 489 (2014) (discussing *McIntyre* in context of restrictions on one-on-one political communications).[19]

Further, *McIntyre* effectively applied strict scrutiny, a harsher constitutional standard than the exacting scrutiny framework that is applicable here. *See McIntyre*, 514 U.S. at 337 ("[W]e uphold the restriction only if it is narrowly tailored to serve an overriding state interest[.]").

As the District Court here held:

> *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,

[19] The other cases relied upon by Plaintiffs are similarly inapposite. *Blakeslee v. St. Sauveur*, pertained to a statute restricting the ability to anonymously distribute flyers and had nothing to do with election expenditure disclosures. 51 F. Supp. 3d 210 (D.R.I. 2014). *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton* pertained to an ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit. 536 U.S. 150, 153 (2002). *Washington Post v. McManus* involved a law that required newspapers, among other platforms, to publish on their websites, as well as retain for state inspection, certain information about the political ads they decide to carry. 944 F.3d 506, 510 (4th Cir. 2019). That case, which involved compelled speech and required "the press itself to disclose the identity or characteristics of political speakers," *id.* at 515, is easily distinguishable from the commonplace election expenditure disclosure requirements contained in Rhode Island's law. Indeed, *McManus* itself expressly distinguished disclosure requirements from the law at issue in that case: "disclosure obligations are ordinarily less detrimental to our commitments to free speech because they do not necessarily censor speech like a direct limit on advocacy does." *Id.* at 516.

> which in effect "indiscriminately outlaw[ed]" anonymous political speech. . . . Here, the Act does not prohibit individual anonymous literature; it instead requires certain disclosures from organizations that meet specific contribution thresholds.

Add., p.17. Moreover, "[i]t 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.'" *Id.* (quoting *Sorrell*, 875 F. Supp. 2d at 399, aff'd, 758 F.3d 118 (2d Cir. 2014)).

CONCLUSION

The District Court's decision should be affirmed.

Respectfully submitted,

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/s/ Katherine Connolly Sadeck
Attorney for Defendants-Appellees
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I hereby certify that I filed this Brief and Addendum with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 10th day of February, 2021 and the same is available for viewing and downloading by counsel of record who are registered as an ECF filer and will be served by the CM/ECF system.

/s/ *Katherine Connolly Sadeck*

ADDENDUM

ADDENDUM

TITLE 17
Elections

CHAPTER 17-25
Rhode Island Campaign Contributions and Expenditures Reporting

SECTION 17-25-3

§ 17-25-3. Definitions.

As used in this chapter, unless a different meaning clearly appears from the context:

(1) "Business entity" means any corporation, whether for profit or not for profit, domestic corporation or foreign corporation, as defined in § 7-1.2-106, financial institution, cooperative, association, receivership, trust, holding company, firm, joint stock company, public utility, sole proprietorship, partnership, limited partnership, or any other entity recognized by the laws of the United States and/or the state of Rhode Island for the purpose of doing business. The term "business entity" shall not include a political action committee organized pursuant to this chapter or a political party committee or an authorized campaign committee of a candidate or office holder. The term "business entity" shall not include any exempt nonprofit as defined herein or any organization described in § 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, for the purposes of chapter 25.3 of title 17.

(2) "Candidate" means any individual who undertakes any action, whether preliminary or final, which is necessary under the law to qualify for nomination for election or election to public office, and/or any individual who receives a contribution or makes an expenditure, or gives his or her consent for any other person to receive a contribution or make an expenditure, with a view to bringing about his or her nomination or election to any public office, whether or not the specific public office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at that time.

(3) "Conduit" or "intermediary" means any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee, except as otherwise limited in this chapter.

(4) "Contributions" and "expenditures" include all transfers of money, credit or debit card transactions, on-line or electronic payment systems such as "pay pal," paid personal services, or other thing of value to or by any candidate, committee of a political party, or political action committee or ballot question advocate. A loan shall be considered a contribution of money until it is repaid.

(5) "Earmarked" means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, that results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

(6) "Election" means any primary, general, or special election or town meeting for any public office of the state, municipality, or district, or for the determination of any question submitted to the voters of the state,

municipality, or district.

(7) "Election cycle" means the twenty-four month (24) period commencing on January 1 of odd number years and ending on December 31 of even number years; provided, with respect to the public financing of election campaigns of general officers under §§ 17-25-19, 17-25-20, and 17-25-25, "election cycle" means the forty-eight month (48) period commencing on January 1 of odd numbered years and ending December 31 of even numbered years.

(8) "In-kind contributions" means the monetary value of other things of value or paid personal services donated to, or benefiting, any person required to file reports with the board of elections.

(9) "Other thing of value" means any item of tangible real or personal property of a fair-market value in excess of one hundred dollars ($100).

(10) "Paid personal services" means personal services of every kind and nature, the cost or consideration for which is paid or provided by someone other than the committee or candidate for whom the services are rendered, but shall not include personal services provided without compensation by persons volunteering their time.

(11) "Person" means an individual, partnership, committee, association, corporation, union, charity, and/or any other organization. The term "person" shall not include any exempt nonprofit as defined herein or any organization described in § 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, for the purposes of chapter 25.3 of title 17 only.

(12) "Political action committee" means any group of two (2) or more persons that accepts any contributions to be used for advocating the election or defeat of any candidate or candidates. Only political action committees that have accepted contributions from fifteen (15) or more persons in amounts of ten dollars ($10.00) or more within an election cycle shall be permitted to make contributions, and those committees must make contributions to at least five (5) candidates for state or local office within an election cycle.

(13) "Public office" means any state, municipal, school, or district office or other position that is filled by popular election, except political party offices. "Political party offices" means any state, city, town, ward, or representative or senatorial district committee office of a political party or delegate to a political party convention, or any similar office.

(14) "State" means state of Rhode Island.

(15) "Testimonial affair" means an affair of any kind or nature including, but not limited to, cocktail parties, breakfasts, luncheons, dinners, dances, picnics, or similar affairs expressly and directly intended to raise campaign funds in behalf of a candidate to be used for nomination or election to a public office in this state, or expressly and directly intended to raise funds in behalf of any state or municipal committee of a political party, or expressly and directly intended to raise funds in behalf of any political action committee.

(16) "Electioneering communication" means any print, broadcast, cable, satellite, or electronic media communication not coordinated, as set forth in § 17-25-23, with any candidate, authorized candidate campaign committee, or political party committee and 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.

(i) A communication that refers to a clearly identified candidate or referendum is "targeted to the relevant electorate" if the communication 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.

(ii) Exceptions: The term "electioneering communication" does not include:

(A) A communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) A communication that constitutes a candidate debate or forum conducted pursuant to regulations adopted by the board of elections or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(C) A communication made by any business entity to its members, owners, stockholders, or employees;

(D) A communication over the internet, except for (I) Communications placed for a fee on the website of another person, business entity, or political action committee; and (II) Websites formed primarily for the purpose, or whose primary purpose is, to expressly advocate the election or defeat of a clearly identified candidate or the passage or defeat of a referendum; or

(E) Any other communication exempted under such regulations as the board of elections may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph.

(17) "Independent expenditure" means an expenditure 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, or amounts to the functional equivalent of such express advocacy, and is in no way coordinated, as set forth in § 17-25-23, with any candidate's campaign, authorized candidate committee, or political party committee. An expenditure amounts to the functional equivalent of express advocacy if it can only be interpreted by a reasonable person as advocating the election, passage, or defeat of a candidate or referendum, taking into account whether the communication mentions a candidate or referendum and takes a position on a candidate's character, qualifications, or fitness for office. An independent expenditure is not a contribution to that candidate or committee.

(i) Exceptions: The term "independent expenditure" does not include:

(A) A communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) A communication that constitutes a candidate debate or forum conducted pursuant to regulations adopted by the board of elections or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(C) A communication made by any business entity to its members, owners, stockholders, or employees;

(D) A communication over the internet, except for (I) Communications placed for a fee on the website of another person, business entity, or political action committee; and (II) Websites formed primarily for the purpose, or whose primary purpose is, to expressly advocate the election or defeat of a clearly identified candidate or the passage or defeat of a referendum; or

(E) Any other communication exempted under such regulations as the board of elections may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph.

(18) "Covered transfer" means any transfer or payment of funds by any person, business entity, or political action committee to another person, business entity, or political action committee if the person, business entity, or political action committee making the transfer: (i) Designates, requests, or suggests that the amounts be used for independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; (ii) Made such transfer or payment in response to a solicitation or other request for a transfer or payment for the making of or paying for independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; (iii) Engaged in discussions with the recipient of the transfer or payment regarding independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; or (iv) Made independent expenditures or electioneering communications in an aggregate amount of five thousand dollars ($5,000) or more during the two-year (2) period ending on the date of the transfer or payment, or knew or had reason to know that the person receiving the transfer or payment made such independent expenditures or electioneering communications in such an aggregate amount during that two-year (2) period.

(A) Exceptions: The term "covered transfer" does not include:

(I) A transfer or payment made by a person, business entity, or political action committee in the ordinary course of any trade or business conducted by the person, business entity, or political action committee or in the form of investments made by the person, business entity, or political action committee; or

(II) A transfer or payment made by a person, business entity, or political action committee if the person, business entity, or political action committee making the transfer prohibited, in writing, the use of such transfer or payment for independent expenditures, electioneering communications, or covered transfers and the recipient of the transfer or payment agreed to follow the prohibition and deposited the transfer or payment in an account that is segregated from any account used to make independent expenditures, electioneering communications, or covered transfers.

(19) For the purposes of chapter 25.3 of title 17, "donation" means all transfers of money, credit or debit card transactions, on-line or electronic payment systems such as "pay pal," paid personal services, or other thing of value to or by any person, business entity, or political action committee. A loan shall be considered a donation of money until it is repaid.

(20) For the purposes of chapter 25.3 of title 17, "donor" means a person, business entity, or political action committee that makes a donation.

(21) "Exempt nonprofit" means 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.

(22) For purposes of chapter 25.3 of title 17, "referendum" means the same as the definition set forth in § 17-5-1.

History of Section.
(P.L. 1974, ch. 298, § 1; P.L. 1981, ch. 188, § 1; P.L. 1984, ch. 2, § 1; P.L. 1988, ch. 420, § 3; P.L. 1992, ch. 21, § 1; P.L. 1994, ch. 78, § 2; P.L. 2001, ch. 176, § 2; P.L. 2005, ch. 36, § 14; P.L. 2005, ch. 72, § 14; P.L. 2006, ch. 174, § 1; P.L. 2006, ch. 292, § 1; P.L. 2006, ch. 582, § 1; P.L. 2006, ch. 588, § 1; P.L. 2012, ch. 446,

§ 2; P.L. 2017, ch. 221, § 1; P.L. 2017, ch. 240, § 1.)

TITLE 17
Elections

CHAPTER 17-25.3
Independent Expenditures and Electioneering Communications

SECTION 17-25.3-1

§ 17-25.3-1. Independent expenditures and electioneering communications for elections.

(a) It shall be lawful for any person, business entity or political action committee, not otherwise prohibited by law and not acting in coordination with a candidate, authorized candidate campaign committee, political action committee, or political party committee, to expend personally from that person's own funds a sum which is not to be repaid to him or her for any purpose not prohibited by law to support or defeat a candidate or referendum. Whether a person, business entity or political action committee is "acting in coordination with a candidate, authorized candidate campaign committee, political action committee or political party committee" for the purposes of this subsection shall be determined by application of the standards set forth in § 17-25-23. All terms used in this chapter shall have the same meaning as defined in § 17-25-3.

(b) Any person, business entity or political action committee making independent expenditures, electioneering communications, or covered transfers shall report all such campaign finance expenditures and expenses to the board of elections, provided the total of the money so expended exceeds one thousand dollars ($1,000) within a calendar year, to the board of elections within seven (7) days of making the expenditure.

(c) A person, business entity or political action committee who makes or contracts to make independent expenditures, electioneering communications, or covered transfers with an aggregate value of one thousand dollars ($1,000) or more shall electronically file a campaign finance report to the board of elections describing the expenditures.

(d) After a person, business entity or political action committee files a report under subsection (b), the person, business entity or political action committee shall file an additional report after each time the person, business entity or political action committee makes or contracts to make independent expenditures, electioneering communications, or covered transfers aggregating an additional one thousand dollars ($1,000) with respect to the same election as that to which the initial report relates.

(e) When a report is required by subsection (c) or (d) of this section within thirty (30) days prior to the election to which the expenditure was directed, it shall be filed within twenty-four (24) hours of the expenditure. When such a report is required at any other time, it shall be filed within seven (7) days after the expenditure.

(f) Reports of independent expenditures, electioneering communications, or covered transfers by a person shall contain the name, street address, city, state, zip code, occupation, employer (if self-employed, the name and place of business), of the person responsible for the expenditure, the name, street address, city, state, and zip code of the person receiving the expenditure the date and amount of each expenditure, and the year to date total.

(g) The report shall also include a statement identifying the candidate or referendum that the independent expenditure or electioneering communication is intended to promote the success or defeat, and affirm under penalty of false statement that the expenditure is not coordinated with the campaign in question, and provide any information that the board of elections requires to facilitate compliance with the provisions of this chapter.

(h) Reports of independent expenditures, electioneering communications, or covered transfers by a person, business entity or political action committee shall also disclose the identity of all donors of an aggregate of one thousand dollars ($1,000) or more to such person, business entity or committee within the current election cycle, if applicable, unless the person, business entity or political action committee has established a separate campaign-related account for independent expenditures, electioneering communications, and covered transfers as detailed in § 17-25.3-2 in which case this paragraph applies only to donors to the person's, business entity's or political action committee's separate campaign-related account; provided that no person, business entity, or political action committee shall be required to disclose in a report to the board of elections the identity, which includes name, address, place of employment, and donation amount, of any donor who makes no donation to such person, business entity, or political action committee after the date of enactment of this section.

(i) If a person, business entity or political action committee and a donor mutually agree, at the time a donation, payment, or transfer to the person, business entity or political action committee which is required to disclose the identification under subsection (f) that the person, business entity or political action committee will not use the donation, payment, or transfer for independent expenditures, electioneering communications, or covered transfers, then not later than thirty (30) days after the person, business entity or political action committee receives the donation, payment, or transfer the person, business entity or political action committee shall transmit to the donor a written certification by the chief financial officer of the person, business entity or political action committee (or, if the organization does not have a chief financial officer, the highest ranking financial official of the organization) that:

(1) The person, business entity or political action committee will not use the donation, payment, or transfer for independent expenditures, electioneering communications, or covered transfers; and

(2) The person, business entity or political action committee will not include any information on the donor in any report filed by the person, business entity or political action committee under this section with respect to independent expenditures, electioneering communications, or covered transfers, so that the donor will not be required to appear in the list of donors.

(3) Exception for payments made pursuant to commercial activities. Subsections (e) and (f) do not apply with respect to any payment or transfer made pursuant to commercial activities in the regular course of a person's, business entity's or political action committee's business.

(j) For the purposes of this chapter, two (2) or more entities (other than an exempt nonprofit as defined in § 17-25-3 or an organization described in § 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time) are treated as a single entity if the entities:

(1) Share the majority of members on their boards of directors;

(2) Share two (2) or more officers;

(3) A candidate committee and a political committee other than a candidate committee are for the purposes of this section treated as a single committee if the committees both have the candidate or a member of the candidate's immediate family as an officer;

(4) Are owned or controlled by the same majority shareholder or shareholders or persons;

(5) Are in a parent-subsidiary relationship; or

(6) Have bylaws so stating.

History of Section.
(P.L. 2012, ch. 446, § 3.)

TITLE 17
Elections

CHAPTER 17-25.3
Independent Expenditures and Electioneering Communications

SECTION 17-25.3-3

§ 17-25.3-3. Disclaimers.

(a) No person, business entity or political action committee shall make or incur an independent expenditure or fund an electioneering communication for any written, typed, or other printed communication, unless such communication bears upon its face the words "Paid for by" and the name of the entity, the name of its chief executive officer or equivalent, and its principal business address. In the case of a person, business entity or political action committee making or incurring such an independent expenditure or electioneering communication, which entity is a tax-exempt organization under § 501(c) of the Internal Revenue Code of 1986 (other than an organization described in § 501(c)(3) of such Code) or an exempt nonprofit as defined in § 17-25-3, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an organization organized under Section 527 of said code, such communication shall also bear upon its face the words "Top Five Donors" followed by a list of the five (5) persons or entities making the largest aggregate donations to such person, business entity or political action committee during the twelve (12) month period before the date of such communication, provided that no donor shall be listed who is not required to be disclosed in a report to the board of elections by the person, business entity, or political action committee.

(b) The provisions of subsections (a) of this section shall not apply to:

(1) Any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility and for which it does not charge or receive any compensation whatsoever;

(2) Political paraphernalia including pins, buttons, badges, emblems, hats, bumper stickers or other similar materials; or

(3) Signs or banners with a surface area of not more than thirty-two (32) square feet.

(c) No person, business entity or political action committee shall make or incur an independent expenditure or fund an electioneering communication for paid television advertising or paid Internet video advertising, unless at the end of such advertising there appears simultaneously, for a period of not less than four (4) seconds:

(1) A clearly identifiable video, photographic or similar image of the entity's chief executive officer or equivalent; and

(2) A personal audio message, in the following form: "I am ..... (name of entity's chief executive officer or equivalent), ... (title) of ..... (entity), and I approved its content."

(3) In the case of a person, business entity or political action committee making or incurring such an independent expenditure or electioneering communication, which person, business entity or political action committee is a tax-exempt organization under § 501(c) of the Internal Revenue Code of 1986 (other than an organization described in § 501(c)(3) of such Code) or an exempt nonprofit as defined in § 17-25-3, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an organization organized under Section 527 of said code, such advertising shall also include a written message in the following form: "The top five (5) donors to the organization responsible for this advertisement are" followed by a list of the five (5) persons or entities making the largest aggregate donations during the twelve (12) month period before the date of such advertisement, provided that no donor shall be listed who is not required to be disclosed in a report to the board of elections by the person, business entity, or political action committee.

(d) No person, business entity or political action committee shall make or incur an independent expenditure or fund an electioneering communication for paid radio advertising or paid Internet audio advertising, unless the advertising ends with a personal audio statement by the entity's chief executive officer or equivalent;

(1) Identifying the entity paying for the expenditure; and

(2) A personal audio message, in the following form: "I am ..... (name of entity's chief executive officer or equivalent), ... (title), of ..... (entity), and I approved its content."

(3) In the case of a person, business entity or political action committee making or incurring such an independent expenditure or electioneering communication, which entity is a tax-exempt organization under § 501(c) of the Internal Revenue Code of 1986 (other than an organization described in § 501(c)(3) of such Code) or an exempt nonprofit as defined in § 17-25-3, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an organization organized under Section 527 of said code, such advertising shall also include:

(A) An audio message in the following form: "The top five (5) donors to the organization responsible for this advertisement are" followed by a list of the five (5) persons or entities making the largest aggregate donations during the twelve (12) month period before the date of such advertisement, provided that no donor shall be listed who is not required to be disclosed in a report to the board of elections by the person, business entity, or political action committee; or

(B) In the case of such an advertisement that is thirty (30) seconds in duration or shorter, an audio message providing a website address that lists such five (5) persons or entities, provided that no contributor shall be listed who is not required to be disclosed in a report to the board of elections by the person, business entity, or political action committee. In such case, the person, business entity or political action committee shall establish and maintain such a website with such listing for the entire period during which such person, business entity or political action committee makes such advertisement.

(e) No person, business entity or political action committee shall make or incur an independent expenditure or fund an electioneering communication for automated telephone calls, unless the narrative of the telephone call identifies the person, business entity or political action committee making the expenditure and its chief executive officer or equivalent. In the case of a person, business entity or political action committee making or incurring such an independent expenditure, which entity is a tax-exempt organization under § 501(c) of the Internal Revenue Code of 1986 (other than an organization described in § 501(c)(3) of such Code) or an exempt nonprofit as defined in § 17-25-3, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an organization organized under Section 527 of said code, such narrative shall also include an audio message in the following form: "The top five (5) donors to the organization responsible for this telephone call are" followed by a list of the five (5) persons or entities making the largest aggregate donations during the twelve (12) month period before the date of such telephone

call, provided that no donor shall be listed who is not required to be disclosed in a report to the board of elections by the person, business entity, or political action committee.

History of Section.
(P.L. 2012, ch. 446, § 3.)