IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

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ILLINOIS OPPORTUNITY PROJECT, Plaintiff, v. **STEPHEN M. HOLDEN, ERIC H. JASO,** and **MARGUERITE T. SIMON,** in their official capacities as commissioners of the New Jersey Election Law Enforcement Commission, Defendants.	Case No. 1:19-cv-17912 MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION MOTION DAY: OCTOBER 7, 2019

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Stretching back to the founding era and *The Federalist Papers*, the freedom of speech has included the right to engage in anonymous issue advocacy concerning important public issues. *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995). This freedom has also included a prohibition on government punishing certain categories of speech based on the content of the speech. *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

The New Jersey Legislature and Governor recently enacted P.L. 2019, c. 124 (sometimes also called S.150), requiring registration and disclaimer of issue-advocacy sponsors to the Defendant Commissioners of the New Jersey Election Law Enforcement Commission (attached as Exhibit 1). Plaintiff Illinois Opportunity Project (IOP) intends to engage in issue advocacy in New Jersey concerning this law. When IOP engages in its planned issue advocacy, it is required to announce its sponsorship the Commissioners and the world.

This law will chill IOP's speech. IOP is entitled to a preliminary injunction on a pre-enforcement basis to protect its core First Amendment rights to free speech and association.

FACTS

Plaintiff is a 501(c)(4) issue-advocacy organization (Besler Declaration, 1). It is also the plaintiff in *Illinois Opportunity Project v. Bullock*, 6:19-cv-00056-CCL (D.Mont.), which challenges a similar member-disclosure regulation in Montana (Besler Declaration, 3). Both cases reflect IOP's interest in member-disclosure laws in states across the nation which compromise First Amendment privacy rights (Besler Declaration, 4).

On June 17, 2019, the State of New Jersey enacted P.L. 2019, c. 124, also known as S.150, regulating issue advocacy (Exhibit 1). Under the law, an organization categorized under section 501(c)(4) (as IOP is) or section 527 of the Internal Revenue Code must comply with various disclaimer and disclosure requirements if it engages in certain issue advocacy. However, 501(c)(5) union organizations and 501(c)(6) business groups are not covered by the same requirements even though they also regularly engage in issue advocacy.

Under the new C.19:44A-3(t), only a 501(c)(4) or 527 organization is an "independent expenditure committee" if it "engages in influencing or attempting to influence the outcome of any election or the nomination, election, or defeat of any person to any State or local elective public office, or the passage or defeat of any public question, legislation, or regulation, or in providing political information on

any candidate or public question, legislation, or regulation, and raises or expends $3,000 or more in the aggregate for any such purpose annually."

IOP does not intend to engage in express advocacy or its functional equivalent to influence any elections in New Jersey (Besler Declaration, 5). However, IOP does intend to engage in issue advocacy after October 15, 2019, by spending at least $3,000 to provide "political information" about legislation, namely this very member-disclosure law (Besler Declaration, 6). In particular, IOP intends to make "statement[s] including, but not limited to, press releases, pamphlets, newsletters, advertisements, flyers, form letters, Internet or digital advertisements, or radio or television programs or advertisements which reflects the opinion of the members of the organization on any candidate or candidates for public office, on any public question, or which contains facts on any such candidate, or public question . . . " C.19:44A-3(h) (Exhibit 1). IOP's intended statements will express its opinion of the new law based on its views of the First Amendment, free speech, and privacy, and whether or not the recipient of the communication's elected officials supported the law (Besler Declaration, 6).

Because IOP will engage in activities that provide factual and opinion information about legislation, it will be required to register with the Commissioners as an "independent expenditure committee," C.19:44A-8.1(21)(a). IOP will be required to provide its complete name and mailing address. It will also

have to give the name and resident address of a resident of this State who shall have been designated by the committee as its agent to accept service of process. The registration statement must also include the name, home address, employer, and employer address of each person who has control over IOP's affairs, who participates in decisions as to its expenditures, and who participated in founding the committee. C.19:44A-8.1(21)(a)(1-3). The Commissioners post PDF copies of registration documents on their website for public viewing (https://www.elec.nj.gov/ELECReport/).

Second, IOP will be required to put a disclaimer on all of its materials, announcing its sponsorship of its issue advocacy: "the [independent expenditure] committee shall use the complete name or identifying title on . . . any decision to expend funds for the purpose . . . providing political information on any candidate or public question, legislation, or regulation." C.19:44A-8.1(21)(a). It will also have to include its name and business address and a statement that it was not undertaken in coordination with a candidate or committee. C.19:44A-22.3(2)(b) & (c). If IOP fails to include the disclaimer, it is subject to civil penalties from the Commissioners. C.19:44A-22.3(2)(g)(1), citing C.19:44A-22(a)(1).

STANDARD OF REVIEW

Normally, for a party to succeed in its application for a preliminary injunction, it must first demonstrate a reasonable likelihood of success on the merits. Second, it must demonstrate that it is likely to suffer irreparable harm absent an injunction. Third, with these two factors established, the party must show the balance of harms favors its motion, as does the public interest. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). In the context of a First Amendment challenge, however, the plaintiff needs only to show the law invades protected activity; the burden then shifts to the government to establish the likelihood of the statute's constitutionality. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017).

Here, the government indeed bears a heavy burden, for it must meet exacting scrutiny as to Count II. *McIntyre*, 514 U.S. at 346 (sponsor disclosure law subject to exacting scrutiny).[1] This means the Court should "uphold the restriction only if

[1] IOP does not seek an injunction as to Count I, which seeks to vindicate its right to private association as an issue-advocacy organization against coerced disclosure of its members and supporters under C.19:44A-8(d)(1). IOP is aware that in another case currently pending before a different division of this Court, the Attorney General on behalf of the Commissioners has acknowledged that "this portion of S150 requires clarification via rulemaking before it will be enforced. . . . Defendants believe that the 'providing political information' part of S150's definition of 'independent expenditure committee' lacks the clarity necessary for that standard to be enforceable in the absence of further clarification by ELEC via rulemaking." *Am. for Prosperity v. Grewal*, 3:19-cv-14228 (D.N.J.), Docket No. 29, Brief in Opposition filed by All Defendants re: Motion for Preliminary Injunction, at p.28-31.

it is narrowly tailored to serve an overriding state interest." *Id*. And it must meet strict scrutiny as to Count III, because it is a content-based regulation. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

ARGUMENT

IOP meets its burden on the merits and satisfies the other three factors as well.

I. IOP is likely to succeed on the merits of its claim.

To succeed on the first factor, IOP must show that the New Jersey law invades its protected First Amendment speech and association. This it can do because the U.S. Supreme Court has held time and again that disclaimer invades the right to anonymous speech and that discriminating between categories of speech is impermissible.

If the Commissioners change their policy and begin to enforce this section prior to rulemaking, IOP reserves the right to bring a motion for preliminary injunction as to Count I. Similarly, if subsequent to the Commissioners' rulemaking IOP believes the rules, when read together with the statute, still violate the First Amendment, it reserves the right to bring a motion for preliminary injunction as to Count I.

A. Compelled registration and disclaimer of issue-ad sponsorship violates the First Amendment. (Count II).

For speech to be free, one does not normally need permission from a government bureaucrat before speaking. There may be exceptions to this rule, as when a permit is necessary as a time-place-manner restriction regarding use of a public park to hold a rally, but in general one can say what one wants without filing paperwork first.

This is the holding of *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), wherein the Court recognized the substantial burden on free speech created when government mandates registration before speech:

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Id. at 165-66.

Registering for such a permit necessarily involves the loss of anonymity: "[T]here are a significant number of persons who support causes anonymously. . . . The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a

surrender of that anonymity." *Id*. at 166. The state may have a compelling interest in requiring such a permit for to protect the integrity of the electoral process or to prevent fraudulent commercial transactions, *see id.* at 167, but no such interest is present in the case of genuine issue advocacy. *SEIU, Local 3 v. Municipality of Mt. Leb.*, 446 F.3d 419, 427 (3d Cir. 2006). *Accord N.J. Envtl. Fed'n v. Monroe Twp.*, Civil Action No. 05-143 (KSH), 2008 U.S. Dist. LEXIS 64008, at *14-15 (D.N.J. July 31, 2008) ("It is the idea of registration itself that offends first amendment principles absent a showing that the regulation is precisely tailored to a legitimate government interest. Those who wish to speak anonymously, spontaneously, or object, on patriotic or religious grounds, to telling the government what they intend to say are burdened by any provision which requires them to register with the government . . .").

In *SEIU*, the Third Circuit found that a permitting scheme does not pass muster under either strict or intermediate scrutiny. 446 F.3d at 425. This Court should reach the same conclusion in this case. New Jersey's new law requiring registration before engaging in issue advocacy functions just like the permitting and registration schemes struck down in *Watchtower* and *SEIU*. The New Jersey scheme costs issue-advocacy speakers their anonymity while serving none of the purposes identified as appropriate by the Supreme Court.

The loss of anonymity is equally problematic when the law requires IOP to disclose certain government-mandated messages, including the fact of its sponsorship, on the face of its materials. The U.S. Supreme Court has twice upheld the right to anonymous issue-advocacy in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *Talley v. California*, 362 U.S. 60, 70 (1960).

In *McIntyre*, the State of Ohio had enacted a law very similar to that of New Jersey, requiring that "persons producing campaign literature identify themselves as the source thereof" (Ohio Supreme Court's description in decision below in *McIntyre v. Ohio Elections Comm'n*, 618 N.E.2d 152, 155 (Ohio 1993)). Campaign literature was broadly defined to include issue advocacy (just as New Jersey has broadly defined independent expenditures to include issue advocacy). Ms. McIntyre was fined for violating its terms because she distributed issue-advocacy flyers without the required disclaimer in advance of public meetings on a proposed school tax levy referendum. *McIntyre*, 514 U.S. at 337. The U.S. Supreme Court struck down the statute, saying, "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." *Id*. at 347. The Court concluded its opinion by holding, "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id*. at 357.

And the Court recognized that sponsor anonymity may be based on any number of legitimate reasons: "fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id*. at 341-42.

McIntyre built on the Court's previous holding in *Talley*, 362 U.S. 60, where it voided a municipal ordinance requiring sponsor disclosure on handbills that engaged in issue speech (urging a boycott of businesses engaged in racial discrimination), holding that the First Amendment's right to anonymous issue speech protected Mr. Talley.

McIntyre, in turn, was a crucial building block for *Buckley v. Am. Constitutional Law Found*., 525 U.S. 182 (1999) and *Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 536 U.S. 150, both of which reinforce *McIntyre's* holdings as to anonymity, if in slightly different contexts (petition circulators and religious evangelists). *Accord Fabulous Assocs., Inc. v. Pa. Pub. Util. Com*., 896 F.2d 780, 785 (3d Cir. 1990) ("An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state imposed burdens or restrictions."); *N.J. Citizen Action v. Edison Twp*., 797 F.2d 1250, 1264-65 (3d Cir. 1986); *Green v. City of Raleigh*, 523 F.3d 293, 301 (4th Cir. 2008) ("[F]orced public revelation can discourage proponents of controversial viewpoints from speaking by exposing them to harassment or

retaliation for the content of their speech. Speech can also be chilled when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression."); *Va. Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814, 817 (Va. 1998) ("a state statute cannot constitutionally prohibit anonymous issue advocacy by groups that engage solely in issue advocacy.").

The baseline in a free society is that we may distribute such materials as we wish that say what we want about important issues in our community without government mandating that we include certain content in our messages, and it is the government's burden to prove that it has a sufficient interest in requiring its mandated message.

Just as with Mrs. McInytre and Mr. Talley, IOP seeks the right to engage in issue advocacy without having to provide particular government-mandated disclaimers on its advocacy materials. And as with them, IOP may have its own reasons for wishing not to include a disclaimer, and it is within its rights to decline to do so. New Jersey's disclaimer requirement eliminates that right to anonymous issue advocacy, and the government must show its overriding interest in doing so, and its narrow tailoring to that end. This it will not be able to do because IOP's speech fits none of the limited number of categories where anonymous issue speech may be revealed. *United States v. Cassidy*, 814 F. Supp. 2d 574, 582 (D. Md. 2011) ("Even though numerous court decisions have made a point to protect

anonymous, uncomfortable speech . . . not all speech is protected speech. There are certain 'well-defined and narrowly limited classes of speech' that remain unprotected by the First Amendment," namely obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct).

B. The statute is void for discriminating among organizations. (Count III).

The New Jersey statute also impermissibly discriminates among categories of speech. By its terms, the statute only applies to 501(c)(4) and 527 organizations. A 501(c)(4) organization may only qualify for that designation if it operates not for profit but rather to "promote the social welfare." 26 U.S. Code 501(c)(4) ("Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare"). A 527 organization is a "political organization" that exists primarily for "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization." 26 U.S. Code 527(e)(1-2).

However, many other organizations, particularly 501(c)(5) union organizations and 501(c)(6) business organizations, also engage in issue advocacy. *See, e.g.*, John Mooney, "State teachers union shatters records for political spending," N.J. Spotlight (March 7, 2014), https://www.njspotlight.com/stories/14/03/06/state-teachers-union-shatters-

records-for-political-spending/ (New Jersey Education Association, i.e., the state teachers union, spent $2.9 million in 2013 to buy television ads for an issue-advocacy campaign regarding school funding and student testing); New Jersey Realtors Association (https://www.njrealtor.com/government-affairs/issues-mobilization-fund/). Thus, labor union and business viewpoints do not have to comply with these regulations, while organizations with social-welfare viewpoints must do so.

In this case, burdening social-welfare viewpoints but exempting union and business viewpoints constitutes just such illicit categorization. In *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)), the U.S. Supreme Court struck down a municipal ordinance that treated commercial newsracks differently from noncommercial newsracks. The Court said, "Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id*. at 424.

Similarly, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015), the Court applied strict scrutiny to a municipal ordinance that regulated different signs based on the contents of the signage, extending more or less favor to different

categories of signs. The Court found the municipality lacked a sufficient justification for its policy, even if there was no animus or prejudice motivating its adoption. *Id*. at 2229.

The State cannot meet the strict test of narrow tailoring. There is no compelling distinction between business and union advocacy versus social-welfare or political advocacy besides the IRS's label for the group paying for it.

The Court in *Reed* said that the prohibition on ill-fitting categorization applies without animus or prejudice. But courts have also said that they should be especially skeptical of a government's interests when such animus may be at work. Blatant underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). "[A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). *Accord Chaker v. Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005) ("The Supreme Court has looked skeptically on statutes that exempt certain speech from regulation, where the exempted speech implicates the very same concerns as the regulated speech.").

This Court need not draw inferences from the blatant underinclusiveness; news reports from the passage of the statute tell the story. The State Assembly version of what became this statute originally included 501(c)(6) business groups alongside 501(c)(4) and 527 social-welfare and political groups. Avi Kelin, "New Jersey 'Dark Money' Bill Poised to Include 501(c)(6) Trade Associations," JDSupra.com (March 26, 2019). However, that provision was stripped out in the final version agreed to by both houses. As one news report put it at the time of the change:

> "I think the way it was written, it is really a sham bill," said Ed Potosnak, executive director of the state League of Conservation Voters. He noted that the Assembly Appropriations Committee had expanded the bill to include such trade organizations as the New Jersey Chamber of Commerce and the Fuel Merchants Association, but a week later, these groups were removed when both houses passed the measure. "They are such powerful lobbying groups, they could get themselves removed," he said. "But groups like us remained. That gives uneven disclosure requirements."

Colleen O'Dea, "Dark-Money disclosure bill facing conditional veto by Murphy?" N.J. Spotlight (May 10, 2019). Advocates for grassroots progressive groups wrote in a newspaper column of the bill's "true purpose []: to drive a stake through the heart of progressive advocacy groups while protecting from disclosure powerful corporate and special interests. . . . At the same time that the bill targets grassroots organizations, it exempts from disclosure groups, like trade associations and the Chamber of Commerce, which represent powerful corporate interests." Phyllis

Salowe-Kaye and Marcia Marley, "Overriding dark money bill will cripple progressive groups, grassroots organization says," N.J. Star-Ledger (June 7, 2019). This sort of picking winners and losers based on an agenda is precisely the sort of animus that should prompt this Court to give special skepticism to the government's claims of a compelling interest in the distinction between the categories. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1669 (2015).

In a similar case, the U.S. Court of Appeals for the Fourth Circuit struck down a county resolution in which "pregnancy centers are singled out for disfavored treatment while many other sources that pregnant women may consult for advice—Internet sites, bookstores, or houses of worship—are left unregulated…" *Centro Tepeyac v. Montgomery Cty.*, 683 F.3d 591, 594-95 (4th Cir. 2012). In another similar case, the State of Arizona barred 501(c)(5)-type labor unions from accessing the state's payroll system while permitting 501(c)(3)-type charitable organizations, corporations, and benefit associations to do so. The district court found this constituted underinclusive viewpoint discrimination targeting union speech while exempting charitable and corporate speech, prompting strict scrutiny which the government could not survive. *United Food & Commer. Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1126 (D. Ariz. 2011).

IOP is likely to succeed on Count III. It has shown that the statute suffers from substantial constitutional problems because it targets two categories of nonprofit viewpoint—social-welfare and political viewpoints—while exempting two other major categories of nonprofit viewpoint—union and business viewpoints.

II. IOP establishes the other three factors necessary for preliminary relief.

First, IOP will suffer irreparable harm if its speech is chilled by this law. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 323 (3d Cir. 2013) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")). IOP is unable to move forward with its planned advocacy in New Jersey without risking disclosure that would burden its rights and threaten its leadership.

Second, the balance of harms favors Plaintiff, as well. If the Plaintiff does not go forward with its planned activities because it refuses to comply with an unconstitutional law, it will have engaged in self-censorship. "[S]elf-censorship" is "a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

If the Plaintiff does go forward with its planned activities without a preliminary injunction, then it must comply with the compelled disclaimer regime. This means the loss of its privacy and the potential for much worse. *McIntyre*, 514 U.S. at 341-42 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").

Registration and sponsorship disclosure expose the organization, its board, and its senior staff to harassment or retaliation, even at their homes. IOP may be reasonably afraid that it will be subjected to retaliation by overzealous officials. Peter Overby, "IRS Apologizes For Aggressive Scrutiny Of Conservative Groups," NPR (Oct. 27, 2017); Kate Zernike, "The Bridge Scandal, Explained," N.Y. Times (May 1, 2015). It may fear that it, its staff, or its board will experience harassment or retaliation by hardcore activists or mentally unstable assailants. *See, e.g.*, "Will your next home purchase support the extremist right-wing movement in the Northwest? A shocking look at the dark side of Conner Homes," Northwest Accountability Project, May 24, 2018, https://nwaccountabilityproject.com (a union-backed group in Washington State targets the staff and businesses of board members for the Evergreen Freedom Foundation); Carol Cratty, "25-year sentence in Family Research Council shooting," CNN.com (Sept. 19, 2013). *See generally Cmty.-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C.

Cir. 1978). This is especially so when the statute requires IOP to register the home addresses of its senior staff, board members, and founding organizers. C.19:44A-8.1(21)(a)(1-3).

If, however, the law is suspended, the State only loses information that it would have collected under an unconstitutional law. *See Doe v. Reed,* 561 U.S. 186, 207-08 (2010) (Alito, J., concurring).

Third, the granting of an injunction is in the public interest. *K.A.*, 710 F.3d at 114 ("granting preliminary injunctive relief here is in the public interest because the enforcement of an unconstitutional law vindicates no public interest.").

CONCLUSION

This Court finds itself where it has been before, faced with a New Jersey statute that forces unwanted regulation on groups engaged in pure issue advocacy. Last time around this Court concluded the "political information" statute at issue was unconstitutional because it regulated "the protected communications of ideas relating to political issues" which "are at the core of the First Amendment," with no sufficient offsetting interest of the state. *Am. Civil Liberties Union v. N.J. Election Law Enf't Com.*, 509 F. Supp. 1123, 1132-33 (D.N.J. 1981).

The same conclusion is appropriate here. Plaintiff respectfully requests that this Court find that the four factors for a preliminary injunction have been met and

issue one forthwith, so Plaintiff can proceed with its planned advocacy activities without being burdened by an unconstitutional law.

Dated: September 12, 2019

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