UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NATIONAL ORGANIZATION FOR MARRIAGE, INC., *Plaintiff* v. JAMES WALSH, in his official capacity as co-chair of the New York State Board of Elections; DOUGLAS KELLNER, in his official capacity as co-chair of the New York State Board of Elections; EVELYN AQUILA, in her official capacity as commissioner of the New York State Board of Elections, and GREGORY PETERSON, in his official capacity as commissioner of the New York State Board of Elections, *Defendants*	Case No. 10-cv-751

AMICUS CURIAE **BRIEF OF COMMON CAUSE/NY AND CITIZENS UNION**

ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000 (telephone)
(212) 715-1399 (facsimile)

Attorneys for Amici Curiae Common Cause/NY and Citizens Union

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTS 2

ARGUMENT 4

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED 4

A. Plaintiff Has Failed to Plead Facts Sufficient to Support its Claims 4

B. Plaintiff Has Failed To Show That It Has Standing 5

II. PLAINTIFF DOES NOT MERIT A PRELIMINARY INJUNCTION 7

A. Plaintiff Cannot Demonstrate Irreparable Harm 8

B. Plaintiff Is Unlikely To Succeed On the Merits 10

1. Article 14 Is Not Vague 13

2. Article 14 is Not Overbroad 18

C. A Preliminary Injunction Will Substantially Injure the Public 22

CONCLUSION 23

PRELIMINARY STATEMENT

This case is one of a series of challenges that plaintiff, National Organization for Marriage, Inc., has brought recently against state laws regulating elections. Plaintiff has filed nearly identical complaints in three other states.[1] Here, plaintiff seeks a preliminary injunction that would neuter Article 14 of New York's Election Law. Plaintiff claims that Article 14's definition of "political committee" is unconstitutional and that the Court should therefore enjoin enforcement of any part of Article 14 that imposes any requirement of any kind on any political committee anywhere in the State of New York.

Plaintiff identifies the requirements to which it objects as: filling out a registration form and filing it with the Board of Elections, designating a treasurer to keep track of its money, keeping records, disclosing the identities of its donors and the persons to whom it has paid money in connection with an election, and declining contributions from certain interests such as foreign nationals. Complaint ¶ 19. These are requirements familiar to every participant in the New York election process, including (of course) candidates for all public offices filled by election. By operation of Article 14, New Yorkers can see who is giving money to, and getting money from, candidates for elected office. For more than thirty-five years, political committees supporting candidates or ballot questions have routinely complied with Article 14, when seeking to influence elections for offices as diverse as Village Trustee, Sheriff, Receiver of Taxes, County Legislator, Family Court Judge, and Highway Superintendent, just to name a small handful.

Granting plaintiff the relief it seeks would do away with all such disclosures, as well as the very modest additional requirements of Article 14, and thereby do an enormous disservice to

[1] Copies of each of those complaints are annexed hereto as Exhibits A, B and C, respectively.

the people of the State of New York. For its own part, plaintiff has made no factual showing that it would benefit from *any* injunction, let alone the sweeping, drastic, and disruptive injunction it demands. Plaintiff's legal arguments are meritless: the Legislature's carefully crafted definition of "political committee" is neither vague nor overbroad. It is substantially related to important government interests—interests that the Supreme Court of the United States reaffirmed only months ago:

> With the advent of the Internet, 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. Shareholders 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." . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. ***This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.***

Citizens United v. FEC, 130 S. Ct. 876, 915-16 (2010) (emphasis supplied). The relief plaintiff seeks would destroy the transparency created by Article 14 and permit special interests to funnel money to elected officials in secret. The Court should deny the motion and dismiss the Complaint.

FACTS

The Complaint and other facts of record before the Court are bare bones. They indicate that plaintiff is an organized advocacy group focused on opposing state recognition of same-sex marriage. Complaint Ex. 7.[2] Plaintiff's IRS Form 990 (Return of Organization Exempt from

[2] In New York, state-sanctioned same-sex marriage has been an issue before the Legislature for several years. *See, e.g.*, A. 40003, 232nd Leg. Sess., 20th Extraordinary Sess. (N.Y. 2009) (bill that would legalize same-sex marriage passed Assembly, but not Senate); A. 3000, 231st Leg. Sess. (N.Y. 2009) (bill introduced that would declare same-sex marriages void, enacting clause stricken); A. 4978, 230th Leg. Sess. (N.Y. 2007) (bill introduced that would declare same-sex

Footnote continued on next page

Tax) provides little additional information. Complaint Ex. 8. Plaintiff is organized under the laws of Virginia, has its principal office in New Jersey, and raised and spent $3 million in 2008. *Id.*

Plaintiff alleges that it intends to participate in electioneering for or against the major-party candidates for governor, as well as certain targeted but unidentified New York legislators running for reelection in 2010, by raising or spending more than $1,000 on radio and television advertisements, direct mail, and internet postings. Complaint ¶¶ 8, 10, Exs. 2-6. Plaintiff has not offered any evidence that it actually plans to go forward with any particular advertisement, and it has not identified any actual election races in this District that it intends to attempt to influence, claiming that to do so would "divulge its strategy." Complaint ¶ 8. Plaintiff also discloses that its charter states: "No substantial part of the activities of the Corporation [*i.e.* plaintiff] shall participate in, or intervene in (including the publishing or distribution of Statements) any political campaign on behalf of or in opposition to any candidate for public office." Complaint Ex. 7 ¶ 9. Plaintiff does not explain how its alleged plans can be reconciled with this limitation in its Charter.

Plaintiff's complaint and its motion papers are silent on whether plaintiff has any other connection to New York, or even any members or donors anywhere in the State of New York, let alone in this District. Plaintiff has not alleged any harm that would actually befall it or any of its members or donors should it comply with the modest requirements of Article 14. Rather, the gravamen of its complaint seems to be that even the fact of being categorized as a "political committee" within the meaning of Article 14 would somehow "chill" its participation in the

Footnote continued from previous page
marriages void, but never passed); A. 7463, 228th Leg. Sess. (N.Y. 2005) (bill introduced that would recognize same-sex marriages as valid, but never passed).

electoral process. Complaint ¶¶ 15-17. Plaintiff does not explain how this would happen. It makes no showing that it does not have the resources to fill out the forms required by Article 14. It makes no showing that any of its donors or members would be stigmatized or shunned should their participation in New York elections be revealed to the public. It makes no showing that it would be dissuaded or discouraged from speaking for any other reason. It states only that complying with Article 14 "would simply not be worth it" because plaintiff "does not want to bear the burdens of being a political committee." Complaint ¶ 20. In other words, for its own reasons, plaintiff wants to spend its out-of-state funds in connection with New York's elections, but wants to do so from under a shroud of secrecy, rather than in the transparent environment created by Article 14.

ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED

A. Plaintiff Has Failed to Plead Facts Sufficient to Support its Claims

Plaintiff's complaint fails to meet the modest pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Rule 8 provides that a "pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). The short and plain statement must present a plausible claim for relief, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), "in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007).

The Complaint utterly fails to meet the requirements of Rule 8. In fact, it does not read like a complaint at all—it is more like a white paper discussing First Amendment theory. The complaint is replete with legal argument, conclusory statements, a thicket of citations to cases,

and more than one footnote per page. *See, e.g.,* Complaint ¶¶ 9, 16, 18, 27, 28, 29, 31, 35-40, 42-48, 50-61 and 63-66. For example, in paragraph 31, Plaintiff alleges:

> The "loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). So unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See id.*

Complaint ¶ 31. Yet, Plaintiff fails to plead any actual *facts* in support of these legal conclusions. The few facts that Plaintiff does plead are buried in lengthy argumentative passages containing legal conclusions regarding ultimate issues in the case. In that way, the complaint "places an unjustified burden on the [Court] and the part[ies] who must respond to it because they are forced to ferret out the relevant material from a mass of verbiage." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1281 at 709 (3d ed. 2004).

The United States District Court for the District of Rhode Island recently reached an identical conclusion with respect to a nearly identical complaint in *National Organization of Marriage, Inc. v. Daluz*, Civil Action No. 10-392-ML (D.R.I.). Noting that federal trial courts have the discretion to enforce Rule 8 and dispose of claims *sua sponte*, the Court held that the pertinent factual allegations were "buried in . . . conclusory and argumentative passages," dismissed the plaintiff's complaint without prejudice, and ordered plaintiff to file an amended complaint, if it chose, within seven days. The Complaint in this case suffers from the same infirmities.

B. <u>Plaintiff Has Failed To Show That It Has Standing</u>

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (*citing Horne v. Flores,* 129 S. Ct. 2579, 2592 (2009)). "'Standing . . . is not an ingenious

academic exercise in the conceivable . . . [but] requires . . . a factual showing of perceptible harm.'" *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992)). "Except when necessary [to prevent actual harm], courts have no charter to review and revise legislative and executive action. . . . This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 129 S. Ct. at 1148 (citations omitted). Plaintiff, as the party seeking to invoke the Court's jurisdiction here, bears the burden of establishing the existence of an individualized injury sufficient to give rise to Article III standing. *Id.* at 1149.

However, instead of coming forth with facts and evidence establishing that it will suffer an actual injury absent an injunction, plaintiff merely alleges that it deems itself "chilled" by the prospect of being a "political committee." Plaintiff provides no facts explaining why it will be hurt if it complies with Article 14. There is no reason to believe (and plaintiff does not contend) that simply meeting the definition of a "political committee" would stigmatize plaintiff or otherwise would, by itself, cause it injury.[3] Plaintiff identifies three requirements of "political committee" status under Article 14 that it considers "burdensome and onerous": (1) designating a treasurer and filing a form registering with the Board of Elections, (2) keeping records, and (3) disclosing its contributions and expenditures in connection with particular elections. Pl. Br. 11.

Designating a treasurer and filling out a form cannot be deemed onerous for plaintiff, because it already has a treasurer who signs and files its federal tax returns and the annual reports required by the State of Virginia, where plaintiff is organized. Complaint Ex. 8.

[3] Plaintiff suggests that political committee status, itself, is burdensome and onerous because the First Amendment allows the state to impose greater restrictions and obligations on such entities than it would be permitted to impose on entities that are not political committees. Pl. Br. 10-11. However, such an abstract point about the restrictions that the state *might* impose on a "political committee" is patently irrelevant to the question whether the *actual* statute *as it exists in the real world* causes identifiable harm to the actual plaintiff before the Court.

Keeping records cannot be deemed onerous for plaintiff because it already must comply with such requirements under state and federal law. *See* Virginia Nonstock Corporation Act. § 13.1-932 (state law imposing recordkeeping requirements on plaintiff); 26 U.S.C. § 1.6001-1(c) (federal law).

Thus, plaintiff's alleged "injury in fact" boils down to the requirement that it comply with Article 14's reporting requirements which are, in fact, quite modest. To be sure, the courts have "long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show 'a reasonable probability that the compelled disclosure of [personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *John Doe No. 1 v. Reed,* 130 S. Ct. 2811, 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). However, plaintiff does not allege in its complaint or elsewhere that disclosing its contributors or expenditures in connection with an election will subject it or its members to any "threats, harassment or reprisals." Nor has plaintiff presented any evidence that it or its contributors will be subject to such harm if an injunction is not granted. Indeed, plaintiff's charter suggests that the activities it asks the Court to protect would be *ultra vires*. Plaintiff has not explained to the Court why, if at all, its election activities would comport with its Charter limitations. At bottom, a mere desire to avoid non-onerous legal obligations is not adequate to show "concrete, particularized, and actual or imminent" injury "fairly traceable" to complying with those obligations giving rise to Article III jurisdiction. *Monsanto Co.*, 130 S. Ct. at 2752 (citation omitted).

II. PLAINTIFF DOES NOT MERIT A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy. *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010). To qualify for one, "a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) 'either a likelihood of success on the merits, or a serious question going to

the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor,' *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (per curiam); and 3) that the public's interest weighs in favor of granting an injunction." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). Further, "'[w]hen, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" *Id.* (quoting *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir.2008)).

Plaintiff bears the burden to come forward with *evidence* sufficient to demonstrate that each of the requirements for a preliminary injunction are met. *See Almontaser*, 519 F.3d at 508; *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007). Plaintiff's bald factual allegations and legal conclusions are not sufficient to meet this burden. *See Benitez v. Duquette*, 293 Fed. App'x 791, 792 (2d Cir. 2008) (affirming denial of preliminary injunction where movant offered conclusory statements in support of alleged irreparable harm).

A. Plaintiff Cannot Demonstrate Irreparable Harm

Plaintiff contends, with virtually no discussion of the pertinent facts, that it is entitled to the extreme remedy of a preliminary injunction prohibiting the enforcement of an important state law not only as applied to itself, but as applied to every person wishing to support or oppose any candidate for any elected office anywhere in the entire state of New York. Plaintiff's motion papers include a lengthy and abstract discussion of First Amendment theory, but that discussion is untethered to actual facts. Plaintiff offers no evidence of irreparable harm.

Little more than a week ago, the First Circuit affirmed the denial of a motion to preliminarily enjoin the enforcement of Maine's campaign finance reporting statute because the appellants had failed to provide evidence of an irreparable injury. *Respect Maine v. McKee*, ---

F.3d ---, 2010 WL 3861051, *1-2 (1st Cir., Oct. 5, 2010). The court held that "[i]t was appellants' burden to produce such evidence," and that conclusory allegations of an injury to appellants' First Amendment rights, absent evidentiary support, were not sufficient to justify a preliminary injunction. *Id.* The court noted:

> The only irreparable injury claimed by appellants is that to their First Amendment rights. "The fact that [appellants are] asserting First Amendment rights does not automatically require a finding of irreparable injury." . . . Whether there is any such harm is the issue that will ultimately be addressed on the merits of the case. We recognize the importance of rights asserted under the First Amendment, but every case depends on its own facts. We acknowledge that the issues raised by the challenge to Maine's laws are difficult and will require careful analysis, on a fully developed record.

Id. (citations omitted). Here, plaintiff has similarly failed to come forward with any evidence to support its claimed loss of First Amendment rights, and thus, has failed to demonstrate the requisite irreparable injury.

Moreover, any suggestion of irreparable harm rings hollow in light of plaintiff's delay in filing this action and the pending motion. Plaintiff claims that it must have the Court's immediate attention because of the impending election. But Article 14 has been on the books for more than thirty-five years. It is common knowledge, and certainly known to an entity as sophisticated as plaintiff, that New York's elections are held on the first Tuesday next succeeding the first Monday in November. Elec. L. § 8-100[1](c). The issue of concern to plaintiff—state sanctioned same-sex marriage—has been a matter of public record before the Legislature since 2005 or earlier, with the most recent vote having taken place on December 2, 2009. *See* A. 40003, 232nd Leg. Sess., 20th Extraordinary Sess. (N.Y. 2009); A. 7463, 228th Leg. Sess. (N.Y. 2005). These votes were reported in the press. *See, e.g.*, Jeremy W. Peters, *New York State Senate Turns Back on Gay Marriage*, N.Y. Times, Dec. 2, 2009, at A1; Jeremy

W. Peters et al., *Marriage Bill Poses a Test Of Loyalties: Church vs. State*, Apr. 27, 2009, at A16; Erin Duggan, *Marriages Divide Legislature*, Albany Times Union, Feb. 28, 2004, at A1.

Plaintiff does not explain why—having waited for years to challenge this long-standing statute—it now urgently needs the Court's intervention. "[D]elay alone may justify denial of a preliminary injunction" because the "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see Respect Maine*, 2010 WL 3861051 at *2-3 (affirming denial of motion to enjoin enforcement of campaign finance statute and noting that, because appellant declined to challenge statute until two months before election, "this 'emergency' is largely one of [appellants'] own making.").

B. Plaintiff Is Unlikely To Succeed On the Merits

Plaintiff contends that the definition of "political committee" under Article 14 is unconstitutionally vague and overly broad. None of these arguments has merit. "New York's election statutes, as with other state legislative enactments, have been afforded a strong presumption of constitutionality." *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 292 (S.D.N.Y. 1994); *see Kermani v. New York State Bd. of Elections*, 487 F. Supp. 2d 101, 107 (N.D.N.Y. 2006) (same); *Soleil v. New York*, 2005 WL 662682, at *5 (E.D.N.Y. Mar. 22, 2005) (same).

Initially enacted in 1974, Article 14 does not ban speech, and it is entirely viewpoint-neutral. In the interest of maintaining an open and transparent election process, Article 14 imposes disclosure and other modest requirements on "political committees" and others involved

in the election process.[4] The Legislature's definition of "political committee" is carefully constructed to capture those organizations in whatever form, to the extent that they involve themselves in an election. Contrary to plaintiff's suggestion, the definition does not apply to *any* issue advocacy group—only advocacy groups that act in connection with a vote in an election. The definition reads:

> "[P]olitical committee means any corporation aiding or promoting and any committee, political club or combination of one or more persons operating or co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office; ***but nothing in this article shall apply to any committee or organization for the discussion or advancement of political questions or principles without connection with any vote*** or to a national committee organized for the election of presidential or vice-presidential candidates; provided, however, that a person or corporation making a contribution or contributions to a candidate or a political committee which has filed pursuant to section 14-118 shall not, by that fact alone, be deemed to be a political committee as herein defined.

New York Election Law § 14-100[1] (emphasis supplied). In addition, the statute contains a further limitation for groups devoted to some party or principal other than a single candidate:

> Notwithstanding the provisions of subdivision one hereof, if the expenditures made and liabilities incurred in any calendar year by

[4] To aid the political committees and other entities that must make disclosures under Article 14, the New York Board of Elections publishes a wealth of information on its website, including descriptions of the various types of entities covered by the statute, step-by-step instructions for registration, the types of reports that must be filed and how to do so. *See http://www.elections.state.ny.us/CFU.html*. The Board of Elections also publishes a written Campaign Finance Handbook, which details filing requirements, explains electronic filing procedures, provides samples of filing forms and defines various frequently used terms. *See http://www.elections.state.ny.us/NYSBOE/download/finance/hndbk2010.pdf.*

> any political committee for the purpose of aiding or promoting the success or defeat of one or more ballot proposals are less than five thousand dollars and ***less than fifty percent of all the expenditures made and liabilities incurred by such committee in such year, then such committee shall be required to report only those contributions which are made to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals***, but such committee shall be required to report all expenditures made and liabilities incurred for such purposes. Nothing contained in this subdivision shall be construed to relieve any political committee aiding or promoting the success or defeat of a candidate from any of the reporting requirements imposed by this article.

New York Election Law § 14-102[2] (emphasis supplied). Taken as a whole, the Legislature has provided a three-part test that is easy for an entity in plaintiff's circumstances to follow.

First, the statute applies to an entity, like plaintiff, that is "co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal" or "to aid or take part in the election or defeat of a candidate for public office." § 14-100[1]. Plaintiff obviously meets the first part of this test because, at a minimum, it is promoting the success of a "political principle," and it expresses an intent to meet this prong as well by "aid[ing] or tak[ing] part in the election or defeat of a candidate for public office."

Second, the statute exempts "any committee or organization for the discussion or advancement of political questions or principles without connection with any vote." § 14-100[1]. If plaintiff wishes to promote the advancement of its political principles without connection with any vote, plaintiff would qualify for the exemption; but plaintiff has announced its intention to promote the advancement of its goals in connection with the upcoming election of particular candidates and, if it follows through on that intention, it would not qualify for the exemption. That is not difficult for a reasonably intelligent person to understand.

Third, the statute contains an additional limitation for political committees spending less than $5,000 per year and less than 50% of their expenditures and liabilities in connection with a

particular ballot proposal. Such committees need only report "*those contributions which are made to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals*" as well as "all expenditures made and liabilities incurred for such purposes." § 14-102[2]. This limitation does not "relieve any political committee aiding or promoting the success or defeat of a candidate from any of the reporting requirements." *Id.* Plaintiff has announced its intention to go beyond mere issue advocacy and to aid or promote the success and defeat of particular candidates, and therefore, it would not qualify for this exemption.

1. Article 14 Is Not Vague

Plaintiff's principal contention is that the Statute's definition of "political committee" allegedly is unconstitutionally vague, because it covers entities that "aid or promote the success or defeat of a political . . . principal." *See* Pl. Br. 5-8. Plaintiff's argument is without merit.

In addressing whether a statute is vague, courts must examine the statute as a whole. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *United States v. Ali*, 2008 WL 4773422, at *6 (E.D.N.Y. Oct. 27, 2008) (citing *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 327 (2d Cir. 2007)). A statute is not unconstitutionally vague unless it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or does not "provide explicit standards" for those who are tasked with enforcing it. *Grayned*, 408 U.S. at 108.

A statute is expected to have some manner of flexibility and reasonable breadth and need not possess "meticulous specificity" in order to be constitutional. *Id.* At 110. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008). The mere fact that a statute may give rise to close factual situations, or is subject to differing interpretations, does not render it

unconstitutional. *See id.* at 305-06; *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 179 (2d Cir. 2006). As the Supreme Court has stated: "Close cases can be imagined under virtually any statute," but that issue is addressed by the burden-of-proof requirement, rather than by striking down the statute as unconstitutional. *Williams*, 553 U.S. at 305-06.

A statute is not *facially* vague unless it is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). In other words, it must be shown that "the statute is vague in the sense that no standard of conduct is specified at all." *United States v. Nadi*, 996 F. 2d 548, 550 (2d Cir. 1993). That obviously is not the case here. Hundreds of political committees each year have no trouble identifying themselves as such and complying with Article 14. There is no colorable claim that Article 14 is vague on its face.

Article 14, on its face, gives notice that an entity will be considered a "political committee" if it involves itself in an election or other vote, regardless of whether that entity is promoting (or opposing) a specific candidate or a broader political principle. However, if the entity is engaged in pure issue advocacy, without tying its activities to any particular vote, Article 14 exempts the entity from its requirements. Such language unquestionably gives a person of ordinary intelligence a reasonable opportunity to understand the types of entities that are designated as "political committees" under Article 14, and therefore, cannot legitimately be said to be facially vague.

The Third Department addressed this very issue in *Klepper v. Christian Coalition of New York, Inc.*, 259 A.D.2d 926 (3d Dept. 1999). In that case, the Christian Coalition (a 501(c)(4) not-for-profit corporation just like plaintiff) argued that Article 14's definition of "political committee" was unconstitutional on its face. *Id.* at 927. The court rejected that argument and,

pointing to the limiting phrase of Section 14-100[1] quoted above, held: "Inasmuch as this savings provision preserves the unencumbered right of an organization to engage in issue advocacy, we find no merit to [Christian Coalition]'s facial challenge to the constitutionality of the provisions at issue." *Id.* Thus, the long-standing provision that plaintiff claims is unconstitutional has already been analyzed and upheld as facially valid by the New York courts.

Article 14 also is not vague as applied to plaintiff. It is apparent from both the timing and text of plaintiff's proposed advertisements that it falls within Article 14's definition of "political committee." In its complaint, plaintiff reveals its intent to spend money advertising in order to support the candidacy of Carl Paladino and to defeat the candidacy of Andrew Cuomo during the weeks leading up to the elections this November. Complaint ¶ 8 & Exs. 2, 4, 5. Plaintiff's advertisements specifically encourage citizens to take action "[a]s the election approaches." *Id.*, Exs. 1-6. It is clear that the promotion of a chosen political principal in connection with the election of specified candidates for public office would render plaintiff a political committee as that term is defined in New York law.

The decision in *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75, 77-78 (S.D.N.Y. 1978), is not persuasive authority to the contrary. That case involved a challenge by the New York Civil Liberties Union to the statue shortly after its enactment. The court held that Article 14 was unconstitutional to the extent that it reached entities engaged in pure issue advocacy, in the context of a case in which the plaintiff made a particularized showing that its members feared the consequences of disclosure. The court in *Acito* did not discuss the definitional exclusion of organizations "without connection with any vote or to a national committee organized for the election of presidential or vice-presidential candidates." § 14-100[1].

Moreover, in 1983, the Legislature amended the Election Law specifically in response to the decision in *Acito*, passing the exception in § 14-100[2]. As the sponsor of the law in the Assembly explained, the legislation was designed to

> accomplish a full restoration of financial reporting by major political action committees and organizations who work to pass or defeat political questions submitted to the voters on Election Day.... [T]hese requirements are very much in effect and law when it comes to political candidates, and I feel that the people of this State have a right to know, as well, how their votes are manipulated, pro or con on an issue, as well as on a candidate.... We believe this particular bill answers the court's recommendation.

Assembly Debate Transcript 73-75 (1983).[5] The sponsor in the Senate explained,

> if an organization spends 5,000 or more or half of their annual budget in a fight for or against something that's on the ballot, I think that's substantial. I think the voters have a right to know where those moneys are coming from; and I think they have the same obligation to report those sums of moneys that they receive as we do as legislators in our campaign committees.... [T]he court's narrow interpretation of the previous section [it] struck down indicated that this would be a proper way to go....

Senate Debate Transcript p. 748-49 (1983).[6]

Finally, since 1978, New York has had thirty years of experience with the statute, which is now routinely obeyed without incident or complaint; persons who make political contributions and who receive expenditures are easily identified though the Board of Election's website, and such disclosure is widely recognized as a strong benefit to the public. To the extent that privacy concerns are implicated by disclosure, the Legislature took account of those concerns, limiting the reach of the disclosure requirement for contributions to "those contributions which are made

---

[5] A copy of the Assembly Debate Transcript is annexed hereto as Exhibit D.

[6] A copy of the Senate Debate Transcript is annexed hereto as Exhibit E.

to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals." § 14-100[2].

Plaintiff argues that Article 14's definition of "political committee" must be unconstitutionally vague on the theory that it is less precise than the phrase "advocating the election or defeat of a candidate," which the Supreme Court purportedly held was vague in *Buckley*. Pl. Br. 7. However, plaintiff's reliance on *Buckley* to support its argument is unpersuasive. *First*, the portion of *Buckley* to which Plaintiff cites has nothing to do with defining "political committees." Rather, that discussion concerned a criminal prohibition limiting independent expenditures "relative to" a candidate to $1,000. *See Buckley*, 424 U.S. at 39-44. *Second*, Plaintiff's contention that the *Buckley* court held that the phrase "advocating the election or defeat of a candidate" was unconstitutionally vague in all applications is incorrect. Rather, the Court found a different phrase—"relative to a clearly identified candidate"—to be unconstitutional. *See id.* at 39-44. Contrary to plaintiff's assertion, the Court expressed concern that the potentially severe penalties would cause individuals to self-censor because of the breadth of the prohibition. To alleviate that concern, the Court narrowed the statutory phrase to encompass only those expenditures made for the express purpose of "advocat[ing] the election or defeat" of a candidate. *See id.* That holding teaches nothing about the vagueness or clarity of the New York statutory scheme, which is carefully reticulated to capture a broad spectrum of organizations—but only when they are spending substantial funds in connection with a particular vote or advocating the election or defeat of a candidate.[7]

---

[7] The limiting language distinguishes Article 14 from the other cases on which plaintiff relies. For example, in both *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), the courts were concerned with statutory language that arguably imposed disclosure requirements on entities that merely engaged in issue advocacy, without becoming involved in any particular election or vote.

Footnote continued on next page

2. **Article 14 is Not Overbroad**

Under the First Amendment, a law may be overturned as impermissibly overbroad only if a "substantial number" of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The courts do not apply the "'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *See New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988). Plaintiff has failed to identify even one unconstitutional application of Article 14, let alone a "substantial number" in "relation to the statute's plainly legitimate sweep."

The courts evaluate election laws imposing disclosure requirements under the "exacting scrutiny" standard. Such laws are upheld as long as there is a "substantial relation" between the statute's requirements and a "sufficiently important" government interest. *Citizens United*, 130 S. Ct. at 914 (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976), and *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003)); *see Speechnow.org v. FEC*, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (following *Citizens United* and applying exacting scrutiny in upholding registration and reporting requirements); *Nat'l Org. For Marriage v. McKee*, 2010 WL 3270092, at *9 (D. Me. Aug. 19, 2010) (same).[8] There is no question that Article 14 meets those requirements.

Footnote continued from previous page
See North Carolina Right to Life., 168 F.3d at 712-13; *Center for Individual Freedom*, 449 F.3d at 663-64. That is not an issue here because the limiting language in Section 14-100[1] specifically excludes such entities from the definition of "political committee" under Article 14.

[8] Plaintiff contends for strict scrutiny by arguing that all regulation of political committees is subject to strict scrutiny. Pl. Br. 9. Plaintiff confuses the case at hand with cases reviewing actual *bans* on speech. *See, e.g., FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986). Nothing in those decisions suggests that strict scrutiny should be applied to *all* regulation of entities called "political committees," nor would such a rule make sense. The issue is what does the statute *do*, not what *name* does it use to identify the entities subject to its terms. Indeed, this precise argument by this precise plaintiff was soundly rejected by the District Court in Maine. *McKee*, 2010 WL 3270092, at *9 & n.122, n.126. Plaintiff's other cases do not
Footnote continued on next page

New York undoubtedly has a substantial (indeed compelling) interest in fostering a fair and transparent electoral system by requiring disclosure of certain information by entities that raise and expend money in connection with elections and other votes. Transparency "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 915-16. "Public disclosure... promotes transparency and accountability in the electoral process to an extent other measures cannot." *John Doe No. 1 v. Reed*, 130 S. Ct. at 2820. Indeed, as long ago as 1976, the Supreme Court enumerated a number of specific governmental interests that are served by statutory recordkeeping and disclosure requirements:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Footnote continued from previous page

support its position. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990) (considering constitutionality of segregated fund requirement); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (analyzing definitional provision without discussing level of scrutiny required); *Colorado Right to Life Comm'n., Inc. v. Coffman,* 498 F.3d 1137, 1146-1155 (10th Cir. 2007) (considering constitutionality of direct bans on express advocacy and electioneering by corporations).

Buckley, 424 U.S. 1, 66-68 (1976); *see also Speechnow.org*, 599 F.3d at 696 (recognizing strong "government interest in 'provid[ing] the electorate with information' about the sources of political campaign funds") (citation omitted).

There also is no question that Article 14 is "substantially related" to the strong government interests described above. Article 14 requires "political committees" to disclose information concerning the contributions received and expenditures made for the purpose of supporting or opposing a candidate or political principle in connection with an election or other vote. Such requirements are not arbitrary or unduly burdensome. They have existed on the books in New York for more than three decades, and thousands of political committees have deemed disclosure "worth it" as the price of admission to advocating for or against a candidate for election.

As the Supreme Court explained earlier this year in an analogous case challenging disclosure:

> Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the [disclosure statute at issue]. In doing so, we note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.

John Doe No. 1 v. Reed, 130 S. Ct. at 2822.

Similarly, in *Citizens United*, the Supreme Court rejected a facial challenge to federal election disclaimer and disclosure requirements, holding that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S. Ct. at 914 (citations omitted). The *Citizens United* court also held that "disclosure is a less restrictive

alternative to more comprehensive regulations of speech." *Id.* at 915. There can be little doubt that Article 14 is facially valid.

Ignoring the holdings in *Citizens United* and *Reed,* plaintiff relies on an erroneous interpretation of *Buckley*. Plaintiff claims that a state may only designate an entity as a "political committee" if the entity (a) is "under the control of a candidate" or (b) "the major purpose" of the entity is the nomination or election of a candidate in the jurisdiction, and that any other definition of "political committee" is unconstitutional. Pl. Br. 12. That is not the law. The Supreme Court has never held that states are limited to imposing disclosure or other requirements on organizations that meet a "control" or "major purpose" test.

To be sure, the Court in *Buckley* performed a narrowing construction of *federal* election law in order to sidestep concerns regarding the overbreadth of the *specific statute at issue in that case*, but the Court never suggested that its particular narrowing construction was constitutionally required in all cases. *See Buckley*, 424 U.S. at 79. The Supreme Court has specifically explained that the part of *Buckley* on which plaintiff relies involved an "intermediate step of statutory construction on the way to its constitutional holding," not "a constitutional test." *FEC v. Wisconsin Right to Life, Inc.*, 550 U.S. 449, 474 n. 7. (2007); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 662 (1990), *overruled on other grounds by Citizens United*, 130 S. Ct. 876 (upholding provision imposing political committee-style requirements on *any* corporation making expenditures in connection with federal election, regardless of corporation's "major purpose"); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (same); *see also Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 at *19-20 (W.D. Wash. Jan. 8, 2009) ("Subsequent Supreme Court opinions make clear that there is no 'bright-line' requirement that

[political committee]-style requirements only be imposed on organizations whose single 'major purpose' is campaign advocacy.").

The United States District Court for the District of Maine recently pointed out the absurdity of plaintiff's argument in rejecting an attack by plaintiff on a similar statute:

> NOM's desire to limit campaign finance disclosures to "major purpose" groups would yield perverse results, totally at odds with the interest in "transparency" recognized in *Citizens United*. Under Plaintiff's interpretation, a small group with the major purpose of re-electing a Maine state representative that spends $1,500 for ads could be required to register as a [political committee]. But a mega-group that spends $1,500,000 to defeat the same candidate would not have to register because the defeat of that candidate could not be considered the corporation's major purpose. I see nothing in the Supreme Court's recent case law suggesting that the First Amendment's protections should apply so unequally.

McKee, 2010 WL 3270092, at *10. Other courts have also rejected the "major purpose" and "control" tests in the context of a state disclosure statute. *See id.*; *Human Life of Washington*, 2009 WL 62144 at *61-63; *California Pro-Life Council, Inc. v. Randolph*, 507 F. 2d 1172, 1180 (9th Cir. 2007).

C. A Preliminary Injunction Will Substantially Injure the Public

Plaintiff states in a conclusory fashion that the equities must tip in its favor and that a preliminary injunction must be in the public interest solely because, without such an injunction, plaintiff's First Amendment rights will be injured. *See* Pl. Br. 4. However, as discussed above, plaintiff has not provided any evidence to support its alleged First Amendment injury and any supposed urgency in preventing that injury is, at best, due to plaintiff's own delay in bringing its motion. Conversely, the preliminary injunction that plaintiff seeks, if granted, will inflict a very real and serious injury on the citizens of the State of New York and will dramatically interfere with the State's ability to regulate its elections.

As discussed above, the state has a strong interest in ensuring that state elections are fair, open and honest, and Article 14 is an essential, time-tested tool for shedding the disinfectant of sunshine on the manner in which campaigns are financed. If, as plaintiff demands, the Court enjoins the State from enforcing Article 14 during the upcoming elections, individuals and entities will be able to engage in all manner of electioneering and other political activity with anonymity. Voters will be left completely in the dark in knowing where political campaign money has come from and how it is being spent.

The recent decision by the First Circuit in *Respect Maine* is once again instructive. There the court affirmed the denial of a motion to enjoin the enforcement of Maine's campaign finance reporting statute that was filed approximately three months before Maine's state elections, pointing to the "considerable harm" that such an injunction would cause to the state's citizens. *Respect Maine*, 2010 WL 3861051 at *2-3.

> We also note the harm to the public interest from the chaos that will ensue if the Maine election laws, which have been in place since 1996, are invalidated by a court order in the crucial final weeks before an election. . . Given the potential harm to Maine and to all candidates if the emergency injunction were granted, and the public interest in maintaining the status quo during the period of the Court's deliberations, we deny the emergency motion.

Id. at *2-3.

Here, plaintiff's interest in advocating for or against particular candidates from under a shroud of darkness—an interest unsupported by any concrete allegations of threats, harassment, or reprisals—pales in comparison to the important public interest in disclosure.

CONCLUSION

The Court should dismiss the Complaint and deny the motion for a preliminary injunction.

Dated: October 15, 2010
New York, New York

ARNOLD & PORTER LLP

By: _/s/ Anthony D. Boccanfuso_
Anthony D. Boccanfuso
Kent A. Yalowitz[9]
Matthew D. Grant
Maxwell C. Preston
Attorneys for Amici Curiae Common Cause/NY and Citizens Union
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Fax: (212) 715-1399
Email: anthony.boccanfuso@aporter.com

[9] Motions for admission *pro hac vice* is pending.

EXHIBIT A

In the United States District Court
for the Northern District of Florida
Gainesville Division

National Organization for Marriage, Inc., *Plaintiff* *v.* **Dawn Roberts,** in her official capacity as Florida secretary of state; Jorge Cruz-Bustillo, in his official capacity as chair of the Florida Elections Commission, and William Hollimon, Alia Faraj-Johnson, Leon Jacobs, Jr., Julie Kane, Gregory King, Jose Luis Rodriguez, Thomas Rossin, and Brian Seymour, in their official capacities as members of the Florida Elections Commission, *Defendants*	Civil Action No. ____

Verified Complaint

Table of Contents

Table of Contents 2

I. Background 5

A. Plaintiff 5

1. NOM 5
2. NOM's Speech 5
3. What NOM Does and Does Not Do 6

B. Defendants 7
C. Florida Law 8
D. Future Speech 12

II. Discussion 13

A. Justiciability 13

1. Standing 13

a. Constitutional Standing 13
b. Prudential Standing 13

2. Ripeness 14

B. Irreparable Harm 14

C. First Principles 14

1. The Limited Power of Government 14
2. The First and Fourteenth Amendments as a Restriction on the Already Limited Power of Government 15

a. Vagueness 15
b. Overbreadth 15

3. Determining the Meaning of Political Speech and whether Government may Regulate it 17

D. Vagueness 18

1. The Order of Questions for Political Committee Status 18
2. Florida Law is Vague, and therefore Overbroad 18
3. Why Florida Law is Vague, and therefore Overbroad 19

E. Overbreadth: In General 19

F. Overbreadth: The Electioneering Communications Organization Definition 20

1. Strict Scrutiny 20
2. Applying Strict Scrutiny 22

G. Exacting Scrutiny 23
H. Facially Unconstitutional 24
I. Narrowing Glosses, Certification, and Severability 25

III. Prayers for Relief 25

Verification 28

1. Plaintiff National Organization for Marriage, Inc. ("NOM") files this verified complaint.

2. This action begins with the principle of freedom of speech. Government may limit or otherwise regulate speech only when it has the enumerated power to do so and only when the exercise of that power is constitutional.

3. This Court has jurisdiction, because this action arises under the First and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331 (1980).

4. This Court also has jurisdiction, because this action arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1996). *See* 28 U.S.C. § 1343.a (1979).

5. This Court also has jurisdiction under the Declaratory Judgment Act. *See id.* §§ 2201 (1993), 2202 (1948).

6. Venue is also proper in this Court, because "a substantial part of the events or omissions giving rise to the claim[s]" occurs in the Northern District of Florida. *See id.* § 1391.b.2 (1992).

7. Plaintiff submits this action is related to *Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning*, No. 08-445 (N.D. Fla.), although it is no longer pending.

I. Background

A. Plaintiff

1. NOM

8. Plaintiff NOM, a non-profit corporation exempt from federal income taxation under I.R.C. § 501.c.4 (2006), is a non-sectarian and non-partisan organization. It is not connected with any political candidate or political party. Nor is it connected with any political committee other than its own. *Cf.* 2 U.S.C. § 431.7 (2002) (defining "connected organization" under federal law).

2. NOM's Speech

9. Consistent with its mission,[1] NOM seeks in September and October 2010 to engage in multiple forms of speech in Florida, including radio ads,[2] television ads,[3] direct mail,[4] and publicly accessible Internet postings of its radio ads and direct mail. NOM will run the radio and television ads on stations reaching, and send the direct mail to, persons in Florida. The direct-mail exhibit refers to "Candidate X." This refers to candidates for the Florida legislature in the 2010 general election. This includes candidates from the Northern District of

---

[1] VERIFIED COMPL. ("VC") Exh. 1, *available at* http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm (all Internet sites visited Sept. 13, 2010).

[2] VC Exhs. 2-3.

[3] VC Exhs. 4-5.

[4] VC Exh. 6.

Florida. When NOM sends the direct-mail piece, it will substitute state candidates' names for "Candidate X." NOM does not wish to reveal the candidates' names in this complaint, because it does not wish to divulge its strategy at this early date. Further, NOM will target each example of its speech to the geographic area that the clearly identified candidate would represent if elected. *Cf.* FLA. STAT. § 106.011.18.a (2010). This is NOM's only election-related activity in Florida. *Cf. id.* §§ 106.011.19 (defining "electioneering communications organization"), 106.03.1.b (2010) (in effect limiting the definition to electioneering-communications organizations that "receive[] contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000").

10. None of this speech is express advocacy as defined in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), *vis-à-vis* state or local office in Florida.[5]

3. What NOM Does and Does Not Do

11. To pay for its speech in Florida, NOM will raise or spend more than $5000 in 2010. *Cf.* FLA. STAT. §§ 106.011.19, 106.03.1.b (2010).

12. NOM does not coordinate any of its speech with any candidate for state or local office in Florida, the candidate's agents, or the candidate's committee, *cf. Buckley*, 424 U.S. at 78, *quoted in FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 294 (2d Cir. 1995), or a state or local political party in Florida. *Cf. McConnell v.*

[5] Although it is not material, none of this speech is express advocacy as defined in *Buckley vis-à-vis any* office.

FEC, 540 U.S. 93, 219-23 (2003), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 896-914 (2010).[6]

13. Nor is there at issue here a contribution NOM receives that (1) is earmarked for a Florida political committee, *i.e.,* an indirect contribution to a Florida political committee, *cf. Buckley,* 424 U.S. at 24 n.23, 78, or (2) "will be converted to an expenditure[,]" *Survival Educ. Fund,* 65 F.3d at 295, *i.e.,* will be earmarked for express advocacy as defined in *Buckley,* 424 U.S. at 44 n.52, 80, *vis-à-vis* state or local office in Florida.[7]

B. Defendants

14. Defendant Dawn Roberts is the Florida secretary of state. Defendant Jorge Cruz-Bustillo chairs the Florida Elections Commission. Defendants William Hollimon, Alia Faraj-Johnson, Leon Jacobs, Jr., Julie Kane, Gregory King, Jose Luis Rodriguez, Thomas Rossin, and Brian Seymour are members of the Florida Elections Commission. Florida law vests Defendants, all of whom are sued in their official capacities, with authority *vis-à-vis* the law at issue in this action. They act under color of law. *See, e.g.,* FLA. STAT. §§ 106.22 (2006), 106.23 (2001), 106.24 (2010), 106.25 (2010), 106.26 (1998), 106.265 (2004), 106.27 (1998).

---

[6] Although it is not material, NOM does not make direct contributions to *any* candidate committee or coordinate its speech with *any* candidate, the candidate's agents, or the candidate's committee, or with *any* political party.

[7] Although it is not material, there is not at issue here a contribution NOM receives that (1) is earmarked for *any* political committee, *i.e.,* an indirect contribution to any political committee or (2) "will be converted to an expenditure[,]" *i.e.,* will be earmarked for express advocacy as defined in *Buckley, vis-à-vis any* office.

C. Florida Law

15. NOM reasonably believes that if it does not follow Florida law, Defendants will subject NOM to enforcement and prosecution leading to civil liabilities and criminal penalties. *See id.* Even if government ultimately imposes no civil liabilities or criminal penalties, being cleared provides little comfort to those whom government has wrung through a process that becomes the punishment. *See, e.g., FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 468 n.5 (2007) ("*WRTL II*"). "The right of free speech can be trampled or chilled even if convictions are never obtained" and civil liabilities are never imposed. *FEC v. Hall-Tyner Election Campaign Comm.,* 678 F.2d 416, 422 n.15 (2d Cir. 1982), *cert. denied,* 459 U.S. 1145 (1983).

16. Florida law chills[8] NOM from proceeding with its speech. NOM will engage in its speech only if the Court grants the requested relief.

17. Florida defines "electioneering-communications organization" as

> any group, other than a political party, political committee, or committee of continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party, political committee, or committee of continuous existence under this chapter.

---

[8] The term "pre-enforcement" applies before civil enforcement or criminal prosecution. The term "chill" is a proper subset of "pre-enforcement" and applies in the First Amendment context when speakers, fearing civil enforcement or criminal prosecution, will not engage in their speech. *See, e.g., New Hampshire Right to Life PAC v. Gardner,* 99 F.3d 8, 13-14 (1st Cir. 1996) ("*NHRL*"). Thus, "pre-enforcement" and "chill" apply to all of Plaintiff's speech.

FLA. STAT. § 106.011.19. With exceptions that do not apply here, "electioneering communication" means

> any communication that is publicly distributed by a television station, radio station, cable television system, satellite system, *newspaper, magazine, direct mail, or telephone* and that:
>
> > 1. Refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is *susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate*;
> >
> > 2. Is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate; and
> >
> > 3. Is targeted to the relevant electorate in the geographic area the candidate would represent if elected.

Id. § 106.011.18.a (emphasis added).

18. NOM – which is neither a political party, a political committee, *see id.* § 106.011.1.a, nor a committee of continuing existence, *see, e.g., id.* §§ 106.011.1.b.1 ("certified ... pursuant to provisions of s. 106.04"), 106.04.1.b (2010) ("At least 25 percent of the income of such organization, excluding interest, must be derived from dues or assessments payable on a regular basis by its membership pursuant to ... the charter or bylaws") – is not under the control of a candidate or candidates for state or local office in Florida.[9] In addition, NOM's organizational documents – *i.e.*,

[9] Although it is not material, NOM is not under the control of *any* candidate or candidates.

its articles of incorporation[10] and by-laws[11] – and public statements[12] do not indicate it has the major purpose of nominating or electing a candidate or candidates for state or local office in Florida, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, a candidate or candidates for state or local office in Florida.[13] "Independent expenditure" means express advocacy as defined in *Buckley* and not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party, which is the standard under the Constitution. 424 U.S. at 39-51; *McConnell,* 540 U.S. at 219-23; *cf.* 2 U.S.C. § 431.17 (2002) (following *Buckley* by limiting the statutory independent-expenditure definition to express advocacy).[14]

19. Nevertheless, NOM reasonably fears that, based on its speech, it is an electioneering-communications organization, because it receives "contributions," or makes "expenditures," exceeding $5000 in a calendar year for speech listed in the electioneering-communications-organization definition. *See* FLA. STAT. §§ 106.011.19, 106.03.1.b.

---

[10] VC Exh. 7.

[11] VC Exh. 8.

[12] *E.g.,* VC Exh. 1.

[13] *See* VC Exh. 9 (IRS Form 990).

[14] Although it is not material, nothing in NOM's organizational documents or in its public statements indicates that NOM has the major purpose of nominating or electing *any* candidate or candidates, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

20. As a result, NOM will have to comply with a panoply of burdens that Florida *via* its electioneering-communications-organization definition imposes on organizations such as NOM, including:

- Registration (including treasurer-designation and bank-account) and termination requirements. *E.g., id.* §§ 106.03.1.b (registration), 106.022 (2010) (same), 106.0703.4 (2010) (treasurer), 106.0703.7.c (same), 106.0703.5 (bank account), 106.03.2.j (termination).
- Recordkeeping requirements. *E.g., id.* § 106.0703.5 (citing *id.* § 106.06)), and
- Extensive reporting requirements. *E.g., id.* § 106.0703.

21. The weight of these burdens[15] is such that the speech would simply not be worth it for NOM. NOM does not want to bear these political-committee burdens that Florida imposes under the electioneering-communications-organization label.

22. Therefore, Plaintiff NOM seeks a declaratory judgment that (1) the electioneering-communications-organization definition, FLA. STAT. §§ 106.011.19 (defining "electioneering communications organization"), 106.03.1.b (in effect limiting the definition to electioneering-communications organizations that "receive[] contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000"), and (2) the electioneering-communication definition, *id.* § 106.011.18.a, are unconstitutional as applied to NOM's speech and

---

[15] As opposed to, for example, limited independent-expenditure reports, *see, e.g., Buckley,* 424 U.S. at 80-81; 2 U.S.C. § 434.c (2002), or limited reports for electioneering-communications as defined in the Federal Election Campaign Act ("FECA"), *see, e.g., Citizens United,* 130 S.Ct. at 914-16, 2 U.S.C. § 434.f (2002), which Florida does not have.

facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.

23. This will allow NOM to engage in its speech, and materially similar speech in the future, without fear of becoming an electioneering-communications organization, and without fear of enforcement or prosecution.

D. Future Speech

24. In materially similar situations in the future, NOM intends to engage in speech materially similar to all of its planned speech such that Florida law will apply to NOM as it does now.

25. Plaintiff will plan its future speech as the need arises, keeping in mind that it often cannot know well in advance of when it wants to speak, *see WRTL II*, 551 U.S. at 462-63, and that "timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

26. Despite *Citizens United*, Plaintiff finds itself in the position of having to consult campaign-finance lawyers or seek declaratory rulings "before discussing the most salient political issues of our day." 130 S.Ct. at 889.

II. Discussion

27. Count 1[16] asserts Florida's electioneering-communication definition, and by extension its electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad. Count 2[17] asserts the electioneering-communications-organization definition fails the appropriate level of scrutiny. Count 3[18] then asserts the definitions are facially unconstitutional.

A. Justiciability

1. Standing

a. Constitutional Standing

28. NOM's injury is the chill to speech caused by Defendants' prospective enforcement of Florida law or prosecution of NOM. The relief it seeks will redress this chill, thereby allowing NOM to engage in its speech without fear of enforcement or prosecution. Therefore, NOM has standing to seek relief from the chill. *See Florida Right to Life, Inc. v. Lamar,* 273 F.3d 1318, 1322-23 (11th Cir. 2001); *Pittman v. Cole,* 267 F.3d 1269, 1283-85 (11th Cir. 2001).

b. Prudential Standing

29. Plaintiff has prudential standing, because its injuries are in the "zone of interests" the challenged law regulates. *FEC v. Akins,* 524 U.S. 11, 20 (1998)

---

[16] *Infra* Part II.D.

[17] *Infra* Parts II.E-G.

[18] *Infra* Part II.H.

("protected or regulated" (quoting *National Credit Union Admin. v. First Nat. Bank & Trust Co.,* 522 U.S. 479, 488 (1998))).

2. Ripeness

30. Pre-enforcement challenges are ripe when they address laws chilling political speech. *See Florida Right to Life, Inc. v. Lamar,* 273 F.3d 1318, 1323-25 (11th Cir. 2001) ("*FRTL*"); *Florida League of Prof'l Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 459 (11th Cir.) (citing *Abbott Labs.,* 387 U.S. at 152-53), *cert. denied,* 519 U.S. 1010 (1996); *Cheffer v. Reno,* 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) (citing *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 762 (11th Cir. 1991)).

31. Therefore, Plaintiff's claims are ripe.

B. Irreparable Harm

32. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). So unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See id.*

C. First Principles

1. The Limited Power of Government

33. Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976).

34. The framers established government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) ("We the people of the United States"); FLA. CONST. preamble ("We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty"), and government has only those powers that the governed surrendered to it in the first place.

2. The First and Fourteenth Amendments as Restrictions on the Already Limited Power of Government

35. This power – including the "constitutional power of Congress to regulate federal elections[,]" *Buckley*, 424 U.S. at 13 & n.16, and each state's parallel power over its own, though not other states', elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*") (citing *Buckley*, 424 U.S. at 13); FLA. CONST. art. VI – is further constrained by other law, including the First and Fourteenth Amendments.

a. Vagueness

36. Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Citizens United,* 130 S.Ct. at 889 (quoting *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926)).

37. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See id.*

b. Overbreadth

38. The absence of vagueness, however, does not make law regulating political speech constitutional. *See Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479

(2007) ("*WRTL II*") (quoting *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 263 (1986) ("*MCFL*")).

39. Even non-vague law regulating political speech must comply with the First Amendment, which provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791). The First Amendment guards against overbreadth, *Buckley,* 424 U.S. at 80 ("impermissibly broad"),[19] and applies to the states through the Fourteenth Amendment, regardless of whether it is through the Due Process Clause, *Gitlow v. New York,* 268 U.S. 652, 666 (1925) (freedom of speech and freedom of the press), or the Privileges and Immunities Clause. *Cf. McDonald v. City of Chicago,* 561 U.S. ____, ____, 130 S.Ct. 3020, 3059, 3062-63 (2010) (Thomas, J., concurring in part and concurring in the judgment).

40. The government's power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further inquiry,[20] have the power to regulate donations received and

[19] One should not confuse this overbreadth with the substantial overbreadth courts address in assessing facial unconstitutionality. *Infra* Part II.H.

[20] *E.g., infra* Parts II.F, G.

spending for political speech only when they are "unambiguously related to the campaign of a particular ... candidate" in the jurisdiction in question, 424 U.S. at 80, or "unambiguously campaign related" for short. *Id.* at 81; *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning,* No. 08-445, 2009 WL 1457972 at *7 (N.D. Fla. May 22, 2009) (summary-judgment order (quoting *Buckley,* 424 U.S. at 80));[21] *Broward,* 2008 WL 4791004 at *7 (N.D. Fla. Oct. 29, 2008) (preliminary-injunction order (quoting *Buckley,* 424 U.S. at 80)), *clarified on other grounds,* 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008).[22] This principle helps ensure government regulates only speech that government has the "power to regulate," *NCRL III,* 525 F.3d at 282, *i.e.,* speech that government has a constitutional interest in regulating. *See id.* at 281 (citing *Buckley,* 424 U.S. at 80). This principle is part of the larger principle that law regulating political speech must not be overbroad, *see Buckley,* 424 U.S. at 80 ("impermissibly broad"), and thus overlaps with constitutional scrutiny.

3. Determining the Meaning of Political Speech and whether Government may Regulate it

41. *WRTL II* also reaffirms that in determining the meaning of political speech and whether government may regulate it, one looks to the *substance* of the speech itself. 551 U.S. at 469 (citing *Buckley,* 424 U.S. at 43-44). *WRTL II* all but

[21] VC Exh. 10.

[22] VC Exh. 11.

forecloses considering *context* to determine the meaning of political speech and whether government may regulate it. *See id.* at 467-73.

Count 1: Vagueness

D. Vagueness

1. The Order of Questions for Political Committee Status

42. Plaintiff re-alleges the preceding paragraphs.

43. In addressing whether a jurisdiction may regulate an organization as a political committee – or impose political-committee-like burdens under another label – the law requires considering these questions in this order: Does the organization (1) fall under a political-committee or similar definition that is not unconstitutionally vague and therefore overbroad? If so, does the organization (2) pass the proper "under the control of a candidate" or major-purpose test? *See Buckley v. Valeo,* 424 U.S. 1, 74-79 (1976).

2. Florida Law is Vague, and therefore Overbroad

44. Florida's electioneering-communication definition, and by extension its electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad, and the definition is unconstitutional as applied to NOM's speech and facially.

45. Florida's vague law does not "provide the kind of notice that will enable ordinary people to understand what conduct it" regulates; furthermore, "it may authorize and even encourage arbitrary and discriminatory enforcement." *City*

of Chicago v. Morales, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)).

3. Why Florida Law is Vague, and therefore Overbroad

46. Florida bases its electioneering-communication definition, and by extension its electioneering-communications-organization definition, on the appeal-to-vote test. *Compare* FLA. STAT. § 106.011.18.a.1 ("is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate") *with FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 469-70 (2007) ("*WRTL II*").

47. The electioneering-communication definition, and by extension the electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad, and are unconstitutional as applied to NOM's speech and facially.[23]

E. Overbreadth: In General

48. In addition, Florida law is unconstitutional as applied to NOM's speech and facially, because it is overbroad.[24]

49. Florida law fails the appropriate level of scrutiny.

[23] Part II.H addresses facial unconstitutionality, including vagueness.

[24] Parts II.E-G address as-applied challenges, and Part II.H addresses facial unconstitutionality, including overbreadth.

Count 2: Electioneering Communications Organization Definition

F. Overbreadth: The Political Committee and Electioneering Communications Organization Definitions

1. Strict Scrutiny

50. Plaintiff re-alleges the preceding paragraphs.

51. Strict scrutiny applies to government regulation of organizations as political committees and to law imposing political-committee-like burdens. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990) (holding that a state requirement that an organization form a segregated fund "must be justified by a compelling state interest"), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 896-914 (2010); *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*") (applying strict scrutiny to a state requirement that organizations themselves be political committees); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 290 (4th Cir. 2008) ("*NCRL III*") (addressing "narrower means" than a state requirement that organizations themselves be political committees); *cf. Citizens United,* 130 S.Ct. at 897-98 (holding that strict scrutiny applies to a ban on speech and noting the burdens of forming a political committee to do the same speech); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 252 (1986) ("*MCFL*") (considering whether a ban on independent expenditures "is justified by a compelling state interest" and noting the burdens of forming a separate segregated fund to do the same speech).

52. *Buckley v. Valeo* establishes that government may regulate an organization as a political committee or otherwise impose political-committee-like burdens only if (1) it is "under the control of a candidate" or candidates or (2) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates in the jurisdiction. *See* 424 U.S. 1, 79 (1976); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982) (quoting *Buckley*, 424 U.S. at 79); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *12-13 (N.D. Fla. May 22, 2009) (summary-judgment order (quoting *Buckley*, 424 U.S. at 80));[25] *Broward*, 2008 WL 4791004 at *12-13 (N.D. Fla. Oct. 29, 2008) (preliminary-injunction order), *clarified on other grounds*, 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008).[26]

53. These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)); *NCRL III*, 525 F.3d at 288-89; *CRLC*, 498 F.3d at 1139, 1154-55; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n.5 (7th Cir. 1998).

---

[25] VC Exh. 10.

[26] VC Exh. 11.

54. Determining whether an organization is "under the control of a candidate" or candidates for state or local office in Florida is straightforward, and NOM is under no such control.[27]

55. Determining whether an organization passes the major-purpose test is also straightforward.

56. NOM does not have the major purpose of nominating or electing a candidate or candidates for state or local office in Florida: (1) It has not indicated this in its organizational documents or in its public statements, and (2) it does not spend the majority of its money on contributions to, or independent expenditures for, such candidates.[28]

2. Applying Strict Scrutiny

57. Florida lacks a compelling interest in regulating organizations such as NOM as political committees – meaning, here, by imposing full-fledged political-committee burdens on electioneering-communications organizations – because they are neither under the control of, nor do they have the major purpose of nominating or electing, candidates for state or local office in Florida. In the alternative, Florida's electioneering-communications-organization definition is not narrowly

---

[27] Although it is not material, NOM is not under the control of *any* candidate or candidates.

[28] Although it is not material, NOM does not have the major purpose of nominating or electing *any* candidate or candidates. It has not indicated this in its organizational documents or in its public statements. Nor does it spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

tailored, because it lets Florida regulate organizations such as NOM with political-committee-like burdens when they are neither under the control of, nor have the major purpose of nominating or electing, candidates for state or local office in Florida. *See Florida for Kennedy Comm.*, 681 F.2d at 1287; *Broward*, 2009 WL 1457972 at *12-13; *Broward,* 2008 WL 4791004 at *12-13; *NCRL III,* 525 F.3d at 290; *CRLC,* 498 F.3d at 1146.

58. Therefore, Florida's electioneering-communications-organization definition is unconstitutional as applied to NOM's speech.

59. If Florida wanted to regulate, for example, spending for political speech by persons it may *not* regulate as political committees under *Buckley,* 424 U.S. at 74-79, then it could use less-restrictive means.

G. Exacting Scrutiny

60. Exacting scrutiny applies to disclosure requirements, including attribution, disclaimer, and reporting requirements, both for organizations government *may* regulate as political committees under *Buckley,* 424 U.S. at 74-79, *see Davis v. FEC,* 554 U.S. ____, ____, 128 S.Ct. 2759, 2775 (2008) (quoting *Buckley,* 424 U.S. at 64), and for those it may *not*. *See Citizens United,* 130 S.Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66).

61. Full-fledged political-committee *disclosure requirements* apply only if the jurisdiction's regulation of organizations as political committees – *i.e.*, only if the

definition through which the jurisdiction imposes political-committee burdens[29] – is constitutional in the first place. So when the definition is unconstitutional – as Florida's electioneering-communications-organization definition is[30] – the requirements are unnecessary to consider.

62. Florida law unconstitutionally imposes full-fledged political-committee burdens. It has no less-restrictive means. Further consideration is unnecessary. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676-79 (10th Cir. 2010) ("*NMYO*") (considering only political-committee status and not going further, as the district court had).

Count 3: Vagueness and Overbreadth:
Facial Unconstitutionality

H. Facially Unconstitutional

63. Plaintiff re-alleges the preceding paragraphs.

64. A state law is facially unconstitutional under the First Amendment, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citing *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)), and a state law burdening free speech is facially unconstitutional for vagueness under the Fourteenth Amendment, *see United States v. Salerno*, 481 U.S. 739, 745 (1987) (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984)); *Kolender v. Lawson*, 461 U.S. 352, 358 & n.8 (1983), *followed in Morales*, *City of Chicago v. Morales*, 527 U.S.

---

[29] VC ¶ 20.

[30] *Supra* Part II.F.

41, 60 (1999), when it reaches "a substantial amount of protected speech ... not only in an absolute sense, but also relative to the [law's] plainly legitimate sweep." *United States v. Williams,* 553 U.S. 285, 292-93 (2008) (citing *Board of Trs. of State Univ. of N. Y. v. Fox,* 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)).

65. Whether the challenge is based on the First Amendment, Fourteenth Amendment, or both, all of the law that is unconstitutional as applied to NOM's speech is also facially unconstitutional.

I. Narrowing Glosses, Certification, and Severability

66. Unlike in *Buckley v. Valeo,* 424 U.S. 1, 44 & n.52, 80 (1976), no narrowing gloss saves the unconstitutional law in this action. Nor is certifying a question appropriate where, as here, the state law is not fairly susceptible to a narrowing gloss. Furthermore, severing the unconstitutional language from the remaining language – which is a question of state law – is not an option in this action.

III. Prayers for Relief

67. Plaintiff NOM seeks a declaratory judgment that (1) the electioneering-communications-organization definition, FLA. STAT. §§ 106.011.19 (defining "electioneering communications organization"), 106.03.1.b (in effect limiting the definition to electioneering-communications organizations that "receive[] contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000"), and (2) the electioneering-communication

definition, *id.* § 106.011.18.a, are unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.[31]

68. Any narrowing gloss would be incorrect as a matter of law. If the Court nevertheless held that a narrowing gloss were possible, Plaintiff NOM prays for a declaratory judgment limiting Florida's electioneering-communications-organization definition, *id.,* and by extension the burdens Florida imposes on electioneering-communications organizations, to organizations that are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Florida.[32]

---

[31] VC ¶ 22,

[32] In the alternative, Plaintiff NOM prays that the Court limit the definition and burdens to organizations that are under the control of, or have the major purpose of nominating or electing, *any* candidate or candidates.

Plaintiff NOM submits this alternative would also be incorrect, because, for example, it would allow Florida to regulate as Florida political committees – meaning, here, electioneering-communications organizations – those organizations that are under the control of, or have the major purpose of nominating or electing, candidates for *federal* office or candidates for *state or local office in another state.* This can easily turn against Florida and allow these non-Florida jurisdictions to regulate organizations that really do pass the "under the control of a candidate" or major-purpose test in Florida.

Moreover, under this approach, a jurisdiction could impose political-committee burdens on organizations whose activity is minimal – or even zero – in the jurisdiction.

69. Plaintiff further seeks costs and attorneys' fees under 42 U.S.C. § 1988 (2000) and any other applicable statute or authority, and further seeks other relief this Court in its discretion deems just and appropriate.

Respectfully submitted,

/s/ Horatio G. Mihet
Mathew D. Staver,
Fla. No. 0701092
Horatio G. Mihet,
Fla. No. 026581
LIBERTY COUNSEL
Post Office Box 540774
Orlando, Fla. 32854
Telephone (800) 671-1776
Facsimile (407) 875-0770
court@lc.org
Local Counsel for Plaintiff

James Bopp, Jr., Ind. No. 2838-84
Randy Elf, New York No. 2863553
JAMES MADISON CENTER FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47803
Telephone (812) 232-2434
Facsimile (812) 235-3685
bcb@BoppLaw.com
Lead Counsel for Plaintiff

September 22, 2010

Verification by

National Organization for Marriage, Inc.

I, Brian Brown, declare as follows:

I am the executive director of the National Organization for Marriage, Inc.

I have personal knowledge of the organization's activities, including those set out in this complaint, and if called upon, I would competently testify as to them.

I verify under penalty of perjury under the laws of the United States of America that the factual statements in this complaint concerning the organization are true.

National Organization for Marriage
By Brian Brown
Executive Director

September 22, 2010

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

The National Organization for Marriage, and American Principles In Action *Plaintiffs*, *v.* **Walter F. McKee, Andre G. Duchette, Michael P. Friedman, Francis C. Marsano,** and **Edward M. Youngblood**, all in their official capacity as members of the Commission on Governmental Ethics and Election Practices; **Matthew Dunlap**, in his official capacity as Secretary of State of the State of Maine; **Mark Lawrence, Stephanie Anderson, Norman Croteau, Evert Fowle, R. Christopher Almy, Geoffrey Rushlau, Michael E. Povich,** and **Neal T. Adams**, all in their official capacity as District Attorneys of the State of Maine; and **Janet T. Mills**, in her official capacity as Attorney General of the State of Maine, *Defendants*.	**Civil Cause No._______________**

Verified Complaint for Declaratory and Injunctive Relief
(INJUNCTIVE RELIEF SOUGHT)

Come now Plaintiffs the National Organization for Marriage ("NOM"), and American Principles In Action ("APIA"), and for their Complaint against the Defendants, state the following:

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. This case concerns the constitutionality of Maine's ballot question committee ("BQC") registration statute, codified in

Maine Revised Statutes Annotated ("M.R.S.A."), Title 21-A § 1056-B.

2. Plaintiffs complain that 21-A M.R.S.A. § 1056-B is unconstitutional in that it infringes protected First Amendment speech and freedom of association and is not narrowly tailored to serve a compelling state interest.

Jurisdiction

3. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

4. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction of the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b). The defendants are officers, employees or agents of the State of Maine.

Parties

6. Plaintiff NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation incorporated in Virginia dedicated to preserving the traditional definition of marriage.

7. Plaintiff APIA is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy organization incorporated in the District of Columbia dedicated to promoting equality of opportunity and ordered liberty.

8. Defendants Walter F. McKee, Andre G. Duchette, Michael P. Friedman, Francis C. Marsano, and Edward M. Youngblood are all residents of Maine and are members of the Commission on Governmental Ethics and Election Practices (the "Commission"). The

Commission is charged under 21-A M.R.S.A. §§ 1003 and 1127 with the enforcement of the provisions of Chapters 13 and 14, respectively, of Title 21-A. The Defendants are sued in their official capacity and are subject to the jurisdiction of this Court.

9. Defendant Matthew Dunlap is a resident of Maine and serves as the Secretary of State. The Secretary of State is charged with enforcing Maine's election laws pursuant to 21-A M.R.S.A. §§ 1003 and 1062-A. He is sued in his official capacity.

10. Defendant Janet T. Mills is a resident of the State of Maine and serves as Attorney General. The Attorney General is charged with enforcing Maine's election laws pursuant to 21-A M.R.S.A. §§ 33, 1003, and 1062-A. She is sued in her official capacity.

11. Defendants Mark Lawrence, Stephanie Anderson, Norman Croteau, Evert Fowle, R. Christopher Almy, Geoffrey Rushlau, Michael E. Povich, and Neal T. Adams are residents of the State of Maine and serve as District Attorneys throughout the State. District Attorneys are charged with enforcing Maine's election laws pursuant to 21-A M.R.S.A. § 33, 30-A M.R.S.A. §§ 282 and 283. Each is sued in his or her official capacity.

Regulatory Scheme

12. 21-A M.R.S.A. § 1056-B, which provides as follows:

> Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of $5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed $5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of influencing in any way a ballot question. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee. In

the case of municipal election, the registration and reports must be filed with the clerk of that municipality.

13. A "person" is defined by 21-A M.R.S.A. § 1001 as "an individual, committee, firm, partnership, corporation, association, group or organization."

14. For purposes of the $5,000 threshold requirement, "contribution" "includes, but is not limited to":

> A. Funds that the contributor specified were given in connection with a ballot question;
> B. Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question;
> C. Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient's activities regarding a ballot question; and
> D. Funds or transfers from the general treasury of an organization filing a ballot question report.

21-A M.R.S.A. § 1056-B(2-A)

15. 21-A M.R.S.A. § 1056-B(1) further requires that "A report required by this section must be filed with the commission according to the reporting schedule in section 1059."

16. Reports required for BQCs:

> must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of $100 in any election; the date of each contribution; the date and purpose of each expenditure; and the name and address of each contributor, payee or creditor; and the occupation and principal place of business, if any, for any person who has made contributions exceeding $100 in the aggregate. The filer is required to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes.

21-A M.R.S.A. § 1056-B(2).

17. The BQC registration form makes clear that a report must be filed at registration, and that a BQC must report "all contributions and expenditures" including "expenditures such as those associated with the collection of signatures, paid staff time, travel reimbursement, and fundraising expenses." Commission on Governmental Ethics and Election Practices, *Registration: Ballot Question Committees: For Persons and Organizations Other Than PACs Involved in Ballot Question Elections* (Exhibit 7.) The registration form requires the personal information of a "Treasurer," "Principal Officer[s]," "Primary Fundraisers and Decision Makers," and requires a "Statement of Support or Opposition," indicating "whether the committee supports or opposes a candidate, political committee, referendum, initiated petition or campaign." (Exhibit 7.)

18. 21-A M.R.S.A. § 1056-B(4) provides that "[a] person filing a report required by this section shall keep records as required by this section for 4 years following the election to which the records pertain." BQCs must also "keep a detailed account of all contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and all expenditures made for those purposes," and "retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of $50."

19. The failure to register as required under 21-A M.R.S.A. § 1056-B is punishable by a $250 fine. 21-A M.R.S.A. § 1062-A(1).

20. The failure to file reports as required by 21-A M.R.S.A. § 1056-B or 1059 is punishable by a maximum fine of $10,000. 21-A M.R.S.A. § 1062-A(4).

21. Further, "[a] person who fails to file a report as required by this subchapter within 30 days of the filing deadline is guilty of a Class E Crime." 21-A M.R.S.A. § 1062-A(8).

Facts

22. On May 6, 2009, Governor John Baldacci signed into law legislation recognizing same-sex marriage in Maine. On May 7, 2009, opponents of the measure submitted the required paperwork necessary to launch a "people's veto" campaign, which would leave the matter to be decided via statewide referendum.

23. Plaintiff NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation dedicated to preserving the traditional definition of marriage. NOM is a national organization active in all fifty states.

24. NOM solicits and receives most of its funds as undesignated donations from major donors and national organizations. The remainder of its funds are received primarily as undesignated donations from direct mail solicitations. NOM's projected budget for 2009 is $7 million.

25. NOM does not have as its major purpose the promotion or defeat of any Maine referendum or ballot question.

26. On May 6, 2009, NOM distributed an email update to subscribers focused on a proposed referendum in Maine that would overturn then pending legislation in Maine regarding same-sex marriage. The May 6th email stated: "Your support today will allow us to start the referendum process immediately when the law is signed, ensuring that the measure does not take effect before the people of Maine have had their say. Can you afford a gift of $35, $50 or $100 today to help stop same-sex marriage not just in Maine, but in New Hampshire, Iowa, and other states as well?" (Exhibit 5, at 2-3.) NOM estimates that it received approximately $2,469 in donations as a result of the May 6th email.

27. On May 8, 2009, NOM distributed an email update to subscribers describing efforts to enact same-sex marriage in the District of Columbia, Maine, and New Hampshire. After describing events in Maine, the email also stated: "You can fight back! Can you help defend marriage in Maine and across the country, by donating $5, $10, or even, if God has given you the means, $100 or $500?" (Exhibit 5, at 4) (Emphasis in original.) NOM estimates that it received approximately $1,055 in donations as a result of the May 8th email.

28. On May 15, 2009, NOM distributed an email update to subscribers. The email focused on events relating to same-sex marriage in New York and New Hampshire, but contained a sentence stating: "We will fight to be your voice in New Hampshire, Maine (more on that next week), Iowa, New York, New Jersey, D.C. and all across this great and God-blessed country of ours." (Exhibit 5, at 7.)

29. On May 22, 2009, NOM distributed an email update to subscribers. The email focused on events relating to same-sex marriage in New Hampshire, New York, and Massachusetts, but contained a sentence stating "I'm back in Maine today we'll keep you updated on progress in building the coalition to push back gay marriage in Maine. We will need your help all the help you can spare!" (Exhibit 5, at 8-9) (Emphasis in original.) NOM estimates that it received approximately $285 in donations as a result of the May 22nd email.

30. On June 12, 2009, NOM distributed an email update to subscribers focused on events relating to same-sex marriage in New York. The email also includes a paragraph regarding Maine, stating: "[i]n Maine, I've joined the board of the new coalition to fight to overturn the gay marriage law. It's called StandforMarriageMaine.com. If you live in Maine, go there right now and find out how you can sign a petition, or collect signatures to get marriage on the ballot this

November . . . I was up in Maine this week and the signature gathering effort is gathering great steam." (Exhibit 5, at 11.) The June 12th also asked "[t]o help us in Maine and all 50 states, can you make a monthly donation?" (Exhibit 5, at 11.)

31. On July 8, 2009, NOM distributed an email update to subscribers describing the efforts of Stand for Marriage Maine, a registered Maine PAC, to overturn recently enacted Maine same-sex marriage legislation via referendum. The email asked readers to "[m]ake an online donation at StandforMarriageMaine.com." (Exhibit 5, at 13.)

32. On July 10, 2009, NOM distributed an email update to subscribers describing efforts to overturn recently enacted Maine same-sex marriage legislation via referendum. The email also stated that "[t]he National Organization for Marriage worked hard with StandforMarriageMaine to make this happen. But it could not have happened without your help! You are the ones who made this happen... and we need you to help secure this victory: Can you help us with $10, 25, or $100 so that Maine and our country can recover the true meaning or marriage?" (Exhibit 5, at 14) (Emphasis in original.) NOM estimates that it received approximately $350 in donations as a result of the July 10th email.

33. On July 17, 2009, NOM distributed an email update to subscribers. The email focused mainly on events related to same-sex marriage in the District of Columbia, but with a brief description of recent events in Maine. NOM estimates that it received approximately $40 in donations as a result of the July 17th email.

34. On July 31, 2009, NOM distributed an email update to subscribers focused on events related to same-sex marriage in Maine, and mentioned that "StandforMarriageMaine.com has turned in an extraordinary 100,000 signatures to overturn gay marriage." (Exhibit 5, at 20.)

NOM estimates that it received approximately $255 in donations as a result of the July 31st email.

35. On August 7, 2009, NOM distributed an email update to subscribers describing the efforts to overturn recently enacted Maine same-sex marriage legislation via referendum. The email asked readers to "[v]isit StandforMarriageMaine.com today to make your contribution in the fight to protect marriage in Maine!" (Exhibit 5, at 23) (Emphasis in original.) The email also added that readers could "[u]se this hyperlink to help support NOM's work not only in Maine but around the country, wherever the need arises." (Exhibit 5, at 23) (Emphasis in original.) NOM estimates that it received approximately $60 in donations as a result of the August 7th email.

36. On August 26, 2009, NOM distributed an email update to subscribers focused on events related to same-sex marriage in New Jersey and New York. The email included one reference to a Maine resident, but otherwise did not discuss the Maine referendum.

37. On August 28, 2009, NOM distributed an email update to subscribers describing a recent article on NOM executive director Brian Brown and focusing on events related to same-sex marriage in Iowa. One sentence in the email stated "Help us fight to protect marriage in Iowa, Maine and everywhere across this great land · donate today!" (Exhibit 5, at 28) (Emphasis in original.) NOM estimates that it received approximately $395 in donations as a result of the August 28th email.

38. On September 4, 2009, NOM distributed an email update to subscribers update. This email stated that "Marriage is now officially on the ballot in Maine this November" and twice urged readers to donate to Stand for Marriage Maine. (Exhibit 5, at 30.)

39. Each of the above listed emails contained a hyperlinked "Donate" button which

sent potential donors to the donations screen at http://www.nationformarriage.org. The donation screen at http://www.nationformarriage.org provides that "[n]o funds will be earmarked or reserved for any political purpose."

40. In July of 2009, NOM distributed newsletter to subscribers. One of the articles in this newsletter described NOM's participation in the Maine same-sex marriage referendum effort, and stated: "Your support of NOM is critical to the success of this effort." The newsletter also included a donation card and return envelope for donations to NOM. (Exhibit 6, at 4.)

41. On August 13, and 24, 2009, the Commission received email correspondence from Fred Karger of Californians Against Hate, alleging that NOM, as well as several other organizations, was engaged in "money laundering" by contributing to Stand for Marriage Maine PAC. (Exhibits 9, 10.)

42. On October 1, 2009, the Commission conducted a preliminary fact gathering regarding Mr. Karger's allegations. While the Commission took no action at this meeting regarding Mr. Karger's specific allegations, the Commission did decide to authorize its staff to conduct an investigation regarding whether NOM had violated Section 1056-B by failing to register as a BQC, with a suggested scope for the investigation to be outlined at a future meeting of the Commission. (Exhibit 11.)

43. Depending on which, if any, of the donations for the above listed emails and newsletters are considered "contributions" for purposes of section 1056-B, NOM is either near or has already exceeded the $5,000 threshold for ballot question committee status.

44. NOM intends to distribute further emails and newsletters mentioning Maine and soliciting donations, which will exceed $5,000, both during the current election cycle and in

future elections. However, NOM fears enforcement under section 1056-B based on any such future activities, as well as for activities already engaged in.

45. Plaintiff APIA is a nonprofit 26 U.S.C. § 501(c)(4) organization dedicated to promoting equality of opportunity and ordered liberty.

46. APIA does not have as its major purpose the promotion or defeat of any Maine referendum or ballot question.

47. APIA intends to produce a 30 second video entitled "Bigot" relating to same-sex marriage in Maine and place it on its website. The script for the ad is as follows:

Girl: Mommy, are you a bigot?

Mother: What?

Girl: At school, we learned that people who are against gay marriage are bigots.

Mother: No, dear. I believe that homosexuals should be treated fairly--but I also believe that marriage should be just for one man and one woman. That doesn't make me a bigot.

Girl: What about Reverend Jones and Father Diego? Are they bigots?

Mother: Did you learn that at school too?

Girl nods

VO: Think that gay marriage won't affect your family? Think again.

Vote Yes Graphic

48. APIA also intends to produce a 30 second video entitled "The New Curriculum" relating to same-sex marriage in Maine and place it on its website. The script for the ad is as follows:

School Administrator (*talking to an off-camera mic/reporter--as he talks, we see images*

of teachers in classrooms reading from blurred-out books, GLSEN-style posters, etc.):
No, we're very proud of the new curriculum. It's all about teaching kids to embrace different lifestyles and explore their own sexuality.

Switching from images of sex ed classrooms to little boy on a bench in a darkened school hallway. We can see an adult male (not his face, we're looking from the perspective of the child and the view never includes his head) come out of an office, take the boy's hand, lead him into the office, and close the door. Freeze on the closed door, which has a sign that says, "Counseling Session: Do Not Disturb"

Reporter (VO) : Yes, but is it appropriate for kindergartners to be receiving counseling about whether they might be gay?

School Admin (VO): Sure, we've had a few complaints, but there's not much parents can do. It's the law, after all.

VO: Think gay marriage won't affect your family? Think again.

Vote Yes Graphic

49. APIA estimates that the total cost of producing "Bigot" and "The New Curriculum" and placing them on its website is approximately $3,000.

50. APIA intends to buy television time in Maine to air "Bigot" and "The New Curriculum." APIA is chilled from doing so, however, by the prospect of having to register as a BQC and meet the reporting and other requirements of sections 1056-B and 1059.

51. Further, APIA intends to solicit donations in order to defray the cost of producing and airing "Bigot" and "The New Curriculum," as well as other expenses, both during the current election cycle and in future elections. However, APIA fears that in doing so it will be deemed a

BQC under Section 1056-B, and will be subject to the reporting and other requirements of sections 1056-B and 1059.

52. Immediate and irreparable injury, loss, and damage will result to Plaintiffs by reason of the regulation's chilling effect on Plaintiffs' free speech and associational rights and by the potential for enforcement of Section 1056-B against NOM and APIA.

53. Plaintiffs have no adequate remedy at law.

Count I

Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That It Imposes Burdensome Registration and Reporting Requirements on Individuals and Organizations Based on Ballot Measure Advocacy.

54. Plaintiffs reallege the preceding paragraphs.

55. Section 1056-B imposes substantial organizational and conduct burdens on individuals and organizations which qualify as a BQC. Individuals and organizations falling under Section 1056-B must undergo registration, must appoint a treasurer, must use a designated account, must keep detailed records for four years, must report contributions and expenditures at prescribed intervals, and must disclose information about persons making contributions over $100.

56. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). In addition, "reporting and disclosure requirements are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).

57. Because Section 1056-B imposes substantial burdens on political speech and

association, it is subject to strict scrutiny. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986).

58. The Supreme Court has held that three governmental interests may justify campaign disclosure laws if the regulations are narrowly tailored to serve those interests. *See Buckley*, 424 U.S. at 66-68. First, "disclosure provides the electorate with information as to where the political campaign money comes from and how it is spent by the candidate." *Id.* at 66. This information alerts voters to the "interests to which a candidate is most likely to be responsive." *Id.* at 67. Second, disclosure can deter actual corruption and avoid the appearance thereof. *Id.* Lastly, disclosure requirements are an essential "means of gathering the data necessary to detect violations of [contribution limits]." *Id.* at 68.

59. However, *Buckley* involved candidate elections, and the Supreme Court has since clarified that the Corruption Interest is simply not present in the context of ballot measure elections. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."); *see also Emily's List v. Federal Election Com'n*, 2009 WL 2972412 *12 (D.C. Cir. Sep. 18, 2009) ("Donations to and spending by a non-profit cannot corrupt a candidate or officeholder."); *Volle v. Webster*, 69 F. Supp.2d 171, 175 n.7 (D. Me. 1999).

60. The enforcement interest is likewise not applicable in the context of ballot measure elections because Maine lacks contribution limits with respect to ballot measures. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (*citing McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

61. The Supreme Court has held that one-time reporting of independent expenditures is a less restrictive means of achieving the state's legitimate informational interest than imposing the "full panoply of regulations that accompany status as a political committee." *Massachusetts Citizens for Life*, 479 U.S. at 262; *see also Volle v. Webster*, 69 F. Supp. 2d 171, 176 (holding that by imposing "the full panoply of registration and reporting requirements that *Buckley I* examined under the Federal Election Campaign Act . . . Maine's registration statute goes considerably beyond what is permitted and is therefore unconstitutional.")

62. Because Section 1056-B would subject NOM and APIA to the "full panoply of registration and reporting requirements" rather than the less restrictive means of one-time disclosure of expenditures, the provision is unconstitutional both facially and as applied to NOM and APIA.

Count II

Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That It Imposes Burdensome Registration and Reporting Requirements on Individuals and Organizations That Do Not Have Ballot Measure Advocacy As Their Major Purpose.

63. Plaintiffs reallege the preceding paragraphs.

64. Section 1056-B imposes substantial organizational and conduct burdens on individuals and organizations which qualify as a BQC. Individuals and organizations falling under Section 1056-B must undergo registration, must appoint a treasurer, must use a designated account, must keep detailed records for four years, must report contributions and expenditures at prescribed intervals, and must disclose information about persons making contributions over $100.

65. The right of association is a "basic constitutional freedom" that is "closely allied

to freedom of speech and a right which, like free speech lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

66. To protect that right and to assure that registration requirements did not chill core First Amendment speech, the *Buckley* Court promulgated its "major purpose" to determine whether a particular group must suffer the burden of registering and reporting as a political committee under federal election law.

67. That test, in the context of political speech regarding candidates, provides that an organization is a political committee only if it is 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

68. Similarly, in the case of a political organization that does not have as its major purpose the initiation, promotion or defeat of a ballot measure, a registration requirement which ignores the "major purpose" of an organization unconstitutionally chills political speech. *See id.* at 75-80.

69. 21-A M.R.S.A. § 1056-B requires individuals and organizations to register as a BQC without regard to whether the major purpose of the individual or organization is the passage or defeat of a ballot measure.

70. Neither NOM nor APIA has as its major purpose the initiation, promotion or defeat of a ballot measure.

71. Because Section 1056-B would subject NOM and APIA to burdensome registration and reporting requirements without regard to whether they have as their major purpose the initiation, promotion or defeat of a ballot measure, the provision is unconstitutional

both facially and as applied to Plaintiffs.

Count III
Section 1056-B's Definition of "Contribution" is Unconstitutional Facially and As Applied to Plaintiffs, in That It is Unconstitutionally Vague and Overbroad.

72. Plaintiffs reallege the preceding paragraphs.

73. The definition of "contribution" in 21-A M.R.S.A. § 1056-B(2-A) includes: (1) "Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question"; and (2) "Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient's activities regarding a ballot question."

74. The vagueness doctrine bars enforcement of a statute whose terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *U.S. v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005) (*quoting U.S. v. Lanier*, 520 U.S. 259, 264 (1997).

75. NOM and APIA have and would like to solicit donations to support their activities. But neither can know whether those solicitations could be interpreted to result in "contributions" that trigger BQC status.

76. A statute will be facially invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *McCullen v. Coakley*, 571 F.3d 167, 182 (1st Cir. 2009) (*quoting Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 n.6 (2008)).

77. A person's right to freedom of speech cannot be contingent on the reaction to, or interpretation of, that speech by third parties. As the Supreme Court noted in *Buckley*, making the legitimacy of speech turn on the interpretation of third parties is problematic, as it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43.

78. By counting towards the $5,000 threshold solicitations for donations that "lead the contributor to believe" donations will be used for ballot measure activity, Section 1056-B potentially imposes burdensome registration and reporting requirements on NOM and APIA based on how others interpret and/or react to their speech. For this reason, the definition of "contribution" in Section 1056-B is substantially overbroad.

Count IV

Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That Its $100 Reporting Requirement Fails Strict Scrutiny.

79. Plaintiffs reallege the preceding paragraphs.

80. Reports required for BQC "must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of $100 in any election," as well as contributor information "for any person who has made contributions exceeding $100 in the aggregate." BQCs are required "to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes." 21-A M.R.S.A. § 1056-B(2).

81. In *Buckley*, the Supreme Court held that any significant encroachment on First

Amendment rights must survive exacting scrutiny, which requires the government to craft a narrowly tailored law to serve a compelling government interest. *See Buckley*, 424 U.S. at 64.

82. The $100 threshold reporting requirement is not narrowly tailored to the state's interest in avoiding corruption, as this interest does not apply in the ballot measure context. *Bellotti*, 435 U.S. at 790.

83. Further, Section 1056-B is not narrowly tailored to the state's informational interest in disclosure, as it requires reporting for contributions and expenditures so low as to give no meaningful information to voters. *Canyon Ferry*, 556 F.3d at 1033. Voters gain little, if any, information from the disclosure of small donors. *Id.* at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'")

84. Since the $100 reporting threshold of Section 1056-B is not narrowly tailored to any compelling government interest, the provision is unconstitutional facially and as applied to NOM and APIA.

WHEREFORE, Plaintiffs pray this court to:

(1) Declare 21-A M.R.S.A. § 1056-B unconstitutional facially and as applied to Plaintiffs as a violation of the First Amendment right to engage in political speech;

(2) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors from enforcing 21-A M.R.S.A. § 1056-B against NOM and APIA; and

(3) Grant NOM and APIA costs and attorney's fees under 42 U.S.C. § 1988 and any other applicable authority.

/s/ Stephen C. Whiting
Stephen C. Whiting, Maine # 559
THE WHITING LAW FIRM
75 Pearl Street, Suite 207
Portland, ME 04101
Ph: (207) 780-0681
Local Counsel for Plaintiffs

James Bopp, Jr., Ind. #2838-84
Jeffrey Gallant, Vir. #46876
Josiah Neeley, Tex. #24046514
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiffs

VERIFICATION

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING THE NATIONAL ORGANIZATION FOR MARRIAGE FOUND IN THIS COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: this 19th day of October, 2009.

Brian S. Brown
Executive Director
National Organization for Marriage
20 Nassau Street, Suite 242
Princeton, NJ 08542
609/688/0450 telephone
609/688/0455 facsimile

VERIFICATION

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING AMERICAN PRINCIPLES IN ACTION FOUND IN THIS COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: this 20th day of October, 2009.

Andresen Blom
Executive Director
American Principles Project
1100 H Street, NW
Suite 700
Washington, DC 20005
202-347-6840
202-347-6849 - fax

EXHIBIT C

In the United States District Court
for the District of Rhode Island

National Organization for Marriage, Inc., *Plaintiff*	
v.	Civil Action No. ____
John Daluz, in his official capacity as chairman of the Rhode Island Board of Elections; Frank Rego, in his official capacity as vice chairman of the Rhode Island Board of Elections; and Richard Dubois, Florence Gormley, Martin Joyce, Jr., Richard Pierce, and William West, in their official capacities as members of the Rhode Island Board of Elections, *Defendants*	CA10- 392ML

Verified Complaint

Table of Contents

Table of Contents 2

I. Background 5

A. Plaintiff 5

1. NOM 5
2. NOM's Speech 5
3. What NOM Does and Does Not Do 6

B. Defendants 7
C. Rhode Island Law 8

1. Regulation of NOM as a Political Action Committee 9
2. Expenditure Ban 12
3. Expenditure Definition and Disclosure Requirements 13

D. Future Speech 14

II. Discussion 15

A. Justiciability 15

1. Standing 15

a. Constitutional Standing 15
b. Prudential Standing 16

2. Ripeness 16

B. Irreparable Harm 16

C. First Principles 17

1. The Limited Power of Government 17
2. The First and Fourteenth Amendments as a Restriction on the Already Limited Power of Government 17

a. Vagueness 18
b. Overbreadth 18

3. Determining the Meaning of Political Speech and whether Government may Regulate it 19

D. Vagueness 20

1. Rhode Island Law is Vague, and therefore Overbroad 20
2. Why Rhode Island Law is Vague, and therefore Overbroad 20

E. Overbreadth: In General 21

F. Overbreadth: The Political Action Committee Definition 21

1. Strict Scrutiny 21
2. Applying Strict Scrutiny 23

G. Overbreadth: Expenditure Bans 24

1. Strict Scrutiny 24
2. Applying Strict Scrutiny 24

H. Overbreadth: Expenditure Definition and Disclosure Requirements 25

1. Exacting Scrutiny 25
2. Spending for Political Speech 25
3. Government's Interest in Disclosure 26
4. Applying Exacting Scrutiny 26

I. Facially Unconstitutional 27
J. Narrowing Glosses, Certification, and Severability 28

III. Prayers for Relief 29

Verification 32

1. Plaintiff National Organization for Marriage, Inc. ("NOM"), files this verified complaint.

2. This action begins with the principle of freedom of speech. Government may limit or otherwise regulate speech only when it has the enumerated power to do so and only when the exercise of that power is constitutional.

3. This Court has jurisdiction, because this action arises under the First and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331 (1980).

4. This Court also has jurisdiction, because this action arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1996). *See* 28 U.S.C. § 1343.a (1979).

5. This Court also has jurisdiction under the Declaratory Judgment Act. *See id.* §§ 2201 (1993), 2202 (1948).

6. Venue is proper in this Court, because Defendants reside in the District of Rhode Island, and "a substantial part of the events or omissions giving rise to the claim[s]" occurs in the District of Rhode Island. *See id.* § 1391.b.1-2 (1992).

I. Background

A. Plaintiff

1. NOM

7. Plaintiff NOM, a non-profit corporation exempt from federal income taxation under I.R.C. § 501.c.4 (2006), is a non-sectarian and non-partisan organization. It is not connected with any political candidate or political party. Nor is it connected with any political committee other than its own. *Cf.* 2 U.S.C. § 431.7 (2002) (defining "connected organization" under federal law).

2. NOM's Speech

8. Consistent with its mission,[1] NOM seeks in September and Octobner 2010 to engage in multiple forms of speech in Rhode Island, including radio ads,[2] television ads,[3] direct mail,[4] and publicly accessible Internet postings of its radio ads, television ads, and direct mail. NOM will run the radio and television ads on stations reaching, and send the direct mail to, persons in Rhode Island. The direct-mail exhibit refers to "Legislator Y." This refers to multiple members of the Rhode Island general assembly. When NOM sends the direct-mail piece, it will substitute

---

[1] VERIFIED COMPL. ("VC") Exh. 1, *available at* http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm (all Internet sites visited Sept. 13, 2010).

[2] VC Exhs. 2-3.

[3] VC Exhs. 4-5.

[4] VC Exh. 6.

general assembly members' names for "Legislator Y." NOM does not wish to reveal the members' names in this complaint, because it does not wish to divulge its strategy at this early date.

9. None of this speech has express advocacy as defined in *Buckley v. Valeo,* 424 U.S. 1, 44 & n.52, 80 (1976), *vis-à-vis* state or local office in Rhode Island.[5]

10. Nevertheless, the speech has characteristics that are significant under constitutional and Rhode Island law.

11. The speech will have clearly identified candidates for state or local office in Rhode Island.

12. The speech will be targeted to the relevant electorate in that it can be received in areas where individuals can vote for the clearly identified candidates.

13. The speech will run in the 30 days before a primary or 60 days before a general election ("30-60 Day Windows").

14. Some of the speech will be a broadcast, cable, or satellite ("Broadcast") communication, and some will not.

3. What NOM Does and Does Not Do

15. NOM receives no donations that anyone specifies "be used for" NOM's speech in Rhode Island. *Cf.* R. I. GEN. LAWS § 17-25-3.10 (2006) (political-action-committee definition).

[5] Although it is not material, none of this speech has express advocacy as defined in *Buckley vis-à-vis any* office.

16. NOM does not coordinate any of its speech with any candidate for state or local office in Rhode Island, the candidate's agents, or the candidate's committee, *cf. Buckley,* 424 U.S. at 78, *quoted in FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 294 (2d Cir. 1995), or a state or local political party in Rhode Island. *Cf. McConnell v. FEC,* 540 U.S. 93, 219-23 (2003), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. ___, ___, 130 S.Ct. 876, 896-914 (2010).[6]

17. Nor is there at issue here a contribution NOM receives that (1) is earmarked for a Rhode Island political committee, *i.e.*, an indirect contribution to a Rhode Island political committee, *cf. Buckley,* 424 U.S. at 24 n.23, 78, or (2) "will be converted to an expenditure[,]" *Survival Educ. Fund,* 65 F.3d at 295, *i.e.,* will be earmarked for express advocacy as defined in *Buckley,* 424 U.S. at 44 n.52, 80, *vis-à-vis* state or local office in Rhode Island.[7]

B. Defendants

18. Defendants John Daluz and Frank Rego are the chairman and vice chairman, respectively, of the Rhode Island Board of Elections ("Board"). Defendants Richard Dubois, Florence Gormley, Martin Joyce, Jr., Richard Pierce,

---

[6] Although it is not material, NOM does not make direct contributions to *any* candidate committee or coordinate its speech with *any* candidate, the candidate's agents, or the candidate's committee, or with *any* political party.

[7] Although it is not material, there is not at issue here a contribution NOM receives that (1) is earmarked for *any* political committee, *i.e.*, an indirect contribution to any political committee or (2) "will be converted to an expenditure[,]" *i.e.,* will be earmarked for express advocacy as defined in *Buckley, vis-à-vis any* office.

and William West are Board members.[8] Rhode Island law vests Defendants, all of whom are sued in their official capacities, with authority *vis-à-vis* the law at issue in this action. They act under color of law. *See, e.g.,* R. I. GEN. LAWS §§ 17-25-5 (2007), 17-25-13 (2001), 17-25-16 (1992), 17-25-28 (2001).

C. **Rhode Island Law**

19. NOM reasonably believes that if it does not follow Rhode Island law, Defendants will subject NOM to enforcement and prosecution leading to civil liabilities and criminal penalties. *See id.* Even if there were no civil liabilities or criminal penalties, being cleared provides little comfort to those whom government has wrung through a process that becomes the punishment. *See, e.g., FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 468 n.5 (2007) ("*WRTL II*"). "The right of free speech can be trampled or chilled even if convictions are never obtained" and civil liabilities are never imposed. *FEC v. Hall-Tyner Election Campaign Comm.,* 678 F.2d 416, 422 n.15 (2d Cir. 1982), *cert. denied,* 459 U.S. 1145 (1983).

20. In two instances,[9] Rhode Island law chills[10] Plaintiff from proceeding with its speech. NOM will do its speech only if the Court grants the requested relief.

---

[8] Commissioners, *available at* http://www.elections.state.ri.us/.

[9] *Infra* Parts I.C.1, 2.

[10] The term "pre-enforcement" applies before civil enforcement or criminal prosecution. The term "chill" is a proper subset of "pre-enforcement" and applies in the First Amendment context when speakers, fearing civil enforcement or criminal prosecution, will not engage in their speech. *See, e.g., New Hampshire Right to Life*

21. In one instance,[11] there is no chill if the Court holds for Plaintiff on political-committee status[12] and the expenditure ban:[13] NOM will do its speech and comply with the law while asking the Court to declare the law unconstitutional and enjoin its enforcement so compliance is no longer necessary.

1. Regulation of NOM as a Political Action Committee

22. First, under Rhode Island law a political-action committee ("PAC") is "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." R. I. GEN. LAWS § 17-25-3.10.

23. Plaintiff NOM seeks a declaratory judgment that it is not a political-action committee under R. I. GEN. LAWS § 17-25-3.10. NOM further asks that the Court preliminarily and then later permanently enjoin its enforcement.

24. This will allow NOM to do its speech, and materially similar speech in the future, without fear of becoming a PAC, and without fear of enforcement or prosecution.

25. In the alternative, NOM challenges Rhode Island's PAC definition.

PAC v. Gardner, 99 F.3d 8, 13-14 (1st Cir. 1996) ("*NHRL*"). Thus, "pre-enforcement" applies to all of Plaintiff's speech, and "chill" applies to some of its speech.

[11] *Infra* Part I.C.3.

[12] *Infra* Part I.C.1.

[13] *Infra* Part I.C.2.

26. NOM is not under the control of a candidate or candidates for state or local office in Rhode Island.[14] In addition, NOM's organizational documents – *i.e.*, its articles of incorporation[15] and by-laws[16] – and public statements[17] do not indicate it has the major purpose of nominating or electing a candidate or candidates for state or local office in Rhode Island, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, a candidate or candidates for state or local office in Rhode Island.[18] "Independent expenditure" means express advocacy as defined in *Buckley* and not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party, which is the standard under the Constitution. 424 U.S. at 39-51; *McConnell*, 540 U.S. at 219-23; *cf.* 2 U.S.C. § 431.17 (2002) (following *Buckley* by limiting the statutory independent-expenditure definition to express advocacy).[19]

---

[14] Although it is not material, NOM is not under the control of *any* candidate or candidates.

[15] VC Exh. 7.

[16] VC Exh. 8.

[17] *E.g.*, VC Exh. 1.

[18] *See* VC Exh. 9 (IRS Form 990).

[19] Although it is not material, nothing in NOM's organizational documents or in its public statements indicates that NOM has the major purpose of nominating or electing *any* candidate or candidates, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

27. Nevertheless, NOM reasonably fears it is a PAC under Rhode Island law. Then NOM will have to comply with a panoply of burdens that Rhode Island *via* its PAC definition imposes on organizations such as NOM, including:

- Registration (including treasurer-designation) requirements. R. I. GEN. LAWS §§ 17-25-7.a (1992), 17-25-8.1 (2006), 17-25-10.a.3 (2006), 17-25-15 (2006).
- Recordkeeping requirements. *Id.* §§ 17-25-7.a, 17-25-11.1 (2001).
- Extensive reporting requirements. *Id.* §§ 17-25-7.a, 17-25-11 (2007).
- Limits on contributions received. *Id.* § 17-25-10.1.a.1, and
- Contribution-source bans. *Id.* § 17-25.10.1.h.1; 2 U.S.C. §§ 441b.a, 441b.b.2 (2002) (national banks and national corporations), 441e (2002) (foreign nationals).

28. The weight of these burdens is such that the speech would simply not be worth it for NOM. It does not want to bear the burdens of being a political committee.

29. Therefore, Plaintiff NOM seeks a declaratory judgment that the political-action committee definition, R. I. GEN. LAWS § 17-25-3.10, is unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin its enforcement.

30. This will allow NOM to do its speech, and materially similar speech in the future, without fear of becoming a PAC, and without fear of enforcement or prosecution.

2. Expenditure Bans

31. Second, an expenditure includes any "thing of value" exceeding $100 "to or by any candidate, committee of a political party, or political action committee or ballot question advocate." *Id.* § 17-25-3.3, 7 (1992). Rhode Island bans corporations and other business entities from making expenditures "to or for any candidate, political action committee, or political party committee[.]"[20] *Id.* § 17-25-10.1.h.1 (2006). Rhode Island law then says only individuals, PACs, party committees, and authorized candidate committees may make expenditures. *Id.* § 17-25-10.1.j; *see Rhode Island Affiliate ACLU v. Begin*, 431 F. Supp.2d 227, 240 (D.R.I. 2006) (noting that given Section 10.1.j, the Section 10.1.h ban is "redundant"). Moreover, a person – including NOM, *see* R. I. GEN. LAWS § 17-25-3.9 (defining "person" to include corporations) – "not acting in concert with any other person or group" may not spend its own money to "support or defeat" a candidate when no one will reimburse the person. *Id.* § 17-25-10.b.

32. NOM reasonably fears its radio ads, television ads, direct mail, and Internet postings are expenditures that Rhode Island bans, because NOM (1) is a corporation, (2) is neither an individual, a PAC, a party committee, nor an authorized candidate committee, and (3) will do its speech by itself without reimbursement.

[20] *See also* VC Exh. 10 at 3 (Advisory Op. of Richard Thorton, Director of Campaign Finance, Rhode Island Board of Elections (May 5, 2010)).

33. Therefore, Plaintiff NOM seeks a declaratory judgment that the corporate expenditure ban, R. I. GEN. LAWS § 17-25-10.1.h.1, the ban on expenditures by persons other than individuals, PACs, party committees, or authorized candidate committees, R. I. GEN. LAWS § 17-25-10.1.j, and the ban on expenditures by persons "not acting in concert with any other person or group" when no one will repay the money, R. I. GEN. LAWS § 17-25-10.b, are unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.

34. This will allow NOM to do its speech, and materially similar speech in the future, without violating the bans, and without fear of enforcement or prosecution.

3. Expenditure Definition and Reporting Requirements

35. Third, even if NOM may do expenditures as Rhode Island defines them, NOM must still report them, because NOM's total expenditures will exceed $100 in a calendar year. *Id.* § 17-25-10.b. Further, NOM must send reports not only to the Board but also to the campaign treasurers or deputy campaign treasurers of the candidates or parties "on whose behalf" NOM made the expenditures. *Id.* And NOM must report even the smallest expenditures as Rhode Island defines them. In this sense, there is no reporting threshold. *See id.*

36. Even if NOM's speech did not sweep it into political-committee status, NOM reasonably fears that if it does its speech, it must comply with these requirements.

37. Therefore, Plaintiff NOM seeks a declaratory judgment that the expenditure definition, R. I. GEN. LAWS § 17-25-3.3, and the expenditure-reporting requirements, R. I. GEN. LAWS § 17-25-10.b, are unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.

38. This will allow NOM to do its speech, and materially similar speech in the future, without having to comply with these expenditure-reporting requirements, and without fear of enforcement or prosecution.

D. **Future Speech**

39. In materially similar situations in the future, NOM intends to do speech materially similar to all of its planned speech such that Rhode Island law will apply to NOM as it does now.

40. Plaintiff will plan its future speech as the need arises, keeping in mind that it often cannot know well in advance of when it wants to speak, *see WRTL II*, 551 U.S. at 462-63, and that "timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

41. Despite *Citizens United*, Plaintiff finds itself in the position of having to consult campaign-finance lawyers or seek declaratory rulings "before discussing the most salient political issues of our day." 130 S.Ct. at 889.

II. Discussion

42. Counts 2 to 4[21] assert various provisions of Rhode Island law fail the appropriate level of scrutiny. Counts 1[22] and 5[23] assert law challenged in Counts 2 to 4 is unconstitutionally vague, and therefore overbroad, both as applied to speech and facially. Count 5 then asserts the law challenged in Counts 2 to 4 is facially unconstitutional.

A. Justiciability

1. Standing

a. Constitutional Standing

43. First, part of NOM's injury is the chill to speech caused by Defendants' prospective enforcement of Rhode Island law or prosecution of NOM. The relief it seeks will redress this chill, thereby allowing NOM to do its speech without fear of enforcement or prosecution. Therefore, NOM has standing to seek relief from the chill. *See New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13-15 (1st Cir. 1996) ("*NHRL*").

44. Second, NOM has standing in part because it will do its speech and comply with some of the law it challenges – as opposed to being chilled and therefore not doing its speech – while asking the Court to declare the law

[21] *Infra* Parts II.E-H.

[22] *Infra* Part II.D.

[23] *Infra* Part II.I.

unconstitutional and enjoin its enforcement so compliance is no longer necessary. *See Davis v. FEC,* 554 U.S. ____, ____, 128 S.Ct. 2759, 2769 (2008).

b. Prudential Standing

45. Plaintiff has prudential standing, because its injuries are in the "zone of interests" the challenged law regulates. *FEC v. Akins,* 524 U.S. 11, 20 (1998) ("protected or regulated" (quoting *National Credit Union Admin. v. First Nat. Bank & Trust Co.,* 522 U.S. 479, 488 (1998))).

2. Ripeness

46. Pre-enforcement challenges are ripe when:

- They address laws chilling political speech, *see Mangual v. Rotger-Sabat,* 317 F.3d 45, 60 (1st Cir. 2003), or
- A speaker is already doing or will do its speech, and is already complying or will comply with the challenged law but asks a court to declare the law unconstitutional and enjoin its enforcement so compliance is no longer necessary. *See Peachlum v. City of York, Pa.,* 333 F.3d 429, 435 (3d Cir. 2003) (citing *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio,* 40 F.3d 1454, 1467 (3d Cir. 1994)).

47. Therefore, Plaintiff's claims are ripe.

B. Irreparable Harm

48. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). So unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See id.*

C. First Principles

1. The Limited Power of Government

49. Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC,* 558 U.S. ___, ___, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976).

50. The framers established government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) ("We the people of the United States"); R. I. CONST. preamble ("We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same"), and government has only those powers that the governed surrendered to it in the first place.

2. The First and Fourteenth Amendments as Restrictions on the Already Limited Power of Government

51. This power – including the "constitutional power of Congress to regulate federal elections[,]" *Buckley*, 424 U.S. at 13 & n.16, and each state's parallel power over its own, though not other states', elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*") (citing *Buckley,* 424 U.S. at 13); R. I. CONST. art. IV – is further constrained by other law, including the First and Fourteenth Amendments.

a. Vagueness

52. Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Citizens United,* 130 S.Ct. at 889 (quoting *Connally v. General Constr. Co.,* 269 U. S. 385, 391 (1926)).

53. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See id.*

b. Overbreadth

54. The absence of vagueness, however, does not make law regulating political speech constitutional. *See WRTL II,* 551 U.S. at 479 (quoting *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 263 (1986) ("*MCFL*")).

55. Even non-vague law regulating political speech must comply with the First Amendment, which provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791). The First Amendment guards against overbreadth, *Buckley,* 424 U.S. at 80 ("impermissibly broad"),[24] and applies to the states through the Fourteenth Amendment, regardless of whether it is through the Due Process Clause, *Gitlow v. New York,* 268 U.S. 652, 666 (1925) (freedom of speech and freedom of the press), or the Privileges and Immunities Clause. *Cf. McDonald v.*

---

[24] One should not confuse this overbreadth with the substantial overbreadth courts address in assessing facial unconstitutionality. *Infra* Part II.I.

City of Chicago, 561 U.S. ____, ____, 130 S.Ct. 3020, 3059, 3062-63 (2010) (Thomas, J., concurring in part and concurring in the judgment).

56. The government's power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further inquiry,[25] have the power to regulate donations received and spending for political speech only when they are "unambiguously related to the campaign of a particular ... candidate" in the jurisdiction in question, 424 U.S. at 80, or "unambiguously campaign related" for short. *Id.* at 81. This principle helps ensure government regulates only speech that government has the "power to regulate," *NCRL III*, 525 F.3d at 282, *i.e.*, speech that government has a constitutional interest in regulating. *See id.* at 281 (citing *Buckley*, 424 U.S. at 80). This principle is part of the larger principle that law regulating political speech must not be overbroad, *see Buckley*, 424 U.S. at 80 ("impermissibly broad"), and thus overlaps with constitutional scrutiny.

3. Determining the Meaning of Political Speech and whether Government may Regulate it

57. *WRTL II* also reaffirms that in determining the meaning of political speech and whether government may regulate it, one looks to the substance of the speech itself. 551 U.S. at 469 (citing *Buckley*, 424 U.S. at 43-44). *WRTL II* all but

[25] *E.g., infra* Parts II.F, G.

forecloses considering context to determine the meaning of political speech and whether government may regulate it. *See id.* at 467-73.

Count 1: Vagueness

D. Vagueness

1. Rhode Island Law is Vague, and therefore Overbroad

58. Rhode Island's vague law does not "provide the kind of notice that will enable ordinary people to understand what conduct it" regulates; furthermore, "it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)).

2. Why Rhode Island Law is Vague, and therefore Overbroad

59. Rhode Island uses the phrase "advocating the election or defeat of" candidates in its PAC definition. It also uses the phrases "support or defeat" and "on whose behalf" in an expenditure ban and an expenditure-reporting requirement, respectively.[26]

60. This language is unconstitutionally vague, and therefore overbroad, and is unconstitutional as applied to NOM's speech and facially.[27]

---

[26] VC ¶¶ 22, 31, 35.

[27] Part II.I addresses facial unconstitutionality, including vagueness.

E. Overbreadth: In General

61. In addition, Rhode Island law is unconstitutional as applied to NOM's speech facially.[28]

62. Rhode Island law fails the appropriate level of scrutiny.

Count 2: The Political Action Committee Definition

F. Overbreadth: The Political Action Committee Definition

63. Plaintiff re-alleges the preceding paragraphs.

64. If the Court does not enter declaratory judgment that Rhode Island's PAC definition does not apply to NOM, then NOM challenges the definition.[29]

1. Strict Scrutiny

65. Plaintiff re-alleges the preceding paragraphs.

66. Strict scrutiny applies to government regulation of organizations as political committees. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 658 (1990) (holding that a state requirement that an organization form a segregated fund "must be justified by a compelling state interest"), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. ____, ____, 130 S.Ct. 876, 896-914 (2010); *Colorado Right to Life Comm., Inc. v. Coffman,* 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*") (applying strict scrutiny to a state requirement that organizations themselves be political committees); *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 290

[28] Parts II.E-H address as-applied challenges, and Part II.I addresses facial unconstitutionality, including overbreadth.

[29] VC ¶¶ 22-25.

(4th Cir. 2008) ("*NCRL III*") (addressing "narrower means" than a state requirement that organizations themselves be political committees); *cf. Citizens United*, 130 S.Ct. at 897-98 (holding that strict scrutiny applies to a ban on speech and noting the burdens of forming a political committee to do the same speech); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) ("*MCFL*") (considering whether a ban on independent expenditures "is justified by a compelling state interest" and noting the burdens of forming a separate segregated fund to do the same speech).

67. *Buckley v. Valeo* establishes that government may regulate an organization as a political committee only if (1) it is "under the control of a candidate" or candidates or (2) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates in the jurisdiction. *See* 424 U.S. 1, 79 (1976).

68. These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)); *NCRL III*, 525 F.3d at 288-89; *CRLC*, 498 F.3d at 1139, 1154-55; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n.5 (7th Cir. 1998).

69. Determining whether an organization is "under the control of a candidate" or candidates for state or local office in Rhode Island is straightforward, and NOM is under no such control.[30]

70. Determining whether an organization passes the major-purpose test is also straightforward.

71. NOM does not have the major purpose of nominating or electing a candidate or candidates for state or local office in Rhode Island: (1) It has not indicated this in its organizational documents or in its public statements, and (2) it does not spend the majority of its money on contributions to, or independent expenditures for, such candidates.[31]

2. Applying Strict Scrutiny

72. Rhode Island lacks a compelling interest in regulating organizations such as NOM as political committees, because they are neither under the control of, nor do they have the major purpose of nominating or electing, candidates for state or local office in Rhode Island. In the alternative, Rhode Island's PAC definition is not narrowly tailored, because it lets Rhode Island regulate organizations such as NOM as political committees when they are neither under the control of, nor have

---

[30] Although it is not material, NOM is not under the control of *any* candidate or candidates.

[31] Although it is not material, NOM does not have the major purpose of nominating or electing *any* candidate or candidates. It has not indicated this in its organizational documents or in its public statements. Nor does it spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

the major purpose of nominating or electing, candidates for state or local office in Rhode Island. *See NCRL III,* 525 F.3d at 290 (calling a political-committee definition "vague" and addressing "narrower means" when the definition regulated as political committees organizations that passed neither the "under the control of a candidate" test nor the major-purpose test); *CRLC,* 498 F.3d at 1146 (holding that strict scrutiny applies and then addressing the tests).

73. Therefore, Rhode Island's PAC definition[32] is unconstitutional as applied to NOM's speech.

74. If Rhode Island wanted to regulate, for example, spending for political speech by persons it may *not* regulate as political committees under *Buckley,* 424 U.S. at 74-79, then it could use less-restrictive means.

Count 3: Expenditure Bans

G. Expenditure Bans

1. Strict Scrutiny

75. Plaintiff re-alleges the preceding paragraphs.

76. Strict scrutiny applies to bans on independent spending for political speech. *See Citizens United,* 130 S.Ct. at 898 (quoting *WRTL,* 551 U.S. at 464).

2. Applying Strict Scrutiny

77. Rhode Island's expenditure bans[33] are unconstitutional as applied to NOM's speech. *See id.* at 896-914.

[32] *Supra* Part I.C.1.

Count 4: Expenditure Definition and Reporting Requirements

H. Overbreadth: Expenditure Definition and Reporting Requirements

1. Exacting Scrutiny

78. Plaintiff re-alleges the preceding paragraphs.

79. Exacting scrutiny applies to disclosure requirements, both for organizations government *may* regulate as political committees under *Buckley*, 424 U.S. at 74-79, *see Davis v. FEC*, 554 U.S. ____, ____, 128 S.Ct. 2759, 2775 (2008) (quoting *Buckley*, 424 U.S. at 64), and for those it may *not*. *See Citizens United*, 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

80. Full-fledged political-committee *disclosure requirements* apply only if the jurisdiction's regulation of organizations as political committees – *i.e.*, only if the *definition* through which the jurisdiction imposes political-committee burdens[34] – is constitutional in the first place. So when the definition is unconstitutional – as Rhode Island's is[35] – the requirements are unnecessary to consider.

2. Spending for Political Speech

81. When it comes to persons Rhode Island may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79, the *only* spending for political speech

---

[33] *Supra* Part I.C.2.

[34] VC ¶ 27.

[35] *Supra* Part II.F.

that Supreme Court precedent has established Rhode Island has a sufficiently important interest in regulating is:

- Express advocacy, *id.* at 39-51, 74-81, as defined in *Buckley, id.* at 44 & n.52, 80, *vis-à-vis* state or local office in Rhode Island, and
- Regulable speech "about a candidate shortly before an election." *Citizens United,* 130 S.Ct. at 915: Electioneering communications as defined in the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), *Citizens United,* 130 S.Ct. at 914-16, having a clearly identified candidate for state or local office in Rhode Island.

See, e.g., NCRL III, 525 F.3d at 281-82.

3. Government's Interest in Disclosure

82. The "constitutional power of Congress to regulate federal elections[,]" *Buckley,* 424 U.S. at 13 & n.16, and each state's parallel power over its own, though not other states', elections, *see, e.g., NCRL III,* 525 F.3d at 281, cannot include power to gather "information" or "data" for information's or data's sake.

4. Applying Exacting Scrutiny

83. Rhode Island's expenditure definition and expenditure-reporting requirements[36] reach beyond spending for political speech that courts allow government to regulate. That is, Rhode Island reaches beyond what it has a sufficiently important interest in regulating.

84. Rhode Island law reaches beyond *spending-for-political-speech* boundaries. That is, it reaches beyond express advocacy as defined in *Buckley,* 424 U.S. at 44 n.52, 80, and beyond what the Supreme Court has held may be regulable

[36] *Supra* Part I.C.3.

speech "about a candidate shortly before an election." *Citizens United,* 130 S.Ct. at 915. This occurs through the expenditure definition and the expenditure-reporting requirements.

85. Because Rhode Island reaches beyond what it has a sufficiently important interest in regulating, its law fails exacting scrutiny and is unconstitutional as applied to NOM's *non-Broadcast* speech, and – as to this speech – it is unnecessary to consider whether any factors such as those *Citizens United* mentions, 130 S.Ct. at 915-16, mean there is no "substantial relation" between the disclosure requirements and a "'sufficiently important' government[] interest." *Id.* at 914 (quoting *Buckley,* 424 U.S. at 64, 66).

86. For these reasons, the expenditure definition and the expenditure-reporting requirements are unconstitutional as applied to NOM's speech.

87. Rhode Island law is unconstitutional as applied to NOM's *Broadcast* and *non-Broadcast* speech for additional reasons. *See Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1198 (10th Cir. 2000) (striking down a requirement to provide copies to candidates); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1033 (9th Cir. 2009) (referring *pre-Citizens United* to tailoring); *id.* at 1036 (Noonan, J., concurring).

Count 5: Vagueness and Overbreadth:
Facial Unconstitutionality

I. Facially Unconstitutional

88. Plaintiff re-alleges the preceding paragraphs.

89. A state law is facially unconstitutional under the First Amendment, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citing *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)), and a state law burdening free speech is facially unconstitutional for vagueness under the Fourteenth Amendment, *see United States v. Salerno*, 481 U.S. 739, 745 (1987) (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984))); *Kolender v. Lawson*, 461 U.S. 352, 358 & n.8 (1983)), *followed in City of Chicago v. Morales*, 527 U.S. 41, 60 (1999), when it reaches "a substantial amount of protected speech ... not only in an absolute sense, but also relative to the [law's] plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292-93 (2008) (citing *Board of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

90. Whether the challenge is based on the First Amendment, Fourteenth Amendment, or both, all of the law that is unconstitutional as applied to Plaintiff's speech is also facially unconstitutional.

J. Narrowing Glosses, Certification, and Severability

91. Unlike in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), no narrowing gloss saves the unconstitutional law in this action. Nor is certifying a question appropriate where, as here, the state law is not fairly susceptible. Furthermore, severing the unconstitutional language from the remaining language – which is a question of state law – is not an option in this action.

III. Prayers for Relief

92. Plaintiff NOM seeks a declaratory judgment that it is not a political-action committee under R. I. GEN. LAWS § 17-25-3.10. NOM further asks that the Court preliminarily and then later permanently enjoin its enforcement.[37]

93. In the alternative to the previous paragraph, Plaintiff NOM seeks a declaratory judgment that the political-action committee definition, R. I. GEN. LAWS § 17-25-3.10, is unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin its enforcement.[38]

94. Plaintiff NOM seeks a declaratory judgment that the corporate expenditure ban, R. I. GEN. LAWS § 17-25-10.1.h.1, the ban on expenditures by persons other than individuals, PACs, party committees, or authorized candidate committees, R. I. GEN. LAWS § 17-25-10.1.j, and the ban on expenditures by persons "not acting in concert with any other person or group" when no one will repay the money, R. I. GEN. LAWS § 17-25-10.b, are unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.[39]

---

[37] VC ¶ 23.

[38] VC ¶ 29.

[39] VC ¶ 33.

95. Plaintiff NOM seeks a declaratory judgment that the expenditure definition, R. I. GEN. LAWS § 17-25-3.3, and the expenditure-reporting requirements, R. I. GEN. LAWS § 17-25-10.b, are unconstitutional as applied to NOM's speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.[40]

96. Any narrowing gloss would be incorrect as a matter of law. If the Court nevertheless held that a narrowing gloss were possible, Plaintiff NOM prays for the following relief:

- A declaratory judgment limiting Rhode Island's political-action-committee definition, R. I. GEN. LAWS § 17-25-3.10, and by extension the burdens Rhode Island imposes on PACs, to organizations that are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Rhode Island,[41] and

---

[40] VC ¶ 37.

[41] In the alternative, Plaintiff NOM prays that the Court limit the definition and burdens to organizations that are under the control of, or have the major purpose of nominating or electing, *any* candidate or candidates.

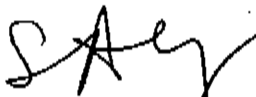
Plaintiff NOM submits this alternative would also be incorrect, because, for example, it would allow Rhode Island to regulate as Rhode Island political committees those organizations that are under the control of, or have the major purpose of nominating or electing, candidates for *federal* office or candidates for *state or local office in another state*. This can easily turn against Rhode Island and allow these non-Rhode Island jurisdictions to regulate organizations that really do pass the "under the control of a candidate" or major-purpose test in Rhode Island.

Moreover, under this approach, a jurisdiction could impose political-committee burdens on organizations whose activity is minimal – or even zero – in the jurisdiction.

- A declaratory judgment limiting Rhode Island's expenditure definition, R. I. GEN. LAWS § 17-25-3.3, and expenditure-reporting requirements, R. I. GEN. LAWS § 17-25-10.b, to (a) express advocacy as defined in *Buckley vis-à-vis* state or local office in Rhode Island or (b) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Rhode Island.[42]

97. Plaintiff further seeks costs and attorneys' fees under 42 U.S.C. § 1988 (2000) and any other applicable statute or authority, and further seeks other relief this Court in its discretion deems just and appropriate.

Respectfully submitted,



Stephen A. Izzi
Rhode Island No. 2928
MOSES & AFONSO, LTD.
160 Westminster Street, Suite 400
Providence, R. I. 02903
Telephone (401) 453-3600
Facsimile (401) 453-3699
SIzzi@MosesAfonso.com
Local Counsel for Plaintiff

James Bopp, Jr., Ind. No. 2838-84
Randy Elf, New York No. 2863553
Jeffrey Gallant, Va. No. 46876
JAMES MADISON CENTER FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Ind. 47807
Telephone (812) 232-2434
Facsimile (812) 235-3685
bcb@BoppLaw.com
Lead Counsel for Plaintiff

September 14, 2010

[42] In the alternative, Plaintiff NOM prays that the Court limit the definition and corresponding requirements to (a) express advocacy as defined in *Buckley vis-à-vis* *any* office or (b) electioneering communications as defined in FECA having *any* clearly identified candidate.

Verification by

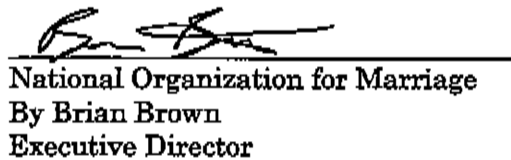
National Organization for Marriage, Inc.

I, Brian Brown, declare as follows:

I am the executive director of the National Organization for Marriage, Inc.

I have personal knowledge of the organization's activities, including those set out in this complaint, and if called upon, I would competently testify as to them.

I verify under penalty of perjury under the laws of the United States of America that the factual statements in this complaint concerning the organization are true.



National Organization for Marriage
By Brian Brown
Executive Director

September 14, 2010

EXHIBIT D

ASSEMBLY DEBATE TRANSCRIPTS

1983
CHAPTER 70

21 PAGES

ELECTION LAW

NEW YORK LEGISLATIVE SERVICE, INC.
The Research Specialists on Legislative Intent and Current Legislation.
A NEW YORK NOT-FOR-PROFIT CORPORATION. ESTABLISHED 1932.
15 Maiden Lane, New York, NY 10038 (212) 962-2826 www.nyls.org

The Assembly
State of New York
Albany

THE HONORABLE STANLEY FINK, SPEAKER
Presiding

RECORD OF PROCEEDINGS

WEDNESDAY, MARCH 23, 1983 1:15 P.M.

THE CLERK: Ladies and gentlemen, the Speaker of the Assembly.

THE SPEAKER: The House will come to order.

RABBI SAMUEL M. BUTMAN: Mr. Speaker; members of the Assembly; honored guests; ladies and gentlemen:

Firstly, I would like to thank this Legislative Body for passion a resolution designating the period of March 25th, corresponding to Nisan 11, to June 14th, corresponding to Tamuz 3, as New York State's "82 Days of Education", in honor of the Lubavitcher Rebbe's Birthday, and his entering into his

The bill is passed.

Page 5, Calendar No. 129, the Clerk will read.

MR. WALSH: Mr. Speaker, would you please recommit Bill No. 2999, Calendar No. 129?

ACTING SPEAKER GRABER: Calendar No. 129 is recommitted.

MR. WALSH: Mr. Goldstein is in a committee meeting. We would like to go to Calendar No. 134 now.

ACTING SPEAKER GRABER: Calendar No. 134, the Clerk will read.

THE CLERK: Bill No. S 420, Calendar No. 134, Calandra (Lipschutz, Koppell--466). An act to amend the Election Law, in relation to regulating political committees which promote the success or defeat of ballot proposals submitted to vote at a public election.

ACTING SPEAKER GRABER: Mr. Nadler.

MR. NADLER: Explanation please.

ACTING SPEAKER GRABER: Explanation asked for, Mrs. Lipschutz.

MRS. LIPSCHUTZ: Thank you, Mr. Speaker.

This particular legislation will

accomplish a full restoration of financial reporting by major political action committees and organizations who work to pass or defeat political questions submitted to the voters on Election Day. This would include bond issues, State constitutional amendments and referenda.

New York State had such a requirement prior to 1978. And, I might remind my colleagues, Mr. Speaker, that these requirements are very much in effect and law when it comes to political candidates, and I feel that the people of this State have a right to know, as well, how their votes are manipulated, pro or con on an issue, as well as on a candidate.

MR. NADLER: Mr. Speaker, will Mrs. Lipschutz yield for a series of questions?

MRS. LIPSCHUTZ: I will.

ACTING SPEAKER GRABER: The member yields.

MR. NADLER: Gerdi, can you concede the possibility that a reporting statute might be over broad, so as to invade the rights of privacy of individual citizens?

MRS. LIPSCHUTZ: I believe, Jerry, that the very reason that the original statute concerning this was overruled or turned down by the court, that

is, the problem was that it was over broad. But, at the same time, the court, at that time, requested and recommended, for the protection of the citizens, that a law shouldn't be brought about within a narrow confine. We believe this particular bill answers the court's recommendation.

MR. NADLER: Gerdi, you believe this bill is not over broad. Do you know why the Citizens' Union, which has been in the forefront of promoting ballot disclosure--

ACTING SPEAKER GRABER: May we get some order in the Chamber please?

MR. NADLER: Can you tell me why the Citizens' Union, which has been in the forefront of advocating disclosure of spending and contributions for political and other campaigns, opposes your bill as being over broad?

MRS. LIPSCHUTZ: I really don't know, Jerry.

MR. NADLER: Have you read the memo?

MRS. LIPSCHUTZ: I have read the memo, I don't understand an organization as liberal and as protective of citizens' right, as the Citizens' Civil Liberty Union is, why they are objecting to it, when

organizations like Common Cause and the League of Women Voters are very much in favor of it.

MR. NADLER: Well, let me ask you a few questions that maybe will elucidate why Citizens' Union thinks it is over broad and why I think it is over broad.

Under your bill, any organization which spends $5,000 to influence a referendum, which buys a newspaper ad must report its expenditures, correct?

MRS. LIPSCHUTZ: Either $5,000 or 50 percent of their total budget on a particular ballot issue.

MR. NADLER: Okay. So, if an organization spends over 50 percent of its budget on the ballot issue, it has got to report its expenditures, and it has got to report its contributors?

MRS. LIPSCHUTZ: Would you suffer an interruption? I am informed by counsel that expenditures must be reported at anytime.

MR. NADLER: Fine, but certainly an organization that spends over 50 percent of its budget must report both expenditures and contributions, correct?

MRS. LIPSCHUTZ: It is the receipts of the amounts that are--

MR. NADLER: Correct.

MRS. LIPSCHUTZ: Yes.

MR. NADLER: Thank you. An organization that spends $5,000, which is less than 50 percent of its budget, must also report its expenditures and the contributors to it, is that correct?

MRS. LIPSCHUTZ: Correct.

MR. NADLER: Okay. Now, let me ask you the following hypothetical. If an organization is set up or is established, not for the specific purpose of influencing a referendum, the New York State Tenant Association--let me change that, the Rockaway Tenant Association--

MRS. LIPSCHUTZ: We have about 20 of those.

MR. NADLER: Fine, the United League of Rockaway Tenants' Association, which spend altogether--

MRS. LIPSCHUTZ: Jerry, I would prefer if you represent your own constituency and not mine.

MR. NADLER: The United League of West Brooklyn Tenant Association, which spends $100,000 a year or $200,000 a year and is a general purpose

organization to represent tenants. And, an individual contributes, in January, $100 to that association. In March, the Governor recommends a referendum. In May, the Legislature passes it. In October, the organization takes out a $5,000 newspaper ad to support or oppose the referendum. Suddenly, the person who contributed $100 with an expectation of privacy, because he wasn't contributing for this referendum, suddenly, his contribution to that organization is now public knowledge, is that correct?

MRS. LIPSCHUTZ: Yes.

MR. NADLER: Can you conceive, Gerdi, that people may want to contribute $100 or more to various public-spirited organizations with no expectation that that organization is going to take a position on a referendum that they may not know is going to occur and that they have a right to expect privacy, which your bill now violates?

MRS. LIPSCHUTZ: I imagine there are such possibilities, but I have always functioned with a belief, and I have always acted with a strong conviction that if I have certain convictions, I should have the strength and courage of those convictions.

MR. NADLER: Yes, but Gerdi, your

convictions may have nothing to do with the referendum that your contribution is now reported about, because you made the contribution in January and nobody knew about the referendum until later, also correct, as a possibility under your bill.

MRS. LIPSCHUTZ: I would say it is a possibility, but I think that is rather farfetched, Jerry.

MR. NADLER: It is rather farfetched. Aren't there many organizations that people make small contributions to, which are multi-purpose organizations, which, if they then get involved and take an ad out in the New York Times, that costs more than $5,000, everybody who made a small contribution to that organization would have to be reported, is that not correct under your bill?

MRS. LIPSCHUTZ: It is correct, however, not many organizations spend $5,000 or more on a multi-faceted issue.

MR. NADLER: Not necessarily multi-faceted. You can easily spend $5,000 on a referendum.

I will ask you a different question. I can understand the public's demand--

MRS. LIPSCHUTZ: Mr. Speaker, I am sorry to interrupt, but may I have some quiet? I can hardly hear Mr. Nadler.

ACTING SPEAKER GRABER: Will the House come to order?

Mr. Nadler.

MR. NADLER: Thank you, Mr. Speaker.

Gerdi, I can understand why it is important that if General Motors is contributing a lot of money to oppose a referendum or support it, the public interest in that being disclosed. I can understand why it is important to disclose a contribution made for the specific purpose of influencing a referendum. I cannot understand, and perhaps you could explain why it is in the public interest that someone who contributes a small amount of money, expecting that that will be private, to a general purpose organization which later elects to participate in a referendum campaign, why is it in the public interest that that person's name be known as a contributor to this organization?

MRS. LIPSCHUTZ: I would be glad to explain, Jerry, and if I may, I am quoting from a transcript taken from a debate on this floor on Monday,

May 17, 1982, the exact time was 12:55 p.m., "Mr. Speaker, this bill presents a conflict, somewhat, of two principles which are both important, in my view, of the requirement of disclosure to the public of campaign contributions that are important in referenda, and the other is the Civil Liberties' view that contributions for an unpopular or popular cause should not be reported lest there should be a chilling effect.

"The courts threw out the earlier reporting statues, and I think this bill attempts, insofar as possible, to protect the civil liberties aspects by excluding minimal campaign contributions, or campaign contributions of organizations the use of which is inferential or used for the referendum.

"I think on any referendum on the ballot, on any issue, it is overwhelmingly important to know what organizations are politically active, what committees are buying TV time or financing the radio spots. So, I commend Mrs. Lipschutz for doing a good job in balancing the constitutional aspects that are involved, and I cast my vote in the affirmative." That was your own explanation, Mr. Nadler.

MR. NADLER: I am aware of that, and I think it is very well spoken, but mistaken on the

facts, because your bill, contrary to my statement last year, when I, obviously, hastily read it, does not exclude small contributions by individuals.

It is important, Gerdi, that we know who is paying for the TV time and the large contributions and three-quarters of the bill is excellent. If your bill said that where a committee is spending more than 50 percent of its money, so it is a pact set up to influence this referendum, then it must report its expenditures and all its contributors. That is fine, and if your bill then went on to say--

MRS. LIPSCHUTZ: Are you asking me a question or making a statement, which?

MR. NADLER: I will be finishing this with a question.

MRS. LIPSCHUTZ: So, you are asking me to yield?

MR. NADLER: I did ask you to yield for a series of questions.

MRS. LIPSCHUTZ: That was back a while ago.

ACTING SPEAKER E. SULLIVAN: Are you asking Mrs. Lipschutz to yield to a question?

MR. NADLER: I asked her to yield to a

series.

ACTING SPEAKER E. SULLIVAN: Do you yield, Mrs. Lipschutz?

MRS. LIPSCHUTZ: Yes, of course.

ACTING SPEAKER E. SULLIVAN: Mr. Nadler, the lady yields.

MR. NADLER: And, if the bill then went on to say that an organization that contributes $5,000 or more for the purpose of influencing a referendum campaign, its contributions and expenditures must be reported, I understand the necessity for that, too, but to then go on and say, as your bill does, that a $5,000 contribution by a general purpose organization triggers the necessity for small contributors, for it to be reported, I think that violates privacy.

Here is the question, why, Mrs. Lipschutz, should someone who contributes $100 to a general purpose organization, with no knowledge that this organization is later going to support a referendum, and when this organization spends, say, one-hundredth of its resources promoting the referendum, and its $5,000 contribution is reported, why is it in the public interest to violate that individual's privacy right and report his $100

contribution? Why is that necessary?

MRS. LIPSCHUTZ: Jerry, I don't know whether it is necessary or not, but all I know is--

MR. NADLER: Your bill does it.

MRS. LIPSCHUTZ: All of us, at one point or another, make contributions to political candidates without knowing whether they will be elected or not, without knowing what the outcome will be, and I think when it comes to the point of motivating and manipulating a vote on a ballot issue, no matter what it is, I think the people of this State have a right to know who is attempting to either win or deny them that vote.

MR. NADLER: Gerdi, I have one more question. The people of the State have a right to know who is attempting to influence the vote, and the first three parts of your bill do that, but someone who gave a $100 contribution to a general purpose organization which later got involved in a referendum, is that person attempting to influence the vote on a referendum, which at the time, he made the contribution, he may have had no idea would be on the ballot?

MRS. LIPSCHUTZ: Well, I think the onus

of that responsibility remains with the donor.

MR. NADLER: Mr. Speaker, on the bill.

ACTING SPEAKER E. SULLIVAN: Your time is up. There are no other speakers. Do you want your second 15 minutes?

MRS. LIPSCHUTZ: May I reserve my closing statement, please?

ACTING SPEAKER E. SULLIVAN: Yes, Mrs. Lipschutz.

MR. NADLER: This bill is a commendable attempt to meet a real problem, which, unfortunately, and by the admission of the sponsor, both privately and now on the floor, has a provision in it that renders it, in my opinion, a dangerous violation of civil liberties and a dangerous violation of the right of privacy.

Imagine an individual who contributes $100 to Planned Parenthood for the promotion of the general purpose of that organization, or to the National Rifle Association, for the promotion of the general purposes of that organization. Months later, a referendum appears on the ballot and Planned Parenthood takes out a $5,000 ad and the NRA takes out a $5,000 ad in the newspaper to oppose or support a referendum.

Suddenly, that individual's $100 contribution, given in total ignorance of the fact that a referendum would exist, not made with any intention to influence a referendum, because of the action of the organization over which the individual has no control, the decision of that organization to support or oppose that referendum, suddenly, it is now public knowledge that Joe Blow gave $100 to Planned Parenthood or to the National Rifle Association. Now, if Joe Blow, who gave the $100 to the NRA happens to be a member of this House from the west side of Manhattan and that might be embarrassing. That might inhibit his willingness to give to the NRA.

If the contributor to Planned Parenthood happened to be a member, for example, of a religious order which frowned on organizations like Planned Parenthood, but he or she wished to do that nonetheless, that would be embarrassing publicly and for no valid public purpose.

It is an invasion of privacy for no valid public purpose, and I would submit under a succession of New York Supreme Court orders, unconstitutional. There is no valid public purpose to lay bare the contributions, the small contributions of

individuals to general purpose organizations in total disregard of the fact that there may or may not be a referendum later.

The public interest does require that an organization that is going to, that is set up to support or oppose a referendum or that spends most of its money doing so, that it report where it gets its contributions, because if you contribute to the committee against the referendum, you know what you are doing, no civil liberties problem.

The public interest requires that those who contribute to such a committee be reported, so if General Motors contributes $2 million to the Committee for Good Government to oppose the referendum, that will be known, no problem.

The public interest requires that anybody who spends more than $5,000 to promote or oppose the referendum, that that expenditure be reported, no problem.

But, those three requirements take care of the entire valid public purpose in terms of disclosing contributions and expenditures for referendum.

The one further step this bill takes,

which invades the privacy of individuals who may wish to contribute small amounts of money to general purpose organizations is a horrendous invasion of privacy, serves no public purpose, because what does it tell us, that Joe Blow gave $100 to Planned Parenthood or the NRA? So what. What we want to know is if the NRA or Planned Parenthood is influencing the referendum by putting $2 million into the TV ads. That is what we want to know.

I submit the bill goes too far for no public purpose, invades privacy and ought to be defeated for that reason, and if it isn't defeated, I predict, we will be back here on this floor a few years hence trying to pass a constitutional bill after this one is knocked down in the courts as the previous one.

ACTING SPEAKER GRABER: Mrs. Lipschutz to close.

MRS. LIPSCHUTZ: Mr. Speaker, I submit to you and to my colleagues a letter I received just several days ago. It is dated March 10th and is written by Richard H. Austin, Secretary of State from the State of Michigan: "Dear Mrs. Lipschutz: In the Sunday, March 6th edition of the New York Times I read of your efforts to enact legislation to require

disclosure of campaign spending by groups attempting to influence ballot question elections. In Michigan, Act 308 of 1976, as amended, has provided for disclosure by all participants in the elective process on dates before and after the election. The law provides late filing fees and fines for incomplete disclosure.

"During last year's general election, Michigan Utilities spent almost $8 million to influence voter behavior on three ballot questions affecting utility regulations. As a result of this disclosure of the source of spending, many political experts believe that a negative reaction resulted in the approval of two of the three ballot measures.

"This week, as the enclosed materials indicate," and here they are, "our Department and three utilities involved in last year's elections negotiated a financial settlement of $130,500 due to their possible violation of the Michigan Campaign Finance Act.

"I bring this matter to your attention because I believe the Michigan experience is positive proof of the value of requiring disclosure of campaign finance spending, and if you would like further

information on that matter, please feel free to contact me. Sincerely, Dennis G. Nuneuner, Chief Assistant Secretary of State."

I close my debate by asking, respectfully, on behalf of the people of this State to give them the full knowledge on anything concerning ballot action and vote for this piece of legislation.

Thank you.

ACTING SPEAKER GRABER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER GRABER: Call the roll.

(The Clerk called the roll.)

Announce the results.

MR. E. SULLIVAN: Mr. Speaker, if I may explain my vote.

ACTING SPEAKER GRABER: Mr. Sullivan to explain his vote.

MR. E. SULLIVAN: I am going to vote in the affirmative on this bill because I do agree with Mr. Nadler's last year's comments that in a conflict of rights, the interest of the people at large has to take precedence.

One of the greatest problems of this country is unseen influence on the affairs of government, and if this bill will be a step in the direction of making sure that people who influence our government are at least known to the people who are influenced, then I think we have made a step forward, and I cast my vote in the affirmative.

ACTING SPEAKER GRABER: Mr. Sullivan in the affirmative.

Mr. Sheffer.

MR. SHEFFER: May I explain my vote, Mr. Speaker?

ACTING SPEAKER GRABER: Mr. Sheffer.

MR. SHEFFER: For the last two years, I have debated against and voted against this bill. For a couple of reasons, I have decided to change my vote in the affirmative. One reason is I am more than a little nervous about the company I keep in opposition to the bill.

The second reason, though, is this, I continue to believe that the bill leaves a loophole, but nevertheless takes a step forward from the law as it stands right now, namely, that there are no restrictions or provisions as a result of the Acito

decision.

If this bill is passed and is signed by the Governor, it is a step forward, but it leaves a loophole that I hope this Legislature will fill with another bill.

For those reason, I have decided to vote in the affirmative.

ACTING SPEAKER GRABER: Mr. Sheffer in the affirmative.

Announce the results.

(The Clerk announced the results.)

The bill is passed.

Calendar No. 114, the Clerk will read.

THE CLERK: Bill No. 1736, Calendar No. 114, Kremer. An act to amend the Insurance Law, in relation to requiring insurance companies to inform policyholders of the cash surrender value of their policies.

MR. TALOMIE: Explanation please, Mr. Speaker.

ACTING SPEAKER GRABER: Mr. Kremer.

MR. KREMER: Mr. Speaker and colleagues, what this bill does is it provides that people who buy life insurance policies should get an annual notice

EXHIBIT E

SENATE DEBATE TRANSCRIPTS

1983
CHAPTER 70

6 PAGES

ELECTION LAW

NEW YORK LEGISLATIVE SERVICE, INC.
The Research Specialists on Legislative Intent and Current Legislation.
A NEW YORK NOT-FOR-PROFIT CORPORATION. ESTABLISHED 1932.
15 Maiden Lane, New York, NY 10038 (212) 962-2826 www.nyls.org

THE PRESIDENT: Senator Stafford is not here, Senator Gold.

SENATOR GOLD: Lay it aside.

THE PRESIDENT: Lay it aside.

THE SECRETARY: Calendar Number 106, by Senator Calandra, Senate Bill Number 420, an act to amend the Election Law.

SENATOR GOLD: Explanation.

THE PRESIDENT: Senator Calandra

SENATOR CALANDRA: This is a very simple bill. What it would do -- always watch out for simple bills; right? Committees that are favoring a ballot question, whether for or against, they would have to report, as we have to report as legislators, contributions of a hundred dollars or more if they either spend more than $5,000 on defeating or passing the proposition or use at least half of their net budget in that way. So that if they should spend more than 5,000, they have to report to the State Board of Elections. If more than half of their annual budget is spent either for or against a question

that is on the ballot, they would have to report the sources of their income, just like we have to report them.

Now, the League of Women Voters and Common Cause support the bill. On the other hand, the Citizens Union and the New York Civil Liberties Union are opposed to it. I don't know how we ever got that kind of a position, two for and two against. It's like a Chinese menu. In any event, we do have that position, and I think it's right for them to let the public know where they get their funds from.

For example, many groups -- take the bond issue, the prison bond issue -- spent huge sums of money to defeat the bond issue. In this kind of a bill, they would have to show where they got the funds in defeating that bond issue. That's all it does, simply.

SENATOR GOLD: Mr. President.

THE PRESIDENT: Senator Gold.

SENATOR GOLD: Mr. President as Senator Calandra very candidly indicated, there

are four memorandums on file, and I want the members to understand that. The League of Women Voters and Common Cause, misunderstanding the bill, support it; and New York Civil Liberties Union and Citizens Union, also I believe, and Council of Churches also has filed in opposition.

Mr. President, the basic problem -- the basic problem is one of constitutionality; and I do understand in this context the application of that old expression, "It depends on whose ox is being gored." When we want to vote for someone or something, we make the excuse that we are only a legislative body and constitutional questions are elsewhere, and we use the reverse argument when it pleases us.

But I believe the argument made as to constitutionality is a serious one in this case. The Federal District Courts have made it eminently clear that legislation such as this or the requirements of disclosure can only be applied in situations where the major purpose for which these organizations are functioning deals

with the ballot questions; and, unfortunately, the way the language of this bill is put together, it would apply to many groups whose main purpose does not apply and, therefore, the constitutional test is not met.

I understand the good motives of Senator Calandra, and I understand the support of the League and of Common Cause and their motives, but the thing that makes this country great is our Constitution. By passing something which is not constitutional, we are accomplishing nothing, and I personally hope that it is defeated.

SENATOR CALANDRA: Well, I just believe that --

THE PRESIDENT: Senator Calandra.

SENATOR CALANDRA: Well, the Communist party is probably against the bill, too, to add to your list, by the way. Let me say this, if an organization spends 5,000 or more or half of their annual budget in a fight for or against something that's on the ballot, I think that's substantial. I think the voters have a right to

know where those monies are coming from; and I think they have the same obligation to report those sums of monies that they receive as we do as legislators in our campaign committees. So I see nothing wrong with it. I think this is a bill that's long overdue, and the court's narrow interpretation of the previous section they struck down indicated that this would be a proper way to go, and I think we are going properly. The State Board of Elections also supports this bill, I might add. Not that that adds that much weight to it, but I would just like you to know who's on what side of the coin here.

SENATOR GOLD: Mr. President.

THE PRESIDENT: Senator Gold.

SENATOR GOLD: Although my phone is working, I haven't heard from the Communist party today. I want the record to indicate that my negative vote is based upon the memorandum from the New York State Council of Churches. It's God and me on this side.

SENATOR CALANDRA: Last section.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 6. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Those recorded in the negative on Calendar Number 106 are Senators Babbush, Berman, Bogues, Gold, Halperin, Jefferson, Jenkins, Leichter, Masiello, Ohrenstein, Stachowski, and Weinstein. Ayes 37. Nays 12.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 116, by Senator Padavan, Senate Bill Number 332, an act to amend the Education Law.

SENATOR GOLD: Explanation.

THE PRESIDENT: We will lay that aside. Senator Padavan is excused.

THE SECRETARY: Calendar 117, by Senator LaValle, Senate Bill Number 360, Education Law.