**Nos. 10-2000 and 10-2049**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

**NATIONAL ORGANIZATION FOR MARRIAGE,**

*Plaintiff-Appellant-Cross Appellee*

*v.*

**WALTER F. MCKEE, *et al.*,**

*Defendants-Appellees-Cross Appellants*

Appeal from the United States Court for the District of Maine
Civil Action No. 1:09-cv-538

---

# BRIEF OF *AMICUS CURIAE* MAINE CITIZENS FOR CLEAN ELECTIONS IN SUPPORT OF DEFENDANTS-APPELLEES-CROSS APPELLANTS, SEEKING AFFIRMANCE IN PART AND REVERSAL IN PART

---

John Brautigam
First Circuit No. 62098
1 Knight Hill Road
Falmouth, ME 04105
(207) 671-6700

Lisa J. Danetz
First Circuit No. 1143264
Brenda Wright
First Circuit No. 68598
DEMOS
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885

*Counsel for Amicus Curiae*

## CORPORATE DISCLOSURE STATEMENT
## FED. R. APP. P. 26.1

Amicus Curiae Maine Citizens for Clean Elections certifies that it has no parent corporation and that it does not issue stock. Therefore, no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Regulations**



**Other Authorities**

## INTEREST OF AMICUS CURIAE

Amicus curiae Maine Citizens for Clean Elections ("MCCE") is a nonpartisan association of organizations and individuals with the common purpose of enacting, implementing, and defending the Maine Clean Election Act ("MCEA") and other campaign finance reforms. For its fifteen-year history, MCCE has been dedicated to ensuring the orderly and successful functioning of Maine's campaign finance system. MCCE drafted the MCEA and successfully campaigned for its approval by popular vote in November 1996.

Since then, MCCE has spearheaded significant efforts to educate the public and candidates about the law, ensured its full implementation by the Ethics Commission, defended the law against legal challenges, and fought for the law's full financing. MCCE's members, citizens of Maine, have a strong interest in the continuing functionality, reliability, and transparency of their election processes, as guaranteed by the MCEA.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a) and (c)(5), all parties have consented to filing of this brief, no counsel for any party has authored this brief in whole or part, and no person or entity other than the amicus, its members or its counsel, made a financial contribution to preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld a framework for electoral financing reforms that embraced transparency in campaign financing to ensure an informed public debate and to promote other important governmental interests. Among other things, *Buckley* upheld the constitutionality of disclosure of donors and the amounts of money donated, and expenditure reporting requirements. *Id.* at 59-61. These types of reforms have been upheld repeatedly in the ensuing years, most recently by the Court's ruling in *Citizens United v. Fed. Election Comm'n.*, 130 S. Ct. 876, 913-916 (2010). *See also McConnell v. Fed. Election Comm'n.*, 540 U.S. 93, 199 (2003).

Since *Buckley*, the people of Maine have enacted a series of campaign finance reforms designed to ensure a high degree of transparency and minimize the potential threats of corruption and the appearance of corruption that can result from reliance on private financing. The Maine Legislature ensured transparency in campaign financing by enacting reporting provisions requiring candidates and Political Action Committees (PACs) to provide information regarding their expenditures and donors. *See* 21-A

M.R.S. §§ 1011 *et seq.* (2010); 21-A M.R.S. §§ 1051 *et seq*.[2] The MCEA, a public election funding program adopted by a citizen's initiative, modernized disclosure and reporting requirements by providing for electronic filing.

The campaign finance laws challenged here, pertaining to PAC registration, attribution of political communications, and disclosure of contributions, donor identities, and campaign expenditures, are constitutional under established precedent. The provisions are not vague because a person "of ordinary intelligence" can understand the conduct regulated. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Contrary to the National Organization for Marriage's ("NOM" or "Appellant") arguments, the statutory definitions of "expenditures" and "political action committee," upon which the challenged provisions rely, clearly define the conduct that is included within and excluded from their purview, and are not rendered invalid merely because they include the term "influencing". The statutory section defining "expenditures" provides further guidance and specificity through a list of exclusions. *See* §§ 1052(4)(A); 1012(3)(A). Indeed, the subchapter in which these statutory sections appear is given an overarching gloss: that the rules apply to organizations working for the "support or defeat

[2] All subsequent statutory citations are to Title 21-A.

of any campaign." § 1051. Like the similar terms upheld in *McConnell*, these terms "provide explicit standards." *See McConnell*, 540 U.S. at 170 n.64 (rejecting vagueness challenge to phrase "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."). Thus, NOM's vagueness challenge must fail.

Nor are the provisions at issue overbroad. Through PAC registration, expenditure disclosure, and attribution requirements, Maine may regulate entities that make substantial campaign-related expenditures, even if such entities' major purpose is not "promoting, defeating or influencing candidate elections," *see* § 1052(5)(A)(5). *See, e.g., Human Life of Wash. v. Brumsickle*, No. 09-35128, 2010 WL 3987316, at *16-18 (9th Cir. 2010) Moreover, NOM is simply in error in claiming that all disclosure definitions must include a bright-line distinction between issue advocacy and express advocacy. *Citizens United*, 130 S. Ct. at 915 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy"); *McConnell*, 540 U.S. at 193-94. NOM fails to show any instance in which protected speech is unconstitutionally brought within the purview of Maine's statute, let alone the substantial amount of overbreadth required to make a showing of

unconstitutionality. Nor is the law overbroad as applied to NOM, because NOM's proposed speech – exhortation to vote for or against a candidate – is squarely within Maine's power to regulate.

Finally, the challenged provisions clearly satisfy the prevailing First Amendment test of "exacting scrutiny" that applies to the registration, record-keeping, disclosure and attribution requirements challenged here. These provisions satisfy exacting scrutiny because they serve the important governmental interests in providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and in gathering the data necessary to enforce other campaign finance regulations. The provisions fit neatly with the types of regulations previously upheld under exacting scrutiny. *See, e.g., Buckley*, 424 U.S. at 68 ("[D]isclosure requirements, as a general matter, directly serve substantial governmental interests.").

The transparency fostered by the MCEA and Maine's campaign finance laws creates an environment where public debate is encouraged and accountability is the rule. Where a speaker's identity is clear to the public, accountability follows – statements can be evaluated in the marketplace of ideas. *See McConnell*, 540 U.S. at 197. Individuals and organizations that might have concealed or disguised their sponsorship of critical campaign

expenditures are instead seen in the light of day. Maine's voters know the sources of a candidate's support, whether from the state or private individuals and organizations, and Maine is able to administer its landmark public funding system. To ensure the continued success of Maine's electoral system and the characteristic rigor and openness of its debate, these provisions should be upheld.

## ARGUMENT[3]

### I. MAINE'S CAMPAIGN FINANCE LAWS

An essential component of Maine's system of campaign finance laws, *see* §§ 1001 *et seq*., is transparency: Candidates and other participants in Maine elections, including PACs, must provide information about donors, expenditures, and intent to support or oppose candidates or ballot initiatives, to allow administration of the public funding and campaign finance laws and to assist the electorate in its decision-making process. In the recent 2010 elections, when campaign-related spending broke records, voters in Maine were able to find out where each candidate's financial support was

[3] Due to space limitations, MCCE has not separately addressed the plaintiffs' lack of standing and certain other issues included in Defendants-Appellees-Cross-Appellants' Brief, but joins and supports all arguments therein.

originating through the state's databases and through intensive news reporting made possible by the provisions challenged here.[4]

Maine's laws facilitate this transparency in a number of ways. First, Maine requires organizations that surpass certain benchmarks to register as PACs. § 1053. Once registered, a PAC must provide the state with limited information about those with a significant fund-raising or decision-making role, its form of organization, and its support or opposition to candidates or ballot initiatives, if known, and must keep records about its donors and expenditures. *Id*.; §§ 1056-A, 1057. Second, the state requires candidates, PACs, and others who spend above certain thresholds on campaign-related messages to disclose their donors, campaign contributions, and expenditures. § 1060. These requirements not only ensure that the electorate has a clear view of who is making and sponsoring campaign messages, but also enable

---

[4] *See, e.g.,* Rebekah and Matthew Stone, *GOP group's spending scrutinized*, MORNING SENTINEL, Oct. 27, 2010, *available at* http://www.onlinesentinel.com/news/gop-groupsspending-under-microscope_2010-10-26.html (outlining substantial spending in gubernatorial and state legislative races); Editorial, *Independent Expenditure Reports*, PINE TREE POLITICS, Oct. 25, 2010, *available at* http://www.pinetreepolitics.com/2010/10/25/indieexpenditurereports/ (discussing nearly $1.2 million in independent expenditures relative to the gubernatorial race during a two week period in October); Rebekah Metzler, *Maine governor's race: A battle worth a million bucks*, THE PORTLAND PRESS HERALD, Oct. 13, 2010, *available at* http://www.pressherald.com/home/governor/both-parties-ready-to-spend_2010-10-13.html (detailing spending by independent groups on the governor's race).

the Commission on Government Ethics and Election Practices ("Commission") to operate the state's public funding system properly.

The law's requirements are basic. A PAC must report the date, amount, and donor of contributions over $50 and "expenditure[s] made to support or oppose any candidate, campaign, political committee, political action committee and party committee or to support or oppose a referendum or initiated petition," § 1060(4). Reports are filed on a quarterly basis, with more frequent reports in the immediate vicinity of an election. § 1059(2). Filings are done easily, with online submission. § 1059(5). While thus imposing minimal obligations on PACs, the disclosure requirements foster a rigorous public debate by pulling together all the information voters need to make informed decisions about who is supporting a candidate. Finally, Maine requires PACs making political communications not authorized by a candidate to make a clear disclaimer and attribution in their communication, whether in print or broadcast media. §§ 1014(2)-(2A). The statement need not be lengthy – simply clear enough for one receiving the communication to understand its source. *Id.* at § 1014(2).

Each of the provisions at issue before the Court relies on Maine's definitions of one or both of the terms "expenditures" and "political action committee."[5] In relevant part, the term "expenditures" is defined as:

> A purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing the nomination or election of any person to political office, except that a loan of money to a candidate by a financial institution in this State made in accordance with applicable banking laws and regulations and in the ordinary course of business is not included;

§ 1052(4)(A)(1); *see also* § 1012(3)(A) (defining "expenditure" in the same manner for other organizations). The definition of "expenditures" contains a lengthy list of exceptions to the definition. *See* § 1052(4)(B); § 1012(3)(B). The term "political action committee" includes:

> (4) Any organization, including any corporation or association, that has as its major purpose initiating, promoting, defeating or influencing a candidate election, campaign or ballot question and that receives contributions or makes expenditures aggregating more than $1,500 in

[5] *See* § 1012(3), 1052(4) (expenditure definitions); § 1014 (Disclaimer and Attribution requirement relying on "expenditure"); § 1019-B (Independent expenditure reporting relying on "expenditure" and "political action committee"); § 1052(5) ("political action committee" definition); § 1053 (PAC registration requirement relying on "expenditure" and "political action committee"); § 1053-B (Out of state PAC provision relying on "expenditure" and "political action committee"); § 1055 (application of attribution/disclaimer provision to PACs relying on "expenditure" and "political action committee"); § 1059 (Reports and Filing requirements relying on "expenditure" and "political action committee"); § 1060 (Contents of Reports requirement relying on "expenditure" and "political action committee"); § 1062-A (Failure to File provision relying on "expenditure" and "political action committee").

a calendar year for that purpose, including for the collection of signatures for a direct initiative or referendum in this State; and

(5) Any organization that does not have as its major purpose promoting, defeating or influencing candidate elections but that receives contributions or makes expenditures aggregating more than $5,000 in a calendar year for the purpose of promoting, defeating or influencing in any way the nomination or election of any candidate to political office.

§ 1052(5)(A)(4)-(5).

## II. MAINE'S LAWS REGARDING PAC REGISTRATION, RECORD KEEPING, DISCLOSURE, ATTRIBUTION, AND DISCLAIMER ARE NOT UNCONSTITUTIONALLY VAGUE.

Maine's statutory definitions of "expenditures," §§ 1052(4)(A), 1012(3)(A), and "political action committee," § 1052(5)(A), are not vague because a person "of ordinary intelligence" can understand the conduct regulated. *See Hill*, 530 U.S. at 732. As a result, NOM's vagueness challenge must fail.

### A. A Law Is Not Vague Where A Person of Ordinary Intelligence Has Adequate Notice of What Conduct Is Prohibited or Authorized.

The vagueness doctrine exists to balance two competing values: that laws must be precise enough to guide those within their purview and that language, by its nature, can never be perfectly precise. *See Roth v. United States*, 354 U.S. 476, 491-92 (1957); *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 578 (1973) ("[T]here

are limitations in the English language with respect to being both specific and manageably brief."). The longstanding jurisprudence in this area reflects this balance. While a statute is "impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement," the vagueness analysis must not be performed in a vacuum. *Hill*, 530 U.S. at 732; *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) (same); *Buckley*, 424 U.S. at 77 (requiring "adequate notice to a person of ordinary intelligence").

When it is "clear what the ordinance as a whole prohibits," from both context and the overall arc of the law, a law with imprecise words will nevertheless survive a vagueness inquiry. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also Roth*, 354 U.S. at 491-92 (even in criminal context, upholding obscenity law where it gave reasonable notice of adequately ascertainable standards of guilt); *United States v. Petrillo*, 332 U.S. 1, 7 (1947) (upholding criminal law that "provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law"). Indeed, a necessity of some level of interpretation does not render a law vague.

*United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004) ("The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague."); *see also Hill*, 530 U.S. at 733 (upholding abortion clinic buffer zone statute against vagueness challenge by rejecting "hypertechnical" interpretations in favor of more reasonable readings); *URI Student Senate v. Town of Narragansett*, 707 F. Supp. 2d 282, 293-95 (D.R.I., 2010) (upholding public nuisance ordinance including words found vague in other cases because ordinance provided enough interpretive context to adequately define terms).

Where one can use common sense or accepted meanings to understand a statute, it should not be considered vague, even where "estimates might differ" slightly. *United States v. Nason*, 269 F.3d 10, 22 (1st Cir. 2001) (*citing Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)); *see also Nat'l Ass'n of Letter Carriers*, 413 U.S. at 577-80 (upholding portion of Hatch Act where clear overall meaning, despite places to "quibble" over wording). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110 (upholding statute marked by "flexibility and reasonable breadth, rather than meticulous specificity").

Indeed, courts have cautioned against invalidating laws on vagueness grounds using a too strict or literal interpretation of their texts: "'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous.'" *Roth,* 354 U.S. at 491-92 (*quoting Petrillo*, 332 U.S. at 7) (upholding anti-obscenity statute where law gave context to define potentially ambiguous terms); *see also Hill*, 530 U.S. at 733 (rejecting "speculation about possible vagueness in hypothetical situations"); *Nat'l Ass'n of Letter Carriers,* 413 U.S. at 579 (recognizing "those intent on finding fault at any cost" but upholding statute in question); *Am. Communications Assn. v. Douds,* 339 U.S. 382, 412 (1950) ("[I]magination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is . . . the practical criterion of fair notice."). "[T]he dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail." *Holder*, 130 S. Ct. at 2720.

### B. **The Challenged Provisions Clearly Notify The Public What Is Included Within Their Purview.**

Maine's statutory requirement that organizations register as PACs when they exceed defined minimum political "expenditures," *see* §§

1052(5)(A), 1053, and follow prescribed disclosure and attribution rules for their "expenditures," § 1052(4), are not unconstitutionally vague. Maine's statutes provide a clear definition of "expenditures":

> A purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing the nomination or election of any person to political office, except that a loan of money to a candidate by a financial institution in this State made in accordance with applicable banking laws and regulations and in the ordinary course of business is not included;

§ 1052(4)(A)(1); *see also* § 1012(3)(A) (defining "expenditure" in the same manner for other entities). The statute also includes a lengthy list of express exclusions. *See* § 1052(4)(B) (excluding, *inter alia*, newspaper articles or commentary, voter registration activities, small amounts of personal services rendered to campaigns by volunteers, and PAC or membership organizations' communications to members unrelated to campaign**)**; § 1012(3)(B) (listing, in relevant part, same exclusions for other organizations). The statute thus gives clear notice as to what is and what is not covered by its provisions.

Similarly, the definition of "political action committee" is a common sense definition well within the understanding of an ordinary person – or a seasoned political organization. A "major-purpose PAC" is:

> Any organization, including any corporation or association, that has as its major purpose initiating, promoting, defeating or influencing a candidate election, campaign or ballot question and that receives

> contributions or makes expenditures aggregating more than $1,500 in a calendar year for that purpose, including for the collection of signatures for a direct initiative or referendum in this State;

§ 1052(5)(A)(4). A "non-major purpose PAC" is:

> Any organization that does not have as its major purpose promoting, defeating or influencing candidate elections but that receives contributions or makes expenditures aggregating more than $5,000 in a calendar year for the purpose of promoting, defeating or influencing in any way the nomination or election of any candidate to political office.

§ 1052(5)(A)(5). Both "major purpose" PACs making aggregate "expenditures" of $1500 or more and "non-major purpose" PACs making aggregate "expenditures" of $5000 or more "for the purpose of promoting, defeating or influencing" or "influencing in any way" an election must register. §§ 1052(5)(A), 1053.

Contrary to NOM's arguments, the use of "influencing" does not render the definitions impermissibly vague. The subchapter containing these statutory sections is given an overarching gloss: the rules apply to organizations working for the "support or defeat of any campaign," § 1051. Just like the terms before the Supreme Court in *McConnell*, the terms "support" and "defeat" "provide explicit standards." *See McConnell*, 540 U.S. at 170 n.64 (rejecting vagueness challenge to phrase "promotes or supports a candidate for that office, or attacks or opposes a candidate for that

office (regardless of whether the communication expressly advocates a vote for or against a candidate).").

Indeed, the specification of "influencing" or "influencing in any way" in each of these definitions should be read to narrow and define the statutory definition, not to add an entirely separate requirement. *See United States v. Bohai Trading Co.*, 45 F.3d 577, 580 (1st Cir. 1995) (noting that courts look at the statute as a whole when determining vagueness). In its discussion of what qualifies as an "expenditure," the statute gives many examples of speech and conduct that *cannot* be seen as "influencing" an election, including situations that might be seen as "marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls." *Roth*, 354 U.S. at 491-492; § 1052(4)(B) (including, for example, voter registration drive run by organization with clear political leanings that does not mention candidates, newspaper endorsements, and PAC's politically slanted communications to members not aimed at influencing specific election.**)**. By way of these examples, the Maine statute "supplies . . . specificity" regarding the conduct it covers. *Parker v. Levy,* 417 U.S. 733, 754 (1974); *see also URI Student Senate*, 707 F. Supp. 2d at 294-95 (concluding that examples, even absent an exhaustive list, effectively narrow the scope of a potentially vague regulation).

In statutes such as Maine's, "influence" finds sufficient context to be clear to both would-be speakers and enforcers. Similar language was upheld by the Second Circuit in *Landell v. Sorrell*, 382 F.3d 91, 136 n.26 (2d Cir. 2004) (upholding expenditure definition including "for the purpose of influencing an election") *rev'd on other grounds sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006). It has also been approved in other jurisdictions. *See, e.g., Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1026, 1028-1029 (9th Cir. 2009) (finding expenditure definition including "for the purpose of influencing" not vague); *Yamada v. Kuramoto*, No. 10-497, 2010 WL 4603936, at *8-*10 (D. Haw. 2010) (finding "influence" in PAC registration provision not vague).

Maine's requirements are clear to the layman relying only on common sense and the overall meaning of the statute; there can be little doubt that its meaning and contours are equally clear to an established political organization such as NOM. NOM itself concedes that Maine's regulations are clear to "political professionals". Appellant Br. p. 33. For NOM, an organization that regularly engages in sophisticated lobbying, grassroots organizing, fundraising, and advertising for targeted races, *see* National Organization for Marriage, *About NOM*, *available at* http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0

/About_NOM.htm, there can be little doubt that the meaning of the terms is readily understandable.

## III. MAINE'S PROVISIONS REGARDING PAC REGISTRATION, RECORD KEEPING, DISCLOSURE, ATTRIBUTION, AND DISCLAIMER ARE NOT UNCONSTITUTIONALLY OVERBROAD.

Maine's independent expenditure definition and the PAC registration, disclosure, and attribution provisions regulate only those who make substantial campaign-related expenditures. NOM fails to show any instance in which protected speech is unconstitutionally brought within the purview of Maine's statute, let alone the substantial amount of overbreadth required to show unconstitutionality. Nor is the law overbroad as applied to NOM, because NOM's proposed speech – exhortation to vote for or against a candidate – is well within Maine's power to regulate.

In order to find that a law is unconstitutionally overbroad, the court must find that the law in question wrongly regulates a "substantial" amount of protected speech. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982); *United States v. Williams*, 553 U.S. 285, 292 (2008) ("In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.") . "Application of the overbreadth doctrine . . . is,

manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

It is NOM's burden to describe the extent and scope of the law's overbreadth and if NOM fails to do so the overbreadth challenge must fail. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988). NOM cannot rely on conjecture or hypothetical instances alone. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-801 (1984) (danger of chill must be "realistic", not hypothetical). Rather, NOM "must demonstrate from the text of [the law in question] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *New York State Club Assn.*, 487 U.S. at 14. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800. Where a statute, in the vast majority of its applications, reaches only that speech or conduct that a state may legitimately regulate, that statute cannot be held overbroad. *Williams*, 553 U.S. at 303. Indeed, where the amount of protected speech potentially affected is insubstantial or hypothetical, it cannot "justify invalidating a statute on its face and so prohibiting a [s]tate from enforcing the statute against conduct that is admittedly within its power

to proscribe." *Broadrick*, 413 U.S. at 615 (1973); *see also Williams*, 553 U.S. at 301-304 (rejecting "endless stream of fanciful hypotheticals" and upholding anti-obscenity statute where vast majority of applications properly subject to regulation).

The provisions at issue before the court are not facially overbroad because Maine's statute is expressly limited to registration, disclosure, and attribution from those organizations that engage in large amounts of campaign related activities – amounting to $1500 of expenditures for organizations whose major purpose is to affect an election in Maine and $5000 of expenditures for organizations without that major purpose. The $5000 threshold for a non-major-purpose PAC constitutes 93% of the average cost of a general election campaign for state representative. *See* Appendix 402. Moreover, construing the phrase "influence" as explained above, the Maine law does not reach speech that is outside the scope of regulation found acceptable in *Buckley, McConnell,* and *Citizens United*. Importantly, NOM offers no specific example of the law's impermissible reach nor any claim that such overreaching is significant or substantial. Absent this showing, there is no legitimate ground on which to find Maine's laws overbroad.

NOM alleges that Maine cannot subject any entity to registration and reporting requirements unless it has as its major purpose "promoting" or "defeating" candidate elections. § 1052(5)(A)(4)-(5). Courts that have considered this argument have rejected it. *See Human Life of Wash.*, 2010 WL 3987316, at *16-18 (upholding Washington's "political committee" definition that lacked "major purpose" limitation), *petition for certiorari filed,* Nov. 22, 2010; *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1180 n.11 (9th Cir. 2007) (California disclosure requirements may be imposed regardless of organization's "major purpose").

NOM further errs in contending that Maine's PAC registration, disclosure, and attribution laws are overbroad because they may reach both issue advocacy and express advocacy. The Supreme Court has rejected this position. Not only is a bright line distinction between issue and express advocacy not required by the First Amendment, the court is not required to distinguish between the two in order to decide an overbreadth challenge. *see McConnell*, 540 U.S. at 190-91, 193-94. Indeed, Maine may constitutionally regulate disclosure of both express and issue advocacy without making its law unconstitutionally broad. *See Citizens United*, 130 S. Ct. at 915 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.").

Moreover, NOM has not presented a situation – its own or that of any other group – in which issue advocacy has been impermissibly regulated. Indeed, NOM contended that it was going to engage in express, not issue advocacy, which even NOM concedes Maine may regulate. *See* Appendix 696-702; Appellant Br. at 30-31.

For this reason, NOM cannot make a colorable as-applied challenge to the provisions here. The type of speech NOM alleges it would have engaged in, had it opted to participate in this election cycle in Maine, would have been advertisements specifically designed to persuade Maine citizens to vote for or against identified candidates, *i.e.* express advocacy. Appendix 187-190, 696-702. This is precisely the type of speech that the Supreme Court, in both *Citizens United* and *McConnell*, has deemed regulable in the manner of the Maine laws. As NOM's proposed speech falls squarely within the type of campaign-related speech Maine is unquestionably entitled to regulate, the law is not overbroad as applied to NOM.

## IV. THE PAC REGISTRATION, RECORD KEEPING, DISCLOSURE, ATTRIBUTION, AND DISCLAIMER REQUIREMENTS ARE SUBSANTIALLY RELATED TO IMPORTANT STATE INTERESTS AND THUS SATISFY FIRST AMENDMENT SCRUTINY.

Subject to the appropriate standard, "[t]he Government may regulate . . . political speech through disclaimer and disclosure requirements."

*Citizens United*, 130 S. Ct. at 886. Unlike outright bans on speech, regulations requiring disclosure and disclaimers generally do not unconstitutionally chill speech, and the minimal extent to which they might affect some would-be speakers is outweighed by the government interests they serve. *See id*. at 914; *McConnell*, 540 U.S. at 231; *Buckley*, 424 U.S. at 68. Because the challenged provisions here address reporting and dissemination of information rather than banning or limiting campaign-related expenditures, they are subject to "exacting scrutiny" rather than strict scrutiny. *Citizens United*, 130 S. Ct. at 914. A challenged provision satisfies "exacting scrutiny" if there is "a 'substantial relation' between the . . . requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

Maine's provisions regulating the related functions of PAC registration, record keeping, disclosure, and attribution fit neatly with the types of regulations previously upheld under exacting scrutiny. *See, e.g., Buckley*, 424 U.S. at 68 ("[D]isclosure requirements, as a general matter, directly serve substantial governmental interests.") The registration, record keeping, and disclosure requirements are a minimal imposition on PACs, allow the state to gather information important to the public, and are

necessary to run an election system without the appearance of corruption and with a viable and administrable public funding option.

### A. **The Challenged Provisions Serve Important Governmental Interests.**

It is well-established that the interests underlying the challenged provisions – "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce" other campaign finance laws – constitute important governmental interests. *McConnell*, 540 U.S. at 196.

A central purpose of the First Amendment is to promote a full and vigorous public discourse during election campaigns. *See New York Times v. Sullivan*, 376 U.S. 254, 269-270 (1964). Such debate is critical to the functioning of an open and democratic system of government. An informed electorate is best able to hold government officials accountable. *See Citizens United*, 130 S. Ct. at 914, 915. A vigorous electoral debate, by its very nature, includes a discourse between diverse parties with competing viewpoints, each trying to persuade the electorate that its own viewpoint is correct.[6] The electorate, of course, has the most critical role to play in the

[6] "The image is one of candidates voicing their positions and competing on the inherent worth of their character and positions, and voters choosing accordingly." *Daggett v. Webster*, 74 F. Supp. 2d 53, 58 (D. Me. 1999).

debate: evaluating the merits of the conflicting viewpoints and choosing among them at the ballot box.

The electorate is best able to evaluate the merits of the conflicting messages when voters can readily identify the source of the messages. *Citizens United*, 130 S. Ct. at 914; *McConnell*, 540 U.S. at 196-197. The public has a strong interest in assessing the motives, biases, financial interests, competency, and experiences of the persons and organizations who speak during electoral campaigns, and an equally strong interest in evaluating the entities that sponsor political speech and fund campaigns. When the speaker is anonymous, the public is unable to make that assessment. By extension, when the financial sponsor of the message is unknown, the public is deprived of the opportunity to evaluate the interests of the party presenting the message. Transparency in political communications therefore serves anti-corruption interests, *see Buckley*, 424 U.S. at 76, and supports the important "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (*quoting McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)). Indeed, *Citizens United* affirmed this reasoning: "[D]isclosure . . . enables the

electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

Requiring the speaker to reveal his identity ensures that the speaker subjects himself and his message to the full and fair scrutiny of public debate. The identity of the speaker matters greatly, because the identity of the speaker is critical to evaluating the speaker's motive and bias, as well as the speaker's competence to speak to a particular opinion or observation. Where the speech is presented in the form of a paid advertisement, the public must be able to discover the real interests behind a given message in order to fully and fairly assess that speaker's motives and biases. When the funder's true identity is not ascertainable, the opinions expressed cannot be evaluated for their credibility in the marketplace of ideas. *See McConnell*, 540 U.S. at 197. To allow electoral participants to hide their expenditures behind faceless organizations denies the public a vital tool for making informed choices in determining who can best represent their interests in state government.

The specific benefits accruing to the public from the challenged provisions are significant. The registration and disclosure requirements ensure that voters have ready access to information about the major players in the campaign cycle. Indeed, where a political action committee makes a

large expenditure – $500 or more – at the last minute, the reporting requirements ensure this information is available to voters within 24 hours. § 1059(2)(E). The information contained in PAC registrations and disclosure reports enables the public to better understand election related communications, especially where the PAC's name alone gives no real information. *See* Appendix 404.

For example, there was significant public discussion in the weeks leading up to the recent general election based on information available as a result of the provisions at issue before the court. As the Republican State Leadership Committee poured nearly $400,000 into Maine legislative races, news sources and individuals were able to use this information to learn not only where the group spent its money, but also its sponsors, donors, and political leanings. *See* Mike Tipping, *State of Maine politics has changed — not for the better*, MORNING SENTINEL, Oct. 31 2010, *available at* http://www.onlinesentinel.com/opinion/MIKE-TIPPING-Rules-of-Maine-politics-have-changed--and-not-for-the-better-.html ("The PAC, according to public records, is funded by the most reviled kinds of corporate interests"). Newspapers and blogs analyzed over $1.2 million in independent expenditures related to the governor's race, including over $400,000 by both the Republican and Democratic Governors' Associations,

$200,000 by the Maine Conservation Voters Action Fund, and others. *See* Editorial, *Independent Expenditure Reports*, PINE TREE POLITICS, Oct. 25, 2010, *available at* http://www.pinetreepolitics.com/2010/10/25/indieexpenditurereports/; Rebekah Metzler, *Political action committee money flows into Maine governor's race*, KENNEBEC JOURNAL, Oct. 13 2010, *available at* http://www.kjonline.com/news/political-action-committee-money-flows-into-maine-governors-race_2010-10-12.html. Indeed, where groups spent heavily in Maine and failed to make proper disclosures, public outcry ensued, leading to investigations by the Ethics Commission. *See* Tipping (discussing the failure of Republican State Leadership Committee to disclose all of its last minute spending); COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, Agenda Item #2, Meeting of October 28, 2010, *available at* http://www.state.me.us/ethics/pdf/meetings/20101028/item02.pdf (investigating Republican State Leadership Committee's failure to disclose expenditures).

The reporting requirement also ensures that the state can administer the public funding system in a way that adequately serves participating candidates and ensures their compliance with the requirements of the law. The requirements allow the state both to ensure that participating candidates

are not receiving impermissible contributions, *see* § 1125(6); Reg 94-270 § 6, and to determine the appropriate amount of matching funds, § 1125(9); Reg 94-270 § 5(3)(c).

The attribution and disclaimer requirements for expenditures meet these same governmental and public needs, but do so in an even more immediate way. Instead of adding to a database that exists passively for the interested news agency or individual, the requirement of attribution brings information directly to the voters. As a voter watches or reads an advertisement or other communication, he can learn immediately who sponsored the piece. This information is crucial, and Maine's system of disclosure, reporting, and attribution ensures that the state and its electorate have the information when they need it most.

### B. **The Challenged Provisions Pose Little Burden And Are Substantially Related To The Government Interests Delineated Above.**

The challenged provisions are campaign finance regulations of the type consistently upheld against First Amendment challenge and are considered to be the least restrictive of protected speech. *See Buckley*, 424 U.S. at 68 ("[D]isclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption"). Each of

the provisions has been crafted to ensure that useful information is provided to the electorate while posing minimal burden.

For example, Maine's requirement that non-major purpose PACs register, keep records, and make disclosures to the state only once they cross the threshold of $5000 spent on in-state races ensures that only organizations participating at a major level come within the law's purview. Cases relied upon by NOM are readily distinguishable. *See e.g, Canyon Ferry Rd. Baptist Church*, 556 F.3d at 1033-34 (9th Cir. 2009) (invalidating a law because its $0 threshold captured de minimus spending); *Nat'l Right to Work Legal Def. & Educ. Fund v. Herbert*, 581 F. Supp. 2d 1132, 1153 (D. Utah 2008) (invalidating a definition of "political issues committee" because its $0 threshold meant that it regulated entities spending any amount of money on a campaign).

Similarly, the record keeping and disclosure requirements – regarding contributions or expenditures of $100 or greater, the donor or payee, the date of the transaction, and its purpose, including whether it is meant to support or oppose a candidate, § 1019-B – cover little more than the PAC would collect and record for its own purposes even absent reporting requirements. And the $100 threshold is sufficiently high to survive a constitutional inquiry. *See Buckley*, 424 U.S. at 82-83 (upholding a $100 threshold for

reporting); *Frank v. City of Akron*, 290 F.3d 813, 819 (6th Cir. 2002) (upholding $50 reporting threshold); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 465-466 (1st Cir. 2000) (upholding $50 threshold for independent expenditure reporting); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1220 (E.D. Cal. 2009) (upholding a $100 disclosure threshold). The court should give deference to the voters' and legislature's decisions on these matters regarding the content of the reporting and the exact dollar thresholds necessary to trigger reporting. *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993) (""[T]he appropriate level at which to require recording and disclosure'" is "best left to legislative discretion" and therefore deferred to unless "'wholly without rationality'") (*quoting Buckley*, 424 U.S. at 83); *see also Daggett*, 205 F.3d at 466.

Finally, the requirement that attribution and disclaimer accompany electoral speech by PACs is both commonplace and minimally burdensome. The communications covered – those "expressly advocating the election or defeat of a clearly identified candidate" through various mechanisms, § 1014(1)-(2) – are those easily recognizable as political advertisements. Maine requires only that the

> communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the

> name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in 10-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."

§ 1014(2). Thus, the required disclaimer takes up only a few seconds of airtime for broadcast advertisements and only a small area – less than half a square inch – in print advertisements. Maine's attribution and disclaimer laws are substantially the same as those upheld in *McConnell*, 540 U.S. at 230-31, and in *Citizens United*, 130 S. Ct. at 913-914. *See also Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 792-93 (9th Cir. 2006) (upholding disclosure of financial sponsorship of political communications); *Fed. Election Comm'n. v. Public Citizen*, 268 F.3d 1283, 1287-89 (D.C. Cir. 2001) (upholding requirement for disclaimer in political advertisements and flyers). Like the provisions upheld elsewhere, the Maine law bears a direct and substantial relationship to the government interests it serves: By preventing speakers from "hiding" from the public, it serves the interest of "'shedding the light of publicity' on campaign financing," *McConnell*, 540 U.S. at 197, 231, allowing the public to evaluate accurately those messages with which it is presented, *see Buckley*, 424 U.S. at 76, and "avoid[s] confusion by making clear that the ads are not funded by a candidate or political party". *Citizens United*, 130 S. Ct. at 915.

## CONCLUSION

For the reasons discussed above, and in the Brief of the State Defendants in which Amicus fully joins, the district court's decision should be affirmed, other than its ruling that the words "influence" and "influencing" in §§ 1012(3), 1014(2-A), 1019-B(2), 1052(4)(A)(1), 1052(5)(A)(5), and 1053-B are unconstitutionally vague. Judgment should be entered for the defendants as to all of the challenged statutes.

Respectfully Submitted,

/s/Lisa J. Danetz

Lisa J. Danetz (No. 1143264)
Brenda Wright (No. 68598)
DEMOS
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885
ldanetz@demos.org
bwright@demos.org

John Brautigam (No. 62098)
1 Knight Hill Road
Falmouth, ME 04105
(207) 671-6700
jblaw@maine.rr.com

Counsel for *Amicus Curiae*

December 20, 2010

*MCCE and its counsel gratefully acknowledge the assistance of Rebecca Wilsker in the preparation of this brief.*

**Certificate of Compliance with Fed. R. App. P. 32(a)**

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6738 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in fourteen point Times New Roman font.

*/s/ Lisa J. Danetz*

Lisa J. Danetz
Attorney for *Amicus Curiae*
December 20, 2010

## Certificate of Service

I hereby certify that on December 20, 2010, a copy of the foregoing Brief of Amicus Curiae was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Lisa J. Danetz*

Lisa J. Danetz
DEMOS
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885
ldanetz@demos.org