20-1944

United States Court of Appeals
for the First Circuit

THE GASPEE PROJECT, et al.,

Plaintiffs-Appellants,

v.

DIANE C. MEDEROS, et al.,

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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The State Defendants and the *Amici* talk a lot about the purpose and goals and values behind the First Amendment in their briefs. But they always overlook this Court's statement of "the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society." *Powell v. Alexander*, 391 F.3d 1, 16 (1st Cir. 2004) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995)). This purpose is the heart of this case: whether through compelled disclosure or compelled disclaimer, to protect individuals from the pervasive cancel culture that marks our current moment in history.

I. Compelling the speaker to announce his or her sponsorship of an issue advertisement violates the right to speaker privacy.

The starting point for analyzing this claim, as for any constitutional claim, is to determine the level of scrutiny involved. The State Defendants contend "*McIntyre* effectively applied strict scrutiny, a harsher constitutional standard than the exacting scrutiny framework that is applicable here. *See McIntyre*, 514 U.S. at 337 ('[W]e uphold the restriction only if it is narrowly tailored to serve an overriding state interest[.]')." State Def. Br. at 53. In actuality, *McIntyre* itself says it uses exacting scrutiny; because "we are not faced with an ordinary election restriction[,] this case involves a limitation on political expression subject to exacting scrutiny." *McIntyre*, 514 U.S. at 345-46. And just recently, the Supreme Court defined exacting scrutiny as "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. AFSCME, Council 31,* 138 S. Ct.

2448, 2465 (2018). In other words, the Plaintiffs are right that the Supreme Court uses the terms strict and exacting scrutiny interchangeably, *contra* State Def. Br. at 19, n.7, but under either strict scrutiny or exactly scrutiny, the State Defendants have quite the burden to shoulder on this first claim.

In fact, while trying to raise the bar on the donor disclosure claim, the State Defendants accidentally admit the higher standard for the compelled speech claims, summarizing the holding of *Worley v. Fla. Sec. of State*, 717 F.3d 1238, 1247 (11th Cir. 2013), thusly: "campaign finance disclosures are a 'far cry from compelled self-identification on all election-related writings.'" State Def. Br. at 51. Indeed they are. Though Plaintiffs believe in this instance that Rhode Island's campaign finance disclosures transgress the bar set by exacting scrutiny, *Worley* is right that a much higher bar applies to self-identification on election-related statements.

The State Defendants begin by arguing that "*McIntyre* is distinguishable . . . because it included an absolute fiat against the distribution of any campaign literature that did not contain the name and address of the person issuing the literature, which in effect 'indiscriminately outlaw[ed]' anonymous political speech. . . . Here, the Act does not prohibit individual anonymous literature; it instead requires certain disclosures from organizations that meet specific contribution thresholds." State Def. Br. at 53-54 (quoting the District Court, Add. p.17).

This attempt to distinguish *McIntyre* on a technicality fails on plain common sense. True, Rhode Island does not have a blanket prohibition on anonymous political speech. Instead, it merely threatens to fine and imprison you for engaging in

anonymous political speech on which you spend over $1,000. 17 R.I. Gen. Laws 25.3-4(a)-(b).

The State Defendants lean into this $1,000 threshold, saying "[t]here is no indication that Ms. McIntyre spent over $1,000 on her flyers or that she intended to reach the 'relevant electorate,' defined as over 2,000 people." State Def. Br. at 51.[1] *Amici* similarly observe correctly that "Plaintiffs are not individual pamphleteers like Mrs. McIntyre." *Amici* Br. at 23. This $1,000 threshold is cold comfort; elsewhere in its brief, the State cites Maine's law, which sets the threshold at $100. State Def. Br. at 30. Moreover, the nature of one's right to speak generally does not depend on the identity of the speaker, *Citizens United v. FEC*, 558 U.S. 310, 346 (2010), or the cost of the speech, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992).

Moreover, nothing in *McIntyre*'s opinion limits its language or logic to lone, low-budget pamphleteers; indeed, the opinions discuss large-scale publishing operations as examples of protected speech. 514 U.S. at 341, n.4.; *id.* at 359-67 (Thomas, J., concurring). Organizations as well as individuals enjoy the First Amendment's protection against compelled speech in general, *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 16 (1986), and against compelled sponsor identification in particular, *ACLU of Nev. v. Heller*, 378 F.3d 979, 989 (9th Cir. 2004).[2] In *McIntyre*

[1] In fact, Mrs. McIntyre absolutely intended to influence the relevant electorate, given that she stood outside the doors to the school board meeting where the referendum was being considered handing out her flyers. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995). And though we do not know how much she spent on her fliers, we know she "paid a professional printer to make additional copies." *Id.*

[2] The State Defendants argue that *ACLU of Nevada* is no longer authoritative because it predates *Citizens United*. State Def. Br. at 36, n. 11. Quite to the contrary,

itself, Justice Ginsburg authored a solo concurrence differentiating the lone pamphleteer from an organization; no other justice felt it necessary to qualify the majority opinion in that way. *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). And even Justice Ginsburg just a few terms later joined an opinion by Justice Stevens granting a facial challenge to an ordinance regulating "religious proselytizing [and] anonymous political speech" brought by a large, well-funded, recognizable religious organization. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002).

Finally, the State Defendants quote the District Court's observation that "*Citizens United* upheld the federal disclaimer provision without so much as mentioning *McIntyre*." State Def. Br. at 54 (quoting Add., p.17). Exactly so. *Citizens United* can hardly be read as ruling authoritatively on an issue that was not decided by the justices. This is a new constitutional claim brought on a different legal theory, and *Citizens United* cannot be used to dismiss it quite so out of hand. By reading the *McIntyre* opinion as a whole, this Court will find that no attempt to distinguish *McIntyre* holds up.

II. The compelled speech provisions challenged here cannot survive strict scrutiny.

The Supreme Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus*,

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if anything *ACLU of Nevada* was strengthened by *Citizens United*, which recognized that corporations enjoy the rights of the free speech clause to the same degree as individuals. *Citizens United v. FEC*, 558 U.S. 310, 346 (2010).

138 S. Ct. at 2463. And government mandates that compel speech by an expressive organization get strict scrutiny. *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Throughout their briefs, however, the State Defendants and *Amici* treat the compelled-speech provisions of the law as though they were just another variety of campaign disclosure under *Buckley*, subject to the same, supposedly lesser "exacting scrutiny" analysis. State Def. Br. at 17-18, esp. n.6; *Amici* Br. at 14-15. This flaw fatally undermines the entire structure of their arguments.

Rhode Island law requires that Plaintiffs, in order to engage in free speech close in time to an election, must mouth "a government-drafted script" that they otherwise would refrain from speaking. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371. *Amici* claim that "the on-ad disclaimers required under R.I. Gen. Law § 17-25.3-3 do not oblige Plaintiffs to alter the meaning of their political messaging or support a position contrary to their views," so the law is therefore not content-based. *Amici* Br. at 16. This approach takes a deceptively technical approach to compelled speech. Basically, *Amici* are saying the law is okay because "you can say whatever you want about issues for the first 25 seconds of your ad ('the meaning of their political messaging') as long as in the last five seconds you say our exact script, which is neutral as to viewpoint."

That framework makes two mistakes. First, the Plaintiffs are buying all 30-seconds of their advertisement. The State of Rhode Island is not paying for the last five seconds and then having the State Defendants recite the State's mandated script.

So though Plaintiffs are not altering the meaning of their political messaging, they are altering the content of the message they bought, and instead of talking for five more seconds about what they want to talk about, they are mouthing the State's script. This is not content-neutral, it is content-altering. *Riley v. Nat'l Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

The second mistake is that because the information provided in the compelled script is supposedly viewpoint neutral, then it is fine for the government to mandate it. Setting aside the fact that Plaintiffs think announcing their donors is forcing them to adopt aloud a position they oppose (because it necessarily implies they are okay with broadcasting their donors to the world), a viewpoint-neutral law can still be an unconstitutional content-based law. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). Otherwise the government could compel any speech it wanted as long as the script could be cast as viewpoint neutral or merely informational. Indeed, Justice Breyer's dissent in *NIFLA* defends California's mandated speech on precisely those grounds, 138 S. Ct. at 2388, yet the Court's majority carefully cabined any such "informational" exception to the commercial context, 138 S. Ct. at 2372 ("factual, noncontroversial information in their 'commercial speech.'"). In the context of compelled content in expressive speech, such as the speech of Plaintiffs, strict scrutiny is still the rule. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[The] general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."); *Masterpiece Cakeshop, Ltd. v. Colo. Civil*

Rights Comm'n, 138 S. Ct. 1719, 1742 (2018) (Kagan, J., concurring). In fact, the Supreme Court in *McIntyre* rejected this argument: "even though this [disclaimer] provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech." 514 U.S. at 345. Because it is a direct regulation of the content of speech, it is subject to strict scrutiny, which it fails.[3]

The State Defendants really have no response to this torrent of precedent about compelled speech. They simply cite *Citizens United* to say that on-air disclaimer requirements (sometimes called "stand by your ad" requirements) are constitutional. State Def. Br. at 34 (citing *Citizens United v. FEC*, 558 U.S. 310, 370-71 (2010)); *Amici* Br. at 7, 14 (same). However, turning to the indicated pages in the *Citizens United* opinion leaves one wanting more: the cited passage focuses on donor disclosure and the threat of retaliation against donors, not speaker disclaimer and the threat of retaliation against speakers. 558 U.S. at 370. The State Defendants would have been better off citing *Citizens United* at page 368, where the Court more directly addresses the "stand by your ad" disclaimer provision. However, the Court only addresses it in the context of two arguments brought by Citizens United: an underinclusivity challenge (it applied to broadcast but not Internet or print advertising) and an argument that the requirement "decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken

[3] Even if the State Defendants have generally asserted an interest, common to all three claims, in informing voters, they have hardly endeavored to show that this interest is sufficiently compelling to justify compelled speech, or that the on-ad reading of the government's script is the least restrictive means of achieving that end.

disclaimer. 558 U.S. at 368. The Court makes no holding, or even mention, as to the compelled speech claim asserted here.[4] This Court must wrestle anew through the arguments presented by Plaintiff that the disclaimer provisions constitute unconstitutional compelled speech, as to which *Citizens United* has no holding.

Finally, even if the State Defendants and *Amici* were correct (*i.e.*, only exacting scrutiny applies to compelled speech in electioneering communications, and *Citizens United's* upheld sponsor disclaimer requirements), that does not answer the question whether the top-donor disclaimer survives even exacting scrutiny, because the Bipartisan Campaign Reform Act at issue in *Citizens United* did not include a top-donor disclaimer mandate. *Amici* argue it survives exacting scrutiny because it "provide[s] voters with the necessary information at the time they hear (or see) the 'sound bite' and without having to independently explore the myriad pressures to which they are regularly subjected." *Amici* Br. at 10 (*quoting Yes on Prop B v. City & Cty. of San Francisco*, 440 F. Supp. 3d 1049, 1059 (N.D. Cal. 2020)). Such an interest in immediate information may be sufficient to survive rational basis scrutiny, but does it survive "exacting scrutiny," which requires "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms"? *Janus*, 138 S. Ct. at 2465.

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[4] The Court also cites its prior holding on disclaimer in *McConnell v. FEC*, but there the Court only considered whether it was constitutional to impose campaign-style disclaimers on issue ads run close in time to an election ("electioneering communications"). *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (citing *McConnell v. FEC*, 540 U.S. 93, 231 (2003)). Equally in *McConnell*, the Court did not rule on the compelled-speech legal theory presented here.

The answer is no. Just a few pages earlier, *Amici* pointed out that "with modern technology, disclosure now offers a particularly effective means of arming the voting public with information, by empowering voters to evaluate political advertising at the click of a mouse." *Amici* Br. at 6, n.2 (*quoting McCutcheon v. FEC*, 572 U.S. 185, 224 (2014)). "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." *Citizens United*, 558 U.S. at 370. If "massive quantities of [donor disclosure] information" are instantly accessible from anywhere by anyone "at the click of a mouse," then requiring top-donor disclaimer on-ad is really "prophylaxis-upon-prophylaxis," which severely undermines the law's supposed fit. *See McCutcheon*, 572 U.S. at 221.

In sum, *Citizens United* does not control Plaintiffs' compelled speech claim, and a straightforward application of *NIFLA* would find this compelled, content-altering speech of a government-imposed script on an expressive association subject to strict scrutiny. This it cannot survive, especially when the information is publicly disclosed through the campaign finance regulations.

III. The donor disclosure provisions of the law are also unconstitutional.

Plaintiffs stand by their opening brief, which anticipated many of the arguments made by the State Defendants. They note only that the U.S. Supreme Court has granted a petition for certiorari in *Americans for Prosperity Foundation v. Becerra*, No. 19-251 & 19-255, to consider the level of scrutiny applicable to donor disclosure in the charitable regulation context, and that amici who filed in support of

donor privacy ranged from the ACLU and the NAACP to the U.S. Chamber of Commerce and Gun Owners of America.

Amici contend that "disclosure laws directly serve the democratic values animating the First Amendment—securing the widest possible dissemination of information from diverse and antagonistic sources and facilitating uninhibited, robust, and wide-open public debate on political issues." *Amici* Br. at 5.

This is not so. Disclosure laws limit the dissemination of information by placing tremendous practical burdens on speakers, discouraging many from voicing their views. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute."). Separate from the possibility of retaliation and the invasion of privacy, disclosure laws impose a very practical burden of paperwork, compliance, and cost. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 255 (1986). Far from facilitating robust, uninhibited debate, disclosure discourages uninhibited debate and shifts the conversation from the merits of ideas to the funders behind messages. *Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019). Anonymity, the ability to participate without fear of repercussion, for both speakers and their financial supporters, is what facilitates uninhibited, robust public debate. *See In re Does 1-10*, 242 S.W.3d 805, 820 (Tex. App. 2007) ("anonymity serves a particularly vital role in the exchange of ideas and robust debate on matters of public concern.").

Amici try to characterize *NAACP v. Alabama* as an as-applied challenge,

asserting that the NAACP only earned its exception from a neutral regulatory scheme by proving its extreme unpopularity. *Amici* Br. at 25. That is a misreading of *NAACP*. The Supreme Court's opinion assumes that privacy for civil society organizations is the baseline, and to pierce that privacy "the subordinating interest of the State must be compelling." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958). The Court gave an example of when a government interest would be sufficiently compelling to override that privacy: when an association is engaged in clear criminality. *Id.* at 465. And the Court confirmed in a subsequent NAACP case that "all legitimate organizations" enjoy these rights, and that some organizations need them more urgently than others because of the possibility of popular backlash does not limit them to only such groups. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555-57 (1963); *id.* at 569-70 (Douglas, J., concurring).

Buckley recognized that like its interest in preventing criminality, the government's interests in combatting corruption, preventing the evasion of campaign contribution limits, and an informed electorate were sufficient to override the baseline of privacy otherwise recognized for nonprofit groups. *Buckley v. Valeo*, 424 U.S. 1, 61-68 (1976). However, the Court held that even when the government could mandate disclosure generally due to its compelling interests, it still had to provide an as-applied exception to minor parties when the risks of retaliation were so severe that they resembled what the NAACP faced in the Civil Rights-era South. *Id.* at 69-70. But in recognizing the possibility of as-applied relief from mandated disclosure, the Court in *Buckley* did not baptize any and all transparency regimes. Rather, the

Court's doctrine remains clear: privacy for civil society organizations is the baseline, as it should be in a free society (*Gibson v. Fla. Legislative Investigation Comm.*); government may invade that privacy when it has a compelling reason to do so and its invasion is narrowly tailored to that interest (*see, e.g., Barenblatt v. United States*, 360 U.S. 109, 127 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959)); and even then, if that interest is lessened (*i.e.*, the organization is a minor party with little chance of winning) or the burden is so severe as to be life-threatening, then the government can no longer justify its invasion of privacy (as in *Brown v. Socialist Workers 1974 Campaign Committee*, 459 U.S. 87 (1982)).

Finally, after citing *Barland* favorably on page 24 of their brief, the State Defendants attack the Seventh Circuit's decision on page 31 as "an outlier [that] is inconsistent with First Circuit precedent." State Def. Br. at 31, n.9. For this proposition, they cite an opinion from the U.S. District Court for the District of Columbia, which hardly shows *Barland* is "inconsistent with First Circuit precedent." Moreover, they attempt to distinguish the statute at issue in *Barland* as an extreme example for, among other things, "requiring 'almost any group that wants to say almost anything about a candidate or election to register as a political committee.'" *Id.*, *quoting* 751 F.3d 804, 808-10 (7th Cir. 2014). The State Defendants fail to explain how this distinguishes Wisconsin's statute from Rhode Island's statute, given that Rhode Island's statute also requires almost any group that says almost anything about a candidate or election to register with the State Defendants, recite their

mandated script, and disclose their donors.[5] If the First Circuit believes *Barland* was wrongly decided, Plaintiffs would appreciate if the Court would say so straightforwardly so that they can present a clear circuit split to the Supreme Court.

CONCLUSION

"[A]ny law that burdens the rights of individuals to come together for political purposes is suspect and must be viewed warily." *Vote Choice v. DiStefano*, 4 F.3d 26, 34 (1st Cir. 1993). This Court should bring its vigilance to bear on this law, as it makes a crime out of anonymous political speech, compels expressive speakers to recite a government-imposed script, and invades the privacy of civil society organizations that talk about issues important to their communities. The District Court's decision granting the motion to dismiss for failure to state a claim should be reversed.

Dated: March 3, 2021

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[5] Under the rule at issue in *Barland*, "almost anything a person might publicly say about a candidate within 30 days of a primary and 60 days of a general election triggers the entire panoply of proscriptions and prescriptions in Chapter 11 once the minimal spending threshold is crossed (then a mere $25; now $300)." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 822 (7th Cir. 2014). The minor difference between a $300 threshold and a $1,000 threshold is not sufficient to distinguish *Barland*.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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