UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THE GASPEE PROJECT and ILLINOIS OPPORTUNITY PROJECT, Plaintiffs, v. DIANE C. MEDEROS, STEPHEN P. ERICKSON, JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM WEST, in their official capacities as members of the Rhode Island State Board of Elections, Defendants.	C.A. No. 1:19-CV-00609-MSM-LDA

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge.

The plaintiffs, the Gaspee Project and Illinois Opportunity Project, have filed this action under 42 U.S.C. § 1983 asserting that the disclosure and disclaimer provisions of Rhode Island's Independent Expenditures and Electioneering Communications for Elections Act, R.I.G.L. § 17-25.3-1 *et seq.* ("the Act"), are facially violative of the First and Fourteenth Amendments to the United States Constitution. The defendants, the members of the Rhode Island Board of Elections (collectively, "the Board"), have filed a Motion to Dismiss the plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the Act's requirements contested

here—the disclosure of donations in excess of a certain threshold, the disclaimer of sponsorship of electioneering, and the disclosure of top donors—are constitutionally permissible.

The avowed governmental purpose for these requirements is for an electorate that is informed and aware of who or what is spending money in its elections. It is for the Court to determine whether this state interest is sufficiently important to impose the Act's burdens on political speech and whether those burdens are substantially related to achieving that end.

The Court determines that the Act meets the applicable standard of constitutional review and, for the following reasons, GRANTS the Board's Motion to Dismiss (ECF No. 22).

I. BACKGROUND

A. The Rhode Island Independent Expenditures and Electioneering Communications Act

Passed in 2012, the Act makes clear that it is lawful for a person, business entity, or political action committee to spend money in elections. R.I.G.L. § 17-25.3-1(a). But any "independent expenditure" or "electioneering communication" where the money spent exceeds $1,000 within a calendar year, must be reported to the Board, along with certain specified information about the entities and the donors. R.I.G.L. § 17-25.3-1(b), (h). The Act defines these two key phrases as follows:[1]

[1] These definitions are found in a companion statute, the Rhode Island Campaign Contributions and Expenditures Reporting Act, R.I.G.L. § 17-25-3, but are expressly incorporated into the Act at issue here. *See* R.I.G.L. § 17-25.3-1(a) ("All terms used in this chapter shall have the same meaning as defined in § 17-25-3.").

- "Independent expenditure" is as any spending that "when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat of a referendum…." R.I.G.L. § 17-25-3(17).
- "Electioneering communication" is print, broadcast, cable, satellite, or electronic media communication that "unambiguously identifies a candidate or referendum" and is made "sixty (60) days before a general or special election or town meeting" or "thirty (30) days before a primary election" and "is targeted to the relevant electorate." R.I.G.L. § 17-25-3(16). A communication is "targeted to the relevant electorate" if it "can be received by two thousand (2,000) or more persons in the district the candidate seeks to represent or the constituency voting on the referendum." R.I.G.L. § 17-25-3(16)(i).

The required report to the Board for independent expenditures and electioneering communications where spending exceeds $1,000 in a calendar year must include the name, street address, city, state, zip code, occupation, and employer of the person responsible for the expenditure, the date and amount of each expenditure, and the year to date total. R.I.G.L. § 17-25.3-1(f). The report must also include a statement identifying the candidate or referendum that the expenditure is intended to promote along with an affirmative statement that the expenditure is not coordinated with the campaign in question. R.I.G.L. § 17-25.3-1(g). Additionally, the report must disclose the identity of all donors of an aggregate of $1,000 or more. R.I.G.L. § 17-25.3-1(h). This report must be filed after each time the person, business entity, or political action committee makes an independent expenditure or

electioneering communication of, in the aggregate, an additional $1,000. R.I.G.L. § 17-25.3-1(d).

The Act also requires independent expenditures and electioneering communications to include disclaimers stating who paid for the communication. R.I.G.L. § 17-25.3-3(a). This includes a message stating "I am ___ (name of entity's chief executive officer or equivalent), and ___ (title) of ____ (entity), and I approved its content." R.I.G.L. § 17-25.3-3(c). Additionally, tax-exempt organizations under § 501(c) of the Internal Revenue Code and other exempt nonprofits[2] that "make or incur or fund an electioneering communication for any written, typed, or printed communication" must include on the communication a list of their top five donors during the one-year period prior to the date of the communication. R.I.G.L. § 17-25.3-3(a).

Only money contributed for the purposes of independent expenditures or electioneering communications must be reported as such.[3] Should a donor prefer; donations can be expressly conditioned on non-use for independent expenditures or electioneering communications. R.I.G.L. § 17-25.3-1(i). The receiving entity must

[2] These other exempt nonprofits are "any organization described in § 501(c)(4) of the Internal Revenue Code that spends an aggregate annual amount of no more than ten percent (10%) of its annual expenses or no more than fifteen thousand dollars ($15,000), whichever is less, on independent expenditures, electioneering communications, and covered transfers as defined herein and certifies the same to the board of elections seven (7) days before and after a primary election and seven (7) days before and after a general or special election." R.I.G.L. § 17-25-3(21).

[3] The Act also applies to "covered transfers" but the plaintiffs only are concerned with independent expenditures and electioneering communications. *See* ECF No. 20 ¶¶ 18-24.

then certify that the donation will not be used as such and the donor "will not be required to appear in the list of donors." R.I.G.L. § 17-25.3-1(i)(2); *see also* R.I.G.L. § 17-25.3-3(a) (exempting opt-out donors from being listed as a top five donor).

B. The Plaintiffs' Amended Complaint

The plaintiffs are 501(c)(4) organizations that plan to spend thousands of dollars on Rhode Island elections. (ECF No. 20 ¶¶ 7, 8, 28, 29.) The plaintiffs wish to do so anonymously, without the required disclosures, because they "are concerned that compelled disclosure of their members and supporters could lead to substantial personal and economic repercussions" such as "harassment, career damage, and even death threats for engaging and expressing their views in the public square." *Id.* ¶ 35.

The plaintiffs therefore have filed suit against the Board under 42 U.S.C. § 1983, asserting the following:

Count I: That R.I.G.L. § 17-25.3-1(h), requiring the plaintiffs to disclose to the Board their members and supporters contributing $1,000 or more, is a violation of their First Amendment right to organizational privacy;

Count II: That R.I.G.L. §§ 17-25.3-1, 3, requiring the plaintiffs to disclose their sponsorship, is a violation of their First Amendment right to anonymity in their free speech; and

Count III: That R.I.G.L. § 17-25.3-3, requiring the plaintiffs to disclose their top five donors, violates their First Amendment right against compelled speech.

The plaintiffs confirmed at oral argument that their claims are a facial challenge to the constitutionality of the Act. *See also* ECF No. 20 at 14 (plaintiffs' Amended Complaint seeking to enjoin the Board from enforcing the Act "against Plaintiffs *and other organizations* that engage solely in issue advocacy") (emphasis

added). A facial challenge is not limited to a plaintiff's particular case and can only succeed where the plaintiff establishes "that no set of circumstances exists under which the Act would be valid." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *United States v. Salerno*, 481 US. 739, 745 (1987); *see also Naser Jewelers, Inc. v. City Of Concord, N.H.*, 513 F.3d 27, 33 (1st Cir. 2008) ("In a facial attack case, it is plaintiff's burden to show that the law has no constitutional application."). A facial challenge requires from a court a cautious approach because it "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

II. MOTION TO DISMISS STANDARD

To survive a motion to dismiss, a complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court assesses the sufficiency of the plaintiff's factual allegations in a two-step process. *See Ocasio-Herandez v. Fortuno-Burset*, 640 F.3d 1, 7, 11-13 (1st Cir. 2011). "Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz v. Republican State Leadership Comm.*, 699 F.3d 50, 55 (1st Cir. 2012). "Step two: take the complaint's well-pled (*i.e.,* non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* "The relevant question … in assessing plausibility is not whether the complaint makes any particular factual allegations but, rather, whether 'the complaint warrant[s]

dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 55 (1st Cir. 2013) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007)).

III. DISCUSSION

There are two preliminary issues the Court must decide to guide its constitutional analysis of the Act. First, woven into their Amended Complaint and their arguments on this motion, the plaintiffs seek to make a constitutional distinction between "express advocacy" and "issue advocacy." (The plaintiffs consider themselves "issue advocacy" organizations.) Express advocacy "encompasses 'communications that expressly advocate the election or defeat of a clearly identified candidate,' *Buckley*, 424 U.S. at 80, while [issue advocacy communications] are communications that seek to impact voter choice by focusing on specific issues." *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015). "[T]he core premise is that regulation of speech expressly advocating a candidate's election or defeat may more easily survive constitutional scrutiny than regulation of speech discussing political issues more generally." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 52 (1st Cir. 2011) (hereinafter, "*NOM*").

But, "in light of *Citizens United* [*v. Federal Election Com'n*, 558 U.S. 310 (2010)] … the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *Id.* at 54-55. *See also Del. Strong Families*, 793 F.3d at 308 ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely

repudiated by *Citizens United*."); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 132 ("The Supreme Court has consistently held that disclosure requirements are not limited to 'express advocacy' and that there is a not a 'rigid barrier between express advocacy and so-called issue advocacy."); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 178 (D.D.C. 2016) (holding that "the Supreme Court and every court of appeals to consider the question" had "largely, if not completely, closed the door to the … argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate"), *summarily aff'd*, 137 S. Ct. 1204 (2017).

The second preliminary issue is the question of which framework the Court should employ to guide its analysis—or more specifically, what line of precedents this Court ought to follow. The Board argues that cases that considered disclosure and disclaimer laws similar to the Act at issue here, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), *Citizens United*, 558 U.S. at 310, and their progeny in the lower courts, provide the most recent, useful, and directly controlling analysis. The plaintiffs take a different tack. They instead challenge the Act under three different theories of First Amendment jurisprudence: the right to speaker privacy, the right to organizational privacy, and the right against compelled speech.

As explained below, the Court is persuaded that the Board's analysis is directly applicable and therefore will first analyze the Act under that framework before discussing the plaintiffs' distinguishable theories.

A. The Act Is Subject To An Exacting Scrutiny.

"Generally, '[l]aws that burden political speech are 'subject to strict scrutiny'"—that is, they must be narrowly tailored to further a compelling government interest." *Nat'l Assoc. for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019) (quoting *Citizens United*, 558 U.S. at 340). But while "[d]isclaimer and disclosure requirements may burden the ability to speak, … they 'impose no ceiling on campaign-related activities … and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. Federal Election Com'n*, 540 U.S. 93, 201 (2003)). Because disclosure and disclaimer laws are a "less restrictive alternative to more comprehensive regulations of speech," they are subject to "exacting scrutiny," a test that requires the Court to consider whether the law bears a "substantial relation" to a "sufficiently important" governmental interest. *Id.* at 366-67. *See also Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir. 2011) (reviewing a First Amendment challenge to Rhode Island's campaign finance disclosure laws under the "exacting scrutiny" test). Compared to strict scrutiny, exacting scrutiny is a lower standard for the government to meet. It does not require the government to select the least restrictive means of achieving its goal. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 309 n.4 (3d Cir. 2015).

B. Is the Act Supported By A Sufficiently Important Governmental Interest?

The Board argues that the governmental interest at issue, an informed electorate, is achieved by the disclosure of who is financing political speech. This is

an interest the Supreme Court has determined is sufficiently important with respect to disclosure and disclaimer laws. *See Citizens United,* 558 U.S. at 371 (holding that "disclosure permits citizens to react to the speech of corporate entities in a proper way … [and] to make informed decisions and give proper weight to different speakers and messages"); *Buckley*, 424 U.S. at 66-67 ("[D]isclosure 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.").

Indeed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *NOM*, 649 F.3d at 57 (quoting *Buckley*, 424 U.S. at 14-15). This informational interest, however, "is not limited to informing the choice between candidates for political office." *Id.* "As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages." *Id.* The First Circuit has held that the informational interest is particularly important today:

> "In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the 'marketplace of ideas' has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus 'enables the electorate to make informed decisions and give proper weight to different speakers and messages.'"

Id. (quoting *Citizens United*, 558 U.S. at 371).

The Board argues that the Act furthers the state's informational interest by requiring the disclosure of independent expenditures in excess of $1,000 within a calendar year and electioneering communications in excess of $1,000 in the sixty days

before a general election and thirty days before a primary election. The required reports detail who and what is spending the money, including who donated $1,000 or more, providing the public with an understanding "as to where the political campaign money comes from." *See Buckley*, 424 U.S. at 66-67.

The Act also furthers the state's "equally compelling interest in identifying the speakers behind politically oriented messages" by requiring those who spend more than $1,000 during that window to disclose their sponsorship on all electioneering communications, including—for 501(c)(3) and exempt nonprofits only—their top five donors. *See NOM*, 649 F.3d at 57; R.I.G.L. § 17-25.3-3. The state's informational interests are also advanced by the Board's publication of these disclosures on its website. *See NOM*, 649 F.3d at 58 (noting that the state interest in disclosure is evidenced by internet publication).

The plaintiffs, on the other hand, argue that the state only has a "single, weak interest justifying their invasion of Plaintiffs' privacy." But nothing in the binding Supreme Court or First Circuit precedents indicate that the informational interest is weak; in fact, they express the opposite. *NOM*, 649 F.3d at 57 (describing the interest in "identifying the speakers behind politically oriented messages" as "compelling"); *see also Citizens United*, 558 U.S. at 371 (holding that "disclosure permits citizens … to make informed decisions and give proper weight to different speakers and messages"). Moreover, the plaintiffs' position depends upon there being a distinction

between issue advocacy and express advocacy.[4] As noted, however, the First Circuit has held that "the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *NOM*, 649 F.3d at 54-55.

The Court finds that the State's interest in an informed electorate is sufficiently important to justify the Act's disclosure and disclaimer requirements under the exacting scrutiny standard. *See Citizens United*, 558 U.S. at 368-69. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

C. Is the Act Substantially Related to the State's Sufficiently Important Governmental Interest?

The Court finds that the Act's disclosure and disclaimer requirements are substantially related to the State's interest, serving as a balanced means of informing Rhode Island voters about who is spending large sums of money in elections. First, the Act is only triggered when certain expenditure thresholds are met, ensuring that "the government does not burden minimal political advocacy." *Nat'l Ass'n for Gun Rights, Inc.*, 933 F.3d at 1118. For independent expenditures, the Act applies when expenditures exceed $1,000 in a calendar year; for electioneering communications, the Act applies when expenditures exceed $1,000 in the sixty days before a general

[4] Specifically, the plaintiffs argue that the State cannot successfully assert an informational interest in who may fund issue advocacy; such an interest must be tightly tied to electioneering (that is, promoting or attacking a specific candidate) to be constitutional.

or special election or thirty days before a primary election.[5] R.I.G.L. §§ 17-25.3-1(b); 17-25-3(16). The $1,000 threshold also applies to individuals whose donations meet or exceed that limit during an election cycle. R.I.G.L. § 17-25.3-1(h).

The timing limitations also narrow the Act's reach. "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign." *Citizens United*, 558 U.S. at 334. As noted, for independent expenditures, only those that exceed $1,000 within a calendar year trigger the reporting requirement. R.I.G.L. § 17-25.3-1(b). For electioneering communications, the Act only covers communications made sixty or thirty days before an election, depending on the election type. R.I.G.L. § 17-25-3(16) The Court therefore agrees with the Board that Rhode Island's disclosure and disclaimer obligations for electioneering communications are "tied with precision to specific election periods," and are "therefore carefully tailored to pertinent circumstances." *Nat'l Ass'n for Gun Rights*, 933 F.3d at 1117.

Similarly, the Act is tailored only to those electioneering communications likely to influence Rhode Island elections. That is, those that "can be received by two

[5] The actual dollar amount of a monetary threshold is afforded "'judicial deference to plausible legislative judgments' as to the appropriate location of a reporting threshold" and such "legislative determinations" are upheld "unless they are 'wholly without rationality.'" *NOM*, 649 F.3d at 60 (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32-33 (1st Cir. 1993)).

thousand (2,000) or more persons in the district the candidate seeks to represent or the constituency voting on the referendum." R.I.G.L. § 17-25-3(16)(i).

Moreover, the Act only applies to speech used in Rhode Island elections. By definition, for instance, "electioneering communication" is any "print, broadcast, cable, satellite, or electronic media communication … that unambiguously identifies a candidate or referendum." R.I.G.L. § 17-25-3(16). Both "independent expenditure" and "electioneering communication" are carefully limited to exclude news stories, commentaries, editorials, candidate debates or forums, and communications made by a business entity to its members or employees. R.I.G.L. §§ 17-25-3(16)(ii); 17-25-3(i).

Importantly, the Act provides an opt-out for donors who wish to support an organization but want to remain anonymous. Donors can designate that their contributions are not to be used for independent expenditures or electioneering communications and, after the person or entity certifies as such, "the donor will not be required to appear in the list of donors." R.I.G.L. §§ 17-25.3-1(i)(1),(2). Thus, the Act narrowly targets only those donations specifically intended to be used for election communications.

It is noteworthy that the Act here is similar to Maine's independent expenditure and disclaimer statute, which the First Circuit held to be constitutional under the exacting scrutiny test. *See NOM*, 649 F.3d at 61. The Maine statute, similarly to the Act's requirements for independent expenditures, required reporting to the state election commission for any entity that "receives contributions or makes expenditures of more than $5000 annually" for the purpose of "promoting, defeating

or influencing" a candidate's election. *Id.* at 58. Additionally, the Maine statute required reporting for "anyone spending more than an aggregate of $100 for communications expressly advocating the election or defeat of a candidate." *Id.* at 59. These provisions, the First Circuit held, "pose[] no First Amendment concerns." *Id.* Indeed, the First Circuit noted that "the information that must be reported under this subsection is … 'modest,' and it bears a substantial relation to the public's 'interest in knowing who is speaking about a candidate shortly before an election.'" *Id.* at 60 (quoting *Citizens United*, 558 U.S. at 369). Maine's disclaimer requirements, like the Act here, were "minimal" and "unquestionably constitutional," calling only for a statement of whether the message was authorized by a candidate and disclosure of the name and address of the person who made or financed the communication. *Id.* at 61.

The plaintiffs attempt to distinguish *NOM* on four grounds: that the Maine statute was challenged under different legal theories (vagueness and overbreadth); that the Maine statute provided an administrative hearing to rebut the presumption that an ad was an electioneering communication; that the Act covers general fund donors; and that the Maine statute applied only to candidates and not ballot referenda.

None of these grounds is persuasive as the holding in *NOM* did not depend upon the legal theory advanced. The *NOM* court applied an exacting scrutiny analysis to the law at issue, holding that "each of the challenged statutes pass muster under the First Amendment." *Id.* at 61. This Court does the same. In any event, the

plaintiffs' alternate legal theories, as discussed below, are not applicable to the instant dispute.

Further, the factual differences that the plaintiffs highlight are not fatal to the Act's constitutionality. The *NOM* holding did not depend on the possibility of an administrative hearing or that the statute did not mention ballot referenda. The Act here provides clear definition on what is, and is not, an independent expenditure or electioneering communication, properly tailoring the Act to the state's informational interest. *See* §§ 17-25-3(16), (17). Moreover, while the Act may cover general fund donors, it provides a method by which a donor can contribute anonymously. R.I.G.L. §§ 17-25.3-1(i)(1),(2).

The plaintiffs also attempt to distinguish *Citizens United*, but this falls flat because it depends again on a constitutional distinction in the express/issue advocacy dichotomy, which the Court holds is irrelevant to this analysis. *See NOM*, 649 F.3d at 54-55.

In all, the Court finds that the Act is substantially related to the state's interest of an informed electorate. The disclosure and disclaimer obligations are carefully limited to apply only to those who spend a significant sum to use traditional methods of political communication that are likely to reach a wide swath of the electorate during specific time periods.

D. The Plaintiffs' Constitutional Theories

1. The Right to Speaker Privacy

The plaintiffs assert that the Act's disclosure and disclaimer requirements are

an unconstitutional violation of speaker privacy, relying primarily on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In that case, the plaintiff, acting alone, violated an Ohio campaign-finance statute when at a public meeting she handed out fliers in opposition to an upcoming referendum without her name and address on the literature. *Id.* at 337. The Ohio statute at issue, which the Supreme Court held was an unconstitutional restriction on political speech, was in fact a blanket prohibition on all anonymous campaign literature. *Id.* at 338.

McIntyre is distinguishable, however, because it included an absolute fiat against the distribution of *any* campaign literature that did not contain the name and address of the person issuing the literature, which in effect "indiscriminately outlaw[ed]" anonymous political speech. *See id.* at 357. Here, the Act does not prohibit individual anonymous literature; it instead requires certain disclosures from organizations that meet specific contribution thresholds.[6]

Moreover, *McIntyre* does not provide the most recent framework under which to analyze the Act's disclosure and disclaimer requirements. It is noteworthy that *Citizens United* "upheld the federal disclaimer provision without so much as mentioning *McIntyre*, noting that while disclaimer provisions 'burden the ability to speak,' they do not limit speech." *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399 (D. Vt. 2012), *aff'd*, 758 F.d 118 (2d Cir. 2014).

[6] The plaintiffs also point to *Blakeslee v. St. Sauveur*, 51 F. Supp. 3d 210 (D.R.I. 2014), another case, like *McIntyre*, that involved an absolute regulation of "pure speech," prohibiting all anonymous political pamphleteering.

2. The Right to Organizational Privacy

The plaintiffs assert that the Act, because it would require them to disclose donors of $1,000 or more, unconstitutionally infringes on their right to organizational privacy. The plaintiffs rely upon *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), where the Supreme Court struck down an Alabama state court order that required the NAACP to reveal the names and addresses of its members. In that case, the NAACP "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. The Court therefore held that "disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it…." *Id.* at 462-63.

Here, the plaintiffs argue that they are "in the same stead as the NAACP." (ECF No. 23-1 at 14.) "They are private associations of members and supporters who pool their resources to talk about issues … [and] speak on issues important in their communities, just like the NAACP." *Id.* They allege that they are concerned about disclosing their sponsors because "[a]cross the country, individual and corporate donors and staff of political candidates and issue causes are being subject to harassment, career damage, and even death threats." (ECF No. 20 ¶ 35.) Further, they believe disclosure "will lead to declines in their membership and fundraising,

impacting their organizations' bottom lines and ability to carry out their missions." *Id.* ¶ 36.

While the plaintiffs do make these conclusory allegations about a concern of reprisals, they are "a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018). But more importantly, it is undisputed that the plaintiffs levy a facial challenge to the Act. A Court considering a facial challenge must determine if the statute at issue is unconstitutional in any application, not because of a party's particular circumstance. *See Hightower v. City of Boston*, 693 F.3d 61, 77-78 (1st Cir. 2012) (holding that for the plaintiff's "facial attack to succeed" he "would have to establish … that the statute lacks any 'plainly legitimate sweep'"). Only when a plaintiff makes an "as applied" constitutional challenge—that is, "to demonstrate that the statute, as applied to *his or her particular situation*, violates" constitutional principles—would the Court consider a plaintiff's individual burden. *Hall v. INS*, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) (emphasis added). Having found that the Act meets the standard of exacting scrutiny, the plaintiffs' facial challenge cannot "establish that no set of circumstances exist under which the Act would be valid." *See Salerno*, 481 U.S. at 745.

The result may be different had this been an as-applied challenge. Indeed, the Supreme Court, in rejecting a facial challenge to a disclosure requirement of the Bipartisan Campaign Reform Act of 2002, did not "foreclose possible future

challenges to particular applications of that requirement" if a plaintiff could show a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threat, harassment, or reprisals from either Government officials or private parties." *McConnell v. Federal Election Com'n*, 540 U.S. 93, 197-98 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 310.

3. The Right Against Compelled Speech

The plaintiffs also argue that the Act's on-ad, top-five donor disclaimer requirement is a form of compelled speech in violation of the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"). The plaintiffs principally rely upon *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (hereinafter, "*NIFLA*"). There, the Supreme Court struck down a California statute that required medical clinics licensed to serve pregnant women to post a notice about their abortion rights. The Court concluded that the required notices were compelled speech: "licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing." *Id.* at 2371.

The plaintiffs likewise call Rhode Island's requirement to list their top donors a "government drafted script." Thus, they claim, the Act compels them to alter their speech to incorporate the government's message just like the pregnancy centers were forced to alter their speech to incorporate the government's notice.

NIFLA (and the strict scrutiny analysis it requires) is distinguishable, however, because the speech compelled in that case was content based. Here, the disclosure requirements are content neutral. *See Schneiderman*, 882 F.3d at 382 ("Disclosure requirements are not inherently content-based nor do they inherently discriminate among speakers."); *see also Mass. Fiscal Alliance v. Sullivan*, 2018 WL 5816344 at *3 (D. Mass. Nov. 6, 2018) (holding that a disclosure law passed constitutional muster and that "[*NIFLA*] does not command a different result, given the content-neutral nature of the [disclaimer] requirement in this case and the minimal burden placed on plaintiff's speech"). The plaintiffs do not need to alter the meaning of their political messaging or support a position contrary to their views. They, and all similarly situated organizations, must disclose their top five donors in order to meet the state's sufficiently important interest in informing the electorate of who "money comes from." *Buckley*, 424 U.S. at 66-67. Under the exacting scrutiny standard by which the Act is properly analyzed, the minimally burdening disclosure and disclaimer requirements are substantially related to the state's informational interest.

IV. CONCLUSION

The Act's disclosure and disclaimer requirements are justified by the sufficiently important state interest of an informed electorate and any burdens on political speech that they may cause are substantially related to that state interest. The plaintiffs, therefore, cannot state a plausible claim that the Act is facially

violative of First and Fourteenth Amendment rights. The Board's Motion to Dismiss the plaintiffs' Amended Complaint (ECF No. 22) therefore is GRANTED.

IT IS SO ORDERED.

Mary S. McElroy
United States District Judge
August 28, 2020