No. 20-1944

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THE GASPEE PROJECT;
ILLINOIS OPPORTUNITY PROJECT,
Plaintiffs-Appellants,

v.

DIANE C. MEDEROS; STEPHEN P. ERICKSON; JENNIFER L. JOHNSON; RICHARD H. PIERCE; ISADORE S. RAMOS; DAVID H. SHOLES; WILLIAM E. WEST, in their official capacities as members of the Rhode Island State Board of Elections
Defendants-Appellees,

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

AMICUS CURIAE BRIEF OF CAMPAIGN LEGAL CENTER, COMMON CAUSE RHODE ISLAND, AND LEAGUE OF WOMEN VOTERS OF RHODE ISLAND IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Amici curiae state that each is a nonprofit corporation, none has a parent corporation, and no publicly held corporation has any form of ownership interest in them.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amicus Curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization working for a more transparent, inclusive, and accountable democracy at all levels of government. *See* https://campaignlegal.org/about. CLC has substantial experience with the issues here, having participated in numerous cases addressing state and federal political disclosure requirements, as well as every major U.S. Supreme Court campaign finance case since *McConnell v. FEC*, 540 U.S. 93 (2003).

Amicus Curiae Common Cause Rhode Island is a state office of Common Cause, a nonpartisan, nonprofit organization that works to create open, honest, and accountable government that serves the public interest. Common Cause Rhode Island has substantial experience with the disclosure law at issue, having advocated on behalf of its enactment in 2012.

Amicus Curiae League of Women Voters of Rhode Island ("LWVRI") is a nonpartisan political organization that works to encourage informed and active participation in government and to influence public policy through education and advocacy. LWVRI is an affiliate of the League of Women Voters of the United

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel or person except *amici* and their counsel authored this brief or contributed money to fund its preparation or submission. All parties have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a)(2).

States. LWVRI has approximately 150 members throughout Rhode Island. LWVRI has been a supporter of campaign finance disclosure and, in 2012, advocated on behalf of the disclosure law at issue.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants Gaspee Project and Illinois Opportunity Project ("IOP") assert a facial challenge under the First Amendment to provisions of Rhode Island's Independent Expenditures and Electioneering Communications Act (the "Act") that require tailored disclosures from groups spending money in state elections. As the district court correctly found, however, organizations that spend substantial sums to influence Rhode Island elections can be required to disclose their identities and large contributors to the public without offending the First Amendment. *See* Addendum to Pls.' Br. ("Add.") at 2.

The constitutionality of transparency rules for pre-election advertisements that discuss candidates and ballot measures is well settled. Disclosure "neither erect[s] a barrier to political speech nor limit[s] its quantity," but "promote[s] the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) ("*NOM I*"). The Supreme Court and First Circuit have repeatedly upheld requirements to disclose the sources of money used for election-related expenditures, including for "electioneering

communications" like those that Gaspee and IOP wished to disseminate in Rhode Island shortly before the 2020 election.

The Plaintiffs' real objective thus appears to be the reversal of decades of precedent affirming the constitutionality of analogous public disclosure requirements based on the substantial—indeed, "compelling"—informational interests that these laws serve. *Id.* at 41. *See generally* Br. of Defendants-Appellees at 16-19, 38-54. The Court should reject this effort not only because it is foreclosed by controlling precedent, but also because it threatens the countervailing First Amendment rights of Rhode Islanders to make informed choices in elections.

Plaintiffs challenge the constitutionality of three components of Rhode Island's disclosure regime: (1) a reporting provision that requires groups spending $1,000 or more on electioneering communications ("ECs") or independent expenditures ("IEs") in Rhode Island to disclose any donors of at least $1,000 who did not expressly condition that their donations *not* be used for ECs or IEs, *see* R.I. Gen. Laws § 17-25.3-1(h); (2) a disclosure requirement providing that groups making ECs or IEs include on-ad sponsorship disclaimers identifying themselves to voters, *id.* § 17-25.3-3(a); and (3) a provision under which certain tax-exempt organizations that make ECs or IEs for "any written, typed, or other printed communication" must disclose on the communication their top five donors within the preceding year, *id.* § 17-25.3-3.

Disclosure requirements like these, however, *promote* First Amendment precepts by ensuring that voters have access to information about the sources of election-related spending. The important and well-established interests that disclosure serves are not outweighed simply because a spender asserts its contrary preference for anonymity.

The Rhode Island reporting and disclaimer provisions challenged here equip voters with information they need to participate effectively in their state's democratic process—and the constitutional analysis must account for *these* First Amendment interests as well. As *amici* will explain, the substantiality of the informational interest supporting disclosure laws like Rhode Island's is confirmed by Supreme Court and First Circuit precedent, abundant empirical evidence, and the record here.

Plaintiffs' constitutional claims about the burdens on the other side of the ledger—which rely on an unrecognized right to electioneer anonymously and sweeping generalizations about possible associational "chill"—are clearly foreclosed by precedent.

The decision below should be affirmed.

ARGUMENT

I. Political Disclosure Laws Like Rhode Island's Advance Core First Amendment Values.

In weighing this constitutional challenge, the Court should give proper consideration to the countervailing First Amendment interests of Rhode Island voters in transparent and accountable self-government. Courts have long recognized that political disclosure laws "do not prevent anyone from speaking," *Citizens United v. FEC*, 558 U.S. 310, 366 (2010), and "tangibly benefit public participation in political debate." *McConnell*, 540 U.S. at 137. Indeed, what Plaintiffs fail to appreciate is that Rhode Island's disclosure regime advances critical interests "rooted in the Constitution and in the First Amendment itself." *McCutcheon v. FEC*, 572 U.S. 185, 236 (2014) (Breyer, J., dissenting).

As the Supreme Court has explained, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices [in elections] is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Because our system of democracy is premised on "enlightened self-government," *Citizens United*, 558 U.S. at 339, disclosure laws directly serve the democratic values animating the First Amendment—"secur[ing] the widest possible dissemination of information from diverse and antagonistic sources" and facilitating "uninhibited, robust, and wide-open" public debate on political issues. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 270 (1964).

Rhode Island's disclosure laws offer a "reasonable and minimally restrictive method of furthering First Amendment values," *Buckley*, 424 U.S. at 82. By providing Rhode Islanders with information about the sources of electioneering messages, the Act protects the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (per curiam)).

The Supreme Court has repeatedly acknowledged the relationship between political disclosure and the First Amendment's promise of citizen self-government. Beginning with *Buckley*, the Court has upheld an array of election-related disclosure laws on the basis that they "provide[] the electorate with information as to where political campaign money comes from and how it is spent . . . in order to aid the voters in evaluating those who seek [public] office." 424 U.S. at 66-67 (cleaned up); *see also McConnell*, 540 U.S. at 194-99 (upholding federal EC disclosure requirements); *Citizens United*, 558 U.S. at 366-71 (same).[2]

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[2] The Supreme Court has specifically endorsed disclosure in connection with independent spending because it allows voters to know "who is speaking about a candidate shortly before an election," *Citizens United*, 558 U.S. at 369, and in turn "to define more of the candidates' constituencies," *Buckley*, 424 U.S. at 81. And "[w]ith 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." *McCutcheon*, 572 U.S. at 224.

Other courts similarly have understood that "[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). *See also, e.g.*, *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 498 (7th Cir. 2012) (noting that disclosure requirements "advance the democratic virtues in informed and transparent public discourse without impairing other First Amendment values").

This Court, too, has expounded on the electorate's "compelling" interest in laws that help "identify[] the speakers behind politically oriented messages":

> 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."

NOM I, 649 F.3d at 57 (quoting *Citizens United*, 558 U.S. at 370-71).

As these decisions confirm, disclosure promotes meaningful participation in the political process and ensures that elected officials remain accountable to the people—bedrock principles in a democracy where "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. In the words of the late Justice Scalia, "requiring people to stand up

in public for their political acts fosters civic courage, without which democracy is doomed." *John Doe 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

II. Transparency Regarding the Sources of Election-Related Spending Plays a Well-Established and Increasingly Crucial Role in Informed Voting.

A. The explosion of independent spending in elections following *Citizens United* only heightens the need for strong disclosure laws like the Act.

As this Court has recognized, the informational interest supporting disclosure laws like the Act is particularly critical today. *See NOM I*, 649 F.3d at 57. Since *Citizens United* opened the door to unlimited corporate and union expenditures, U.S. elections have increasingly been awash in dark-money spending, often by 501(c)(4) groups and similar entities hiding behind opaque names or otherwise organized to conceal the moneyed interests behind them.[3] Given this landscape, tailored donor-disclosure provisions like Rhode Island's are all the more necessary to vindicate voters' informational interests.

The effects of dark-money advertising can be particularly pronounced in state and local elections. *See, e.g.*, Chisun Lee et al., *Secret Spending in the States*, Brennan Ctr. for Justice, 3 (June 2016), https://www.brennancenter.org/sites/

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[3] *See, e.g.*, Anna Massoglia, *'Dark money' groups find new ways to hide donors in 2020 election*, Ctr. for Responsive Politics (Oct. 30, 2020), https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors (noting that the last decade has seen an explosion of dark money in U.S. elections, including more than $750 million spent in 2020 alone); Issue One, *Dark Money Illuminated* (Sept. 2018), https://www.issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf.

default/files/2019-08/Report_Secret_Spending_in_the_States.pdf. In Rhode Island, outside groups have continued to test the limits of state transparency laws following the Act's 2012 passage—but thanks in large part to the disclosure provisions challenged here, the public has remained informed about the funders of electioneering ads. For example, disclosure reports filed by the Mid America Fund, an Ohio-based 501(c)(4) group that spent more than $700,000 on IEs in Rhode Island's 2014 gubernatorial race, revealed that it was largely funded by another Ohio-based nonprofit with no apparent ties to Rhode Island. Russ Choma, *Another Link in Ohio Dark Money Network*, Ctr. for Competitive Politics (Feb. 25, 2015), https://www.opensecrets.org/news/2015/02/another-link-in-ohio-dark-money-network (noting that the group's connection to a larger network of politically active nonprofits was only known because Rhode Island disclosure law requires contributor disclosure).

The growing share of campaign advertisements disseminated through digital media has only made it more critical for voters to know who is really vying to influence their electoral choices. *See* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. Cal. L. Rev. 1223, 1225 (2018) (observing that "[t]racing the money behind [online advertisements] is next to impossible under current regulations and advertising platforms' current policies").

Transparency is a powerful corrective for these contemporary challenges. In particular, top-donor disclaimers on electioneering ads "provide 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.'" *Yes on Prop B v. City & Cty. of San Francisco*, 440 F. Supp. 3d 1049, 1059 (N.D. Cal. 2020) (citation omitted) (upholding on-ad disclosure of top donors to political committees, including largest "secondary" donors where the direct contributor is itself a committee).

Following in Rhode Island's footsteps, jurisdictions across the country have recognized the benefits of an informed electorate and strengthened their disclosure laws accordingly. Many states now require sponsors of political advertisements to identify their largest contributors as part of requisite on-ad disclaimers, recognizing that "on-message disclosure of the source of money behind the speaker is . . . an effective means for achieving voter understanding and knowledge." *Mass. Fiscal All. v. Sullivan*, No. 18-12119-RWZ, 2018 WL 5816344 at *3 (D. Mass. Nov. 6, 2018) (citing *NOM I*, 649 F.3d at 57). *See* Alaska Stat. § 15.13.090; Cal. Gov't Code § 84503; Conn. Gen. Stat. § 9-621(h); D.C. Code § 1-1163.15; Haw. Rev. Stat. § 11-393; Me. Stat. tit. 21A, § 1013-B; Mass. Gen. Laws. ch. 55 § 18G; S.D. Codified Laws § 12-27-16.1; Vt. Stat. tit. 17, § 2972; Wash. Rev. Code 42.17A.350.

B. The informational value of disclosure to voters is borne out in the empirical and social scientific literature.

A robust body of empirical and scholarly research confirms that knowing the sources of election messaging is a "particularly credible" informational cue for voters seeking to make decisions consistent with their policy preferences. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Finance Disclosure Laws in Direct Democracy*, 4 Election L.J. 295, 296 (2015); *see also* Abby K. Wood, *Campaign Finance Disclosure*, 14 Ann. Rev. L. & Soc. Sci. 11, 19 (2018) ("Voters use heuristics, or informational shortcuts, to help them make the vote choice most aligned with their priorities without requiring encyclopedic knowledge . . . on every issue.").

As one legal scholar has observed, "[r]esearch from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition." Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 Minn. L. Rev. 1700, 1718 (2013). This research establishes that public disclosure of the sources behind campaign spending, including through contemporaneous on-ad disclaimers, equips voters with valuable informational shortcuts that facilitate knowledgeable choices on Election Day.

Transparency is imperative in ballot measure contests, too, where many of the informational shortcuts that aid voters in appraising a candidate—like party affiliation, campaign platforms, and demeanor—are absent. *See* Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 Geo. L.J. 1443, 1471-72 (2014). Knowledge of the interest groups supporting or opposing a ballot measure affords voters important insight into the measure's substance, as they "can reasonably infer that the biggest spenders campaigning for or against a particular ballot measure are likely to have strong preferences about the policy substance of the ballot measure." Kang, *supra*, at 1716; *see also* Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev. 63, 70 (1994) (in a study of voter behavior on California tort reform ballot measures, the largest determinant of a low-information respondent's voting behavior was "whether they knew the insurance industry's preferred electoral outcome").

In both candidate and ballot measure races, disclosure also allows voters to assess the credibility of political messages. A well-known study of ballot measures observed that "how campaign statements affect a voter's beliefs depend on her assessment of the campaigner's incentive to tell the truth." Elizabeth R. Gerber & Arthur Lupia, *Campaign Competition and Policy Responsiveness in Direct Legislation Elections*, 17:3 Pol. Behav. 287, 290 (Sept. 1995). Gauging the

credibility of political messaging is even more essential today given the proliferation of electioneering on the internet, where voters often are more vulnerable to the influence of malign actors. *See* Wood & Ravel, *supra*, at 1248-53. With the growing prominence of digital campaigning, public information made available through campaign finance reports and on-ad disclaimers "can help meet the government's interest[s] in improving voter competence" and combatting online disinformation. Abby K. Wood, *Learning From Campaign Finance Disclosures*, Emory L.J. (forthcoming 2021) (manuscript at 44-45), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623512.

Information about contributions and expenditures also colors the public's assessment of elected leaders' performance, and alerts voters to instances when an official has unduly prioritized campaign supporters over other constituencies. *See id.* at 15-17, 23. Transparency therefore cultivates integrity in government and dissuades elected officials from engaging in political rent extraction. *See* Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & Pol. 557, 565 (2012).

This growing body of scholarship more than substantiates judicial observations about the importance of disclosure to the democratic process, *see supra* Part I. By facilitating informed voting and empowering citizens to hold public

officials accountable, disclosure laws like Rhode Island's foster effective self-governance.

III. Rhode Island's Disclosure Regime Enables Voters to Make Informed Decisions in State Elections and Easily Satisfies "Exacting Scrutiny."

A. Plaintiffs' attempts to heighten the level of scrutiny applicable to electoral disclosure laws are unavailing.

Because disclosure laws promote First Amendment values but "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking,'" *Citizens United*, 558 U.S. at 366 (citations omitted), they are evaluated under a more lenient standard of review than restrictions on campaign expenditures or contributions, which are reviewed under "strict" and "closely drawn" scrutiny, respectively. The Supreme Court has made clear that disclosure requirements are subject to the relatively relaxed "exacting scrutiny" standard. *See id.* at 366-67; *Doe*, 561 U.S. at 196; *McConnell*, 540 U.S. at 230-31; *Buckley*, 424 U.S. at 96. A disclosure law satisfies exacting scrutiny so long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66).

Contrary to Plaintiffs' suggestions, exacting scrutiny applies to Rhode Island's *entire* disclosure regime, including the sponsorship identification and top-donor disclaimer statements required by R.I. Gen. Laws § 17-25.3-3. In *Citizens United*, the Court applied exacting scrutiny to affirm the constitutionality of both

reporting and on-ad disclaimer requirements for federal electioneering communications. 558 U.S. at 370-71. Rhode Island's sponsorship identification requirement is nearly identical to the federal disclaimer provision upheld in *Citizens United*, *see* 52 U.S.C. § 30120, and the top-donor disclaimer is even more clearly analogous to conventional campaign finance laws requiring spenders to disclose their large contributors. *See NOM I*, 649 F.3d at 56 (applying exacting scrutiny to organizational and recordkeeping requirements that facilitated disclosure because it is the "obligations that attend [campaign finance provisions] that matter for purposes of First Amendment review"). Other circuits likewise have recognized that exacting scrutiny applies to *all* aspects of a state's disclosure framework. *See Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1120 (9th Cir. 2019) (collecting cases), *cert. denied*, 140 S. Ct. 2825 (2020).

This Circuit's decisions confirm that the district court properly reviewed the reporting and disclaimer components of Rhode Island's law under exacting scrutiny. *See NOM I*, 649 F.3d at 61; *Nat'l Org. for Marriage v. McKee*, 669 F.3d 34, 39-40 (1st Cir. 2012) ("*NOM II*"); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118-20 (1st Cir. 2011). Plaintiffs cannot dodge this precedent by attempting to recast Rhode Island's content-neutral disclosure requirements as "compelled speech" warranting strict scrutiny. *See* Plaintiffs-Appellants' Principal Br. ("Pls.' Br.") at 16-22. As the district court observed, cases implicating the compelled-speech doctrine are readily

"distinguishable," "because the *speech compelled* in [those cases] was content based." Add. at 21 (emphasis added). By contrast, 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." *Id.*

Accordingly, Rhode Island's disclaimer provisions are "properly understood as a permissible incremental adjustment to the very same disclosure requirement upheld in *Citizens United*." *Mass. Fiscal All.*, 2018 WL 5816344 at *3.

B. The informational interests supporting Rhode Island's disclosure provisions are well-established and significant.

Rhode Island's reporting and disclaimer provisions readily withstand exacting scrutiny: each challenged element of the state's disclosure law is substantially related to its sufficiently important—or "compelling," *NOM I*, 649 F.3d at 57—interest in providing voters with information about the sources of election-related spending.

Although Plaintiffs attempt to minimize Rhode Island's informational interest as "weak," Pls.' Br. at 25-27, the weight of this interest is firmly established in Supreme Court and First Circuit precedent. Ensuring that the public is "fully informed" about political messaging and its sources "alone is sufficient" to justify reporting and disclaimer rules, including with respect to pre-election "issue" ads that lack express advocacy or its functional equivalent, *see Citizens United*, 558 U.S. at

368-69; *McConnell*, 540 U.S. at 240-43, and spending in non-candidate elections. *NOM I*, 649 F.3d at 54-55.[4]

The Supreme Court's decisions upholding federal disclosure provisions as to the "entire range of electioneering communications," without regard to "the presence or absence of magic words" of express electoral advocacy, *McConnell*, 540 U.S. at 196, also comports with its longstanding approval of disclosure of lobbying and ballot issue advocacy. These cases confirm that the public's interest in knowing who is financing political advocacy is not limited to express advocacy or its functional

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[4] The Supreme Court has twice declined to carve out the issue advocacy exception that Plaintiffs urge here. First, *McConnell* clarified that there is no "constitutionally mandated line between express advocacy and so-called issue advocacy" in affirming the facial validity of federal EC disclosure requirements, 540 U.S. at 190, which, like Rhode Island's statute, "automatically" cover pre-election ads that mention candidates and are distributed to the relevant electorate. *See* Pls.' Br. at 43.

Then, in *Citizens United*, eight Justices reaffirmed that the same disclosure provisions could be constitutionally applied to pre-election advertising that urged viewers to watch a documentary about then-candidate Hillary Clinton. *Id.* at 367-68. All the parties agreed that the ads did not contain express advocacy or its equivalent. Br. for Appellant at 51, *Citizens United*, 558 U.S. 310 (No. 08-205); Br. for Appellee at 36. But the Court "reject[ed] the contention that . . . disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369.

This Circuit also has made clear that "the distinction between issue discussion and express advocacy has no place" in the constitutional review of disclosure laws. *NOM I*, 649 F.3d at 54-55. Although Plaintiffs suggest that *NOM I* "was based on an entirely different legal theory"—facial overbreadth and vagueness—and is thus "distinguishable," Pls.' Br. at 42-43, this Court was unequivocal in finding that the constitutionality of a disclosure requirement does *not* "turn on the distinction between issue discussion and express advocacy." 649 F.3d at 55.

equivalent, nor to the narrow context of candidate elections. To claim that a state "cannot successfully assert an informational interest in funders of issue advocacy" or that its informational interest "must be tightly tied to electioneering to be constitutional," Pls.' Br. at 26, ignores this precedent.

As noted in *Citizens United*, the Supreme Court has long approved of lobbying disclosure laws. 558 U.S. at 369 (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)). Almost seventy years ago, *Harriss* found that "full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate" the pressures posed by "those who for hire attempt to influence legislation or who collect or spend funds for that purpose." 347 U.S. at 625-26. The Court explained that "[p]resent-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected," and noted approvingly that disclosure did not "prohibit these pressures" but "merely provided for a modicum of information" about them. *Id*. at 625.[5]

[5] More recently, when the D.C. Circuit upheld a federal lobbying disclosure law based on the "compelling" informational interests it furthered, the court drew from both *Buckley* and *Harriss* to conclude that "[t]ransparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15-16 (D.C. Cir. 2009) (quoting *Buckley*, 424 U.S. at 81).

The Supreme Court has expressed similar approval of disclosure in the ballot measure context, where "[i]dentification of the source of advertising" enables voters "to evaluate the arguments to which they are being subjected." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *see also Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981) ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified."). Indeed, the electorate's informational interest is particularly weighty in ballot measure races, where voters act as legislators and decide matters of great public significance while often being confronted with incomplete or misleading information about the moneyed interests vying for their votes. In the direct democracy setting, "[p]ublic disclosure promotes transparency and accountability . . . to an extent other measures cannot." *Doe*, 561 U.S. at 199.

This Circuit likewise has accepted that "transparency is a compelling objective" in ballot measure elections, since "[k]nowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown." *NOM II*, 669 F.3d at 40 (alteration in original) (citations and internal quotation marks omitted). *NOM II* upheld the disclosure of donors of more than $100 to ballot measure advocates because "the cumulative effect of [donor] disclosure ensures that the electorate will have access

to information regarding the driving forces backing and opposing each [measure]." *Id.* at 41 (internal quotation marks omitted). Plaintiffs' claim that the informational interest for "speech about ballot issues is lower than for speech about candidates," Pls.' Br. at 44, cannot be squared with this precedent.[6]

C. The challenged reporting and disclaimer requirements are properly tailored.

That Rhode Island has a "compelling" informational interest in election-related disclosure is beyond dispute. *NOM I*, 649 F.3d at 57. The only question remaining under exacting scrutiny is whether the reporting and disclaimer provisions are "substantially related," i.e., appropriately tailored, to the State's interest in an informed electorate. *Id*. Line-drawing questions regarding the scope and frequency of reporting, the particular information that must be disclosed, and the monetary thresholds triggering coverage are relevant in this tailoring analysis, but receive substantial deference if they "rationally" advance the State's informational interest. *Buckley*, 424 U.S. at 83 (observing that line-drawing questions are "best left in the context of this complex legislation to [legislative] discretion"); *NOM I*, 649 F.3d at 60-61 (same).

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[6] In fact, multiple federal circuits have suggested that "[e]ducating voters is at least as important, *if not more so*, in the context of initiatives and referenda as in candidate elections." *Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) (emphasis added); *see also Justice v. Hosemann*, 771 F.3d 285, 298 (5th Cir. 2014); *Brumsickle*, 624 F.3d at 990, 1006.

For the reasons described by the district court, the challenged provisions bear a substantial relation to Rhode Island's interest in providing voters with information about the sources of election-related spending. *See* Add. at 12-16. While disclosure requirements are not subject to a "least restrictive means" test, Rhode Island was careful to tailor its reporting and disclosure obligations to the vital informational objectives they serve.

The statute includes a $1,000 spending threshold that must be exceeded before reporting of independent expenditures or electioneering communications is required, R.I. Gen. Laws § 17-25.3-1(b).[7] Reporting is also event-driven: after filing an initial report, the spender need only file a subsequent report *if* it again spends over $1,000 for independent expenditures or electioneering communications in connection with the same election. *Id.* § 17-25.3-1(d).

Moreover, only donors who have given $1,000 or more to an organization must be included on reports to the Board of Elections. *Id.* § 17-25.3-1(h); the identification of donors on disclaimer statements is likewise pegged to the $1,000 threshold. *Id.* § 17-25.3-3(a). Still, even donors whose contributions exceed $1,000 may avoid public identification if they reach an agreement with the recipient that their donations will not be used for election spending. *Id.* § 17-25.3-1(i). Rhode

[7] Notably, Rhode Island's $1,000 threshold is substantially higher than the $100 independent expenditure reporting threshold upheld in *NOM I*. 649 F.3d at 59-61.

Island offers another exception for an "exempt nonprofit," defined as a 501(c)(4) organization that spends no more than $15,000 or 10% of its annual revenue, whichever is less, on independent expenditures or electioneering communications. *Id.* § 17-25-3(21).[8]

Finally, it is worth emphasizing that the materials Plaintiffs supposedly sought to distribute in Rhode Island—which they describe, without apparent irony, as "non-electoral advocacy communications run near in time to an election," Pls.' Br. at 1-2—are subject to disclosure as "electioneering communications" only if they are publicly disseminated within sixty days of a general election or thirty days of a primary and "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. Gen. Laws § 17-25-3(16).

Rhode Island's disclosure regime does not prevent Plaintiffs from exercising their "right to speak about issues and politics," Pls.' Br. at 5, nor from spending substantial sums to target voters with messages about candidates and ballot referenda shortly before an election. And Plaintiffs could have circulated their proposed mailings at any time outside of "the weeks before the 2020 election" without

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[8] Both the "independent expenditure" and "electioneering communication" definitions are further narrowed by exceptions for news media, certain internal communications by business entities or membership organizations, and unpaid internet communications. R.I. Gen. Laws § 17-25-3(16)(ii), (17)(i).

triggering the disclosure requirements that supposedly "chilled" their speech. *Id.* at 3-4. Instead, they demand the right to disseminate their messaging anonymously in the immediate run-up to an election—because, as they acknowledge, that is "when voters are paying attention." *Id.* at 2. But it is also precisely when the public's interest "in knowing who is speaking" about candidates and ballot questions is at its apex. *Citizens United*, 558 U.S. at 369.

IV. Plaintiffs' Alternative Constitutional Theories Rest on an Unrecognized Right to Secret Spending in Elections and Are Foreclosed by Precedent.

Plaintiffs attempt to sidestep the precedent that directly controls the disposition of their facial challenge by invoking inapposite strands of First Amendment jurisprudence. *See* Pls.' Br. at 16-32. Relying primarily on *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), they claim sweeping protections for "speaker" and "organizational" privacy that neither case supports here. Plaintiffs are not individual pamphleteers like Mrs. McIntyre, and they do not claim as-applied "injury of the sort at stake in *NAACP*." *Buckley*, 424 U.S. at 69. They bring only a facial challenge—but one that has been rejected by the Supreme Court and this Circuit.

In *McIntyre*, the Supreme Court invalidated an Ohio statute that categorically prohibited distribution of anonymous campaign literature, regardless of cost. 514 U.S. at 337-38. The case was brought by an individual who was fined for passing out handmade leaflets that lacked legally required disclaimers. *Id.* In striking down

Ohio's law, the Court emphasized that compulsory self-identification on an individual's homemade literature was distinguishable from the campaign finance disclosure requirements upheld in *Buckley* and other cases, as the latter are "less specific, less personal, and less provocative than a handbill—and as a result . . . less likely to precipitate retaliation." *Id.* at 354-55.

By its terms, therefore, *McIntyre* was a narrow ruling. And in the quarter century since it was decided, the Supreme Court has not extended *McIntyre*'s holding beyond its facts. Indeed, "*Citizens United* upheld the federal disclaimer provision without so much as mentioning *McIntyre*." *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 399 (D. Vt. 2012). Consequently, courts have come to recognize that *McIntyre*'s generalized "interest in anonymity" is, at most, germane in rare instances of "the lone pamphleteer." *Madigan*, 697 F.3d at 482; *see also Yamada v. Snipes*, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013).

NAACP, which concerned whether Alabama could compel the NAACP to identify its in-state members at the height of the Jim Crow era, is equally inapposite. 357 U.S. at 466. Reviewing an exhaustive record of violence and discrimination against Black residents in the state, the Supreme Court determined that the NAACP's Alabama members would face severe economic reprisals, harassment, and physical injury if their identities became public, and that disclosure posed "the

likelihood of a substantial restraint upon the exercise by [NAACP] members of their right to freedom of association." *Id.* at 462. In light of the overwhelming evidence, the Court concluded that compelling the NAACP to disclose its members would likely "induce members to withdraw from the Association and dissuade others from joining it" for fear of "the consequences of . . . exposure." *Id.* at 462-63.

Plaintiffs' attempt to invoke *NAACP*'s context-specific protection of the associational rights of NAACP members in 1950s Alabama in support of their *facial* claim here is woefully misplaced. Rhode Island's disclosure law does not compel an organization to indiscriminately divulge its "membership information," as Plaintiffs insinuate, *see* Pls.' Br. at 23, nor can Plaintiffs plausibly compare themselves or the contributors to their electioneering efforts to rank-and-file members of the Alabama NAACP in 1956. And most importantly, Plaintiffs have disavowed any claim to the as-applied relief granted in *NAACP*. Add. at 5, 19.

While the Supreme Court has acknowledged the availability of *as-applied* relief from disclosure "where the threat to the exercise of First Amendment rights is *so serious* and the state interest furthered by disclosure *so insubstantial* that the [disclosure] requirements cannot be constitutionally *applied*," *Buckley*, 424 U.S. at 71 (emphasis added), it has not countenanced facial relief from disclosure on the basis of generalized concerns about associational privacy. Instead, *Buckley* formulated an as-applied exemption for organizations that could show a "reasonable

probability" that disclosure would subject their supporters to "threats, harassment, or reprisals from either Government officials or private parties"—in other words, "injury of the sort at stake in *NAACP*." *Id.* at 69, 74.

In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), for example, the Court focused on the substantial evidence of widespread and "ingrained" hostility toward the Socialist Workers Party ("SWP") when granting that party an as-applied exemption from Ohio's campaign disclosure statute. *Id.* at 101. The record included extensive evidence that public affiliation with SWP would expose its members to severe reprisals from both governmental and private actors. *Id.* (noting concrete instances of hostility toward SWP including FBI surveillance, members' loss of employment, "destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office"). An as-applied disclosure exemption was consequently warranted to ensure that the "dissident" viewpoints of SWP, which had few members and "little success at the polls," were not eradicated from "the free circulation of ideas." *Id.* at 88-89, 91, 93.

Plaintiffs here, despite disavowing an as-applied challenge, claim to "stand in the same stead as the NAACP." Pls.' Br. at 26. But there is no serious comparison between Plaintiffs' circumstances and those of "historically ostracized groups" like the SWP during the Cold War or the NAACP in Jim Crow Alabama. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1219 (E.D. Cal. 2009). And

beyond sweeping generalizations and anecdotes about putative "harassment" across the country—which could apply equally to any group—neither Plaintiff alleges facts suggesting that public disclosure would expose *their* contributors to threats, harassment, or reprisals.[9]

Like the plaintiff in *Citizens United*, Gaspee and IOP are not new organizations,[10] yet neither alleges a single instance of "harassment" or retaliation stemming from their own activities. *See* 558 U.S. at 370 (rejecting claim that disclosure would expose plaintiff's donors to retaliation where evidence of harassment exclusively involved other groups). Instead, they offer anecdotes about highly charged episodes—the campaign for marriage equality in California, the

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[9] Exacting scrutiny already accounts for disclosure's potential chilling effects on associational rights; that is why heightened First Amendment scrutiny applies in the first place. *See Buckley*, 424 U.S. at 68-74 (acknowledging that disclosure may "deter some individuals who otherwise might contribute" but finding that generalized burden insufficient to outweigh "the substantial public interest in disclosure"); *Madigan*, 697 F.3d at 498-99 ("We . . . take the [plaintiff] at its word that its donors are so adamant about remaining anonymous that subjecting it to the Illinois reporting requirements will deter it from engaging in its preferred form of public advocacy. That is regrettable, but it is the [plaintiff's] and its donors' choice to make.").

[10] Gaspee and IOP were incorporated in 2014 and 2010, respectively. *See* R.I. Sec'y of State, *Entity Summary: The Gaspee Project Inc.*, http://business.sos.ri.gov/corpweb/corpsearch/corpsearch.aspx?FEIN=000983044&SEARCH_TYPE=1 (last visited Feb. 16, 2021); *Rio Grande Found. v. Oliver*, 1:19-cv-01174-JCH-JFR, 2020 WL 6063442, at *10-*11 (D.N.M. Oct. 14, 2020) (declining to preliminarily enjoin New Mexico disclosure law challenged by IOP and another group based on similarly "unsupported" theories).

removal of Confederate monuments in New Orleans—involving other groups in other states. *See* Pls.' Br. at 48-55. Plaintiffs also speculate that disclosure will make fundraising more difficult, *id.* at 55-57, but they do not explain why they could not take advantage of the donor opt-out provision, R.I. Gen. Laws § 17-25.3-1(i), or create a segregated fund to pay for their Rhode Island electioneering, *see id.* § 17-25.3-2, to accommodate donors who want to avoid public identification on a report or political advertisement in Rhode Island.

Regardless, Plaintiffs present only a facial challenge, so their speculation that disclosure might subject corporate donors to "boycotts and brand damage," limit their lobbyists' privileged access to "meetings with the governor," or "precipitat[e] the wrath of organized labor," Pls.' Br. at 40-42, are of limited relevance. Even taking these claims at face value, "there is no evidence that the [Rhode Island] laws at issue here have had such a deleterious effect on [*Plaintiffs*] or [*their*] constituents." *NOM I*, 649 F.3d at 41 (emphasis added).

CONCLUSION

For the foregoing reasons, the district court decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Megan P. McAllen
Megan P. McAllen

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Megan P. McAllen
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