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Re: Comments in Support of Proposed Rule 410-RICR-10-00-11, Disclosure of Independent Expenditures, Electioneering Communications, and Covered Transfers

Dear Chair Mederos and Members of the Board,

Common Cause Rhode Island ("CCRI") and Campaign Legal Center ("CLC") respectfully submit these written comments to the Board of Elections ("Board") in support of Proposed Rule 410-RICR-10-00-11 ("Proposed Rule"), Disclosure of Independent Expenditures, Electioneering Communications, and Covered Transfers.[1]

CCRI is a nonpartisan, nonprofit organization based in Providence promoting transparent and accountable government in Rhode Island. CCRI is a state affiliate of Common Cause, a nonpartisan grassroots organization based in Washington, D.C. Since its formation in 1970, CCRI has educated and mobilized the people of Rhode Island on issues related to ethics, open government, and campaign finance. CCRI was a strong supporter and advocate for the initial passage of the legislation that added Chapter 17-25.3, the subject of this rulemaking, to the Rhode Island General Laws.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American's right to an accountable and transparent democratic system.

[1] Disclosure of Independent Expenditures, Electioneering Communications, and Covered Transfers, 410-RICR-10-00-11 (Noticed April 28, 2023), https://rules.sos.ri.gov/promulgations/organization/410 [(hereinafter "Proposed Rule")].

CLC and CCRI welcome the Board's decision to reopen the rulemaking process for the Proposed Rule. The affirmation of 2012 R.I. Public Law Ch. 446 ("An Act Relating to Elections— Disclosure of Political Contributions and Expenditures")'s constitutionality by the U.S. Court of Appeals for the First Circuit in *Gaspee Project v. Mederos*[2] provides firm support for the Board's implementation of the Act through the Proposed Rule, and we encourage the Board to adopt the Proposed Rule as soon as practicable.

We submit the following comments in support of the Board's rulemaking. Our comments first discuss the statutory background behind the Act and the need for updated rules to effectively implement the law, followed by a more detailed explanation of the constitutional foundation of the Act and the Proposed Rule.

DISCUSSION

I. Background

a. The Act

On June 26, 2012, the Rhode Island General Assembly passed "An Act Relating to Elections— Disclosure of Political Contributions and Expenditures" ("Act"), which added Chapter 17-25.3 to Title 17 of the Rhode Island General Laws.[3] The Act was adopted in the wake of the U.S. Supreme Court's decision in *Citizens United v. FEC* to "protect and enhance core democratic functions" following a substantial increase in independent expenditures.[4]

The General Assembly designed the Act to address three key objectives: First, to provide "vital information" to Rhode Island's electorate about the sources of political spending, thereby "allowing [voters] to make knowledgeable decisions at election time;" second, to reduce corruption and the public perceptions of corruption "[b]y bringing political spending out into the light;" and finally, to facilitate the collection of information necessary to enforce other campaign finance laws, including contribution limits and the prohibition on campaign spending by foreign nationals.[5] Recognizing the rise of "new media and technological platforms [that] bring with them a risk of

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[2] 13 F.4th 79 (1st Cir. 2021), *cert. denied*, 142 U.S. 2467 (2022).

[3] 2012 R.I. Public Law Ch. 446 (12-H 7859 Substitute B).

[4] 2012 R.I. Public Law Ch. 446 (12-H 7859 Substitute B), § 1(2).

[5] *Id.* §§ 1(3)(i), 1(3)(iv), (1)(3)(vii).

circumvention of existing regulation[s]," the General Assembly also acknowledged the need to extend Rhode Island's campaign finance regime to include "new media [to] ensure that the interests bolstered by disclosure and disclaimers remain well supported."[6]

As a result, the Act included necessary disclosure requirements for independent expenditures, electioneering communications, and covered transfers made in Rhode Island elections.[7] Chapter 17-25.3 requires any person, political action committee, or business entity[8] making independent expenditures, electioneering communications, or covered transfers in excess of $1,000 in a calendar year to file event-driven reports with the Board, including detailed information regarding election-related disbursements and transfers made by an independent spender and the identity of any donor of $1,000 or more to the spender during the election cycle.[9]

Chapter 17-25.3 also instituted new disclaimer requirements for political advertisements, where paid political advertising by political committees and many nonprofit entities[10] must disclose the five top donors to the sponsoring organization and an attribution statement made by the organization's chief executive or equivalent officer as a part of the advertisement.[11]

b. Prior Rulemaking

The Board has not adopted new rules or revised existing rules to implement the provisions in Chapter 17-25.3 regarding the disclosure of independent expenditures, electioneering communications, or covered transfers. The existing administrative rule on disclosure of independent expenditures was

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[6] *Id.* § 1(3)(iii).

[7] *See* R.I. Gen. Laws § 17-25.3-1.

[8] R.I. Gen. Laws §§ 17-25-3(1), (11), and (21) exempt 501(c)(3) entities and any 501(c)(4) entity 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." *Id.* § 17-25-3(21).

[9] *Id.*

[10] 501(c)(3) entities are exempt from top five donor disclaimers under R.I. Gen. Laws §§ 17-25-3.3(a), (c)(3), (d)(3), and (e).

[11] *Id.* § 17-25.3-3.

adopted in 2010, two years before the Act's passage.[12] The existing rule thus offers no guidance (and may potentially provide misguidance) to independent spenders regarding current legal requirements in Rhode Island.

On May 11, 2018, CCRI and CLC submitted a rulemaking petition to the Board.[13] As the petition explained, there was—and remains—an urgent need for clear, updated administrative rules and guidance for Chapter 17-25.3. In the absence of accurate regulations and guidance, numerous high-profile instances of noncompliance with and violations of Chapter 17-25.3 have occurred, resulting in administrative complaints and clearly incorrect filings from independent spenders.[14]

In 2019, the Board issued proposed regulations based on CCRI and CLC's petition for public comment.[15] Following public comment and a hearing, CCRI and CLC submitted a further comment to address issues raised by other commenters.[16] The Board ultimately postponed rulemaking until the resolution of litigation challenging certain aspects of the Act in *Gaspee Project v. Mederos*; that case concluded on April 25, 2022, when the U.S. Supreme Court denied a petition for certiorari and, thereby, left undisturbed the decisions of the federal district court and First Circuit upholding the Act.[17]

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[12] *See* R.I. Bd. of Elections, Rules and Regulations on Reporting Requirements for Coordinated and Independent Expenditures, ERLID No. 6126 (Aug. 8, 2010).

[13] Campaign Legal Center and Common Cause Rhode Island, Petition for Promulgation of Rules on Title 17, Chapter 25.3 of the Rhode Island General Laws (May 11, 2018) [hereinafter "Petition for Rulemaking"].

[14] *See* Petition for Rulemaking at 3-5; *See also* Katherine Gregg, *McKee alleges Latino Victory Fund broke RI campaign law in pro-Gorbea ad buy,* PROVIDENCE JOURNAL (updated Sep. 7, 2022), https://www.providencejournal.com/story/news/politics/2022/09/06/ri-election-gorbea-mckee-latino-victory-fund-campaign-law/8003346001/, Patrick Anderson, *'Who's worse?' Pro-Gorbea TV attack ad comes under fire again*, PROVIDENCE JOURNAL (Sep. 9, 2022), https://www.providencejournal.com/story/news/politics/2022/09/09/ad-supporting-nellie-gorbea-ri-governor-comes-under-fire-again/8024992001/.

[15] *See* Amended Public Notice of Proposed Rulemaking, 410-RICR-10-00-8 (Nov. 20, 2019), https://risos-apa-productionpublic.S3.amazonaws.com/ELE/10918/PBN_10918_20191120143216.pdf.

[16] Campaign Legal Center and Common Cause Rhode Island, Response to ACLU Comments on Proposed Rule (June 23, 2020) [hereinafter "Response"].

[17] *Gaspee Project v. Mederos*, 482 F. Supp. 3d 11 (D.R.I. 2020), *aff'd*, 13 F.4th 79 (1st Cir. 2021).

II. The Proposed Rule Provides Needed Guidance to Implement the Act.

Although the Act is a groundbreaking legislative achievement in protecting voters' right to know who is spending big money to influence their vote, among other goals, it has gone largely unimplemented and underenforced for over a decade. Since the submission of CCRI and CLC's petition over five years ago, additional examples of noncompliance among the regulated community have emerged.[18]

The 2022 gubernatorial primary election spawned a series of news stories regarding alleged violations of and noncompliance with Chapters 25 and 25.3 by candidates and outside spenders in Rhode Island.[19]

In one case, the Latino Victory Fund's $136,000 ad buy in support of Nellie Gorbea failed to include a disclaimer listing the organization's top five donors, as required under R.I. Gen. Laws § 17-25.3-3, and the Fund did not report the expenditure to the Board of Elections within 24 hours, as required for independent expenditures made or contracted within thirty days of an election.[20]

The Proposed Rule will help to reduce noncompliance and ensure both the Board and the public are obtaining the information about independent spending in Rhode Island elections that the law requires. The Proposed Rule accomplishes these goals in several ways. First, the Proposed Rule adds definitions for terms that are undefined in the statute[21] and clarifies existing definitions as necessary.[22] With the rapid advance of online and digital

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[18] *See* Gregg, *supra* note 14; Anderson, *supra* note 14.

[19] *Id.*

[20] *Id*; *see also*, Gregg, *supra* note 14.

[21] The Proposed Rule adds regulatory definitions for certain terms used throughout Chapter 17-25.3 and Chapter 17-25 that are not statutorily defined, including "agent," "authorized candidate committee," "clearly identified candidate," "clearly identified referendum," "electronic media communication," "expressly advocates," "general treasury," "political committee," and "street address." *See* Proposed Rule § 11.3.

[22] For example, the Proposed Rule includes definitions of "candidate," "covered transfer," "election cycle," "electioneering communication," "expenditure," "independent expenditure," "paid personal services," and "person," which are defined in R.I. Gen. Laws § 17-25-3. The rule also includes a definition of "referendum", which closely tracks R.I. Gen. Laws § 17-5-1

communication technologies, particularly in the campaign and elections space, spenders seeking to reach voters through digital and electronic technologies in the period directly before an election need clarity about what expenditures fall in this category. The new "electronic media communication" definition clarifies the larger definition of "electioneering communications,"[23] specifying that a broad range of communications posted, broadcast, or transmitted online, but also "any electronic message, electronic message attachment, text message, or other electronic communication system" qualify as electioneering communications[24]

The Proposed Rule also introduces newly defined terms to streamline the application of related statutory provisions and provide clearer guidance to regulated groups. For example, the introduced term "covered disbursement" is a condensed designation for independent expenditures, electioneering communication, and covered transfers,[25] and—consistent with the Act—

("Referenda elections – Constitutional and public questions."). *See* Proposed Rule § 11.3, R.I. Gen. Laws §§ 17-25-3(16) and (17), R.I. Gen. Laws § 17-25.3-1.

[23] *See* R.I. Gen. Laws § 17-25-3(16) ("'Electioneering communication' means any print, broadcast, cable, satellite, or *electronic media communication* not coordinated, as set forth in § 17-25-23, with any candidate, authorized candidate campaign committee, or political party committee and that unambiguously identifies a candidate or referendum and is made either within sixty (60) days before a general or special election or town meeting for the office sought by the candidate or referendum; or thirty (30) days before a primary election, for the office sought by the candidate; and is targeted to the relevant electorate." (emphasis added)); *see also* Proposed Rule § 11.3(A)(10).

[24] Proposed Rule § 11.3(A)(10).

[25] "Covered transfer" means "any transfer or payment of funds by any person, business entity, or political action committee to another person, business entity, or political action committee if the person, business entity, or political action committee making the transfer: (i) Designates, requests, or suggests that the amounts be used for independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; (ii) Made such transfer or payment in response to a solicitation or other request for a transfer or payment for the making of or paying for independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; (iii) Engaged in discussions with the recipient of the transfer or payment regarding independent expenditures or electioneering communications or making a transfer to another person for the purpose of making or paying for such independent expenditures or electioneering communications; or (iv) Made independent expenditures or electioneering communications in an aggregate amount of five thousand dollars ($5,000) or more during the two-year (2) period ending on the date of the transfer or payment, or knew or had reason to know that the person receiving the transfer or payment made such independent expenditures or electioneering communications in such an aggregate amount during that two-year (2) period." R.I. Gen. Laws § 17-25-3(18). Exceptions include transfers or payments made in the

reporting requirements are connected to making any such covered disbursements. [26]

Second, the Proposed Rule establishes standards for determining whether an expenditure is "coordinated" with a candidate or political party.[27] Such standards are critical to the effective implementation of the Act and its integration with other requirements of Rhode Island law; because coordinated spending is properly treated as a contribution to the benefiting candidate or party and, as a result, subject to contribution limits, the requirements of the Act generally focus on independent spending.

In particular, the Proposed Rule provides further clarification of coordination criteria under existing law. Consistent with the statute's requirement that independent expenditures must lack "any arrangement, coordination, or direction" between a candidate and a spender,[28] the Proposed Rule addresses a wide range of sophisticated approaches to coordination. This includes situations where a candidate or political party "played any role in establishing, financing, fundraising for, or controlling the person making the expenditure or electioneering communication" within the previous two years;[29] where people with authority in a campaign or knowledge of the campaign's strategy leave to (or otherwise) work with a spender during the

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ordinary course of trade or business and where the entity making the transfer prohibited in writing the use of the funds for independent spending. *Id.*

[26] *See* Proposed Rule §§ 11.3(A)(6)-(7), 11.5; *see also* R.I. Gen. Laws §17-25.3-1.

[27] *See* Proposed Rule § 11.4(C).

[28] *See* R.I. Gen. Laws § 17-25-23(1); Proposed Rule § 11.4(C) ("An expenditure or electioneering communication is considered coordinated with a candidate . . . if . . . [t]he expenditure or electioneering communication is made by a person in cooperation, consultation or in concert with, or at the request, suggestion or direction of, or pursuant to an express or implied agreement, arrangement or understanding with, or with the advance knowledge of, the candidate or committee . . .")

[29] *See* Proposed Rule § 11.4(C)(2-3). Other state agencies have interpreted coordination laws to cover expenditures made by entities with close connections candidates and their former staffers. For example, California's Fair Political Practices Commission has adopted a rebuttable presumption that any expenditure made by an entity "established, run, or staffed" by a candidate's former senior staff is "coordinated" with such candidate. 2 Cal. Code Regs. § 18225.7(d)(6). In similar fashion, the Minnesota Campaign Finance & Public Disclosure Board has concluded that a candidate fundraising on behalf of an independent expenditure PAC "destroys the independence of any subsequent expenditures made by the IEPC to affect the Candidate's election." Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437, at 5 (Feb. 11, 2014), https://cfb.mn.gov/pdf/advisory_opinions/AO437.pdf?t=1525448588.

same election cycle;[30] and where a spender republishes a candidate or political party's original campaign materials.[31]

Finally, the Proposed Rule sets forth more precise requirements and processes for several aspects of the Act, including:

- the timelines, formats, and contents of event-driven reporting by independent spenders, including the necessary information regarding covered disbursements, and the spender itself that must be reported;[32]
- the process for opting out a donor's contribution from use in covered disbursements;[33]
- the formatting and content of political advertising disclaimers, including for qualified internet and digital communications and with respect to top donor disclosure;[34] and
- the Board's enforcement procedures and the process to contest Board decisions.[35]

Together, these proposed regulations give everyone involved in the political process—spenders, donors, candidates, parties, the Board, advocates, and the public—a roadmap to understand the obligations and responsibilities of independent spenders under the Act. Thus, by adopting this Proposed Rule, the Board would clarify the requirements of the Act, provide more effective guidance to independent spenders, reduce noncompliance in future elections, and ensure Rhode Island voters receive timely information as required by law.

III. The Constitutionality of the Proposed Rule—and the Act—Is Well-Established.

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[30] *See* Proposed Rule § 11.4(C)3-5.

[31] *See* R.I. Gen. Laws § 17-25-10.1(d) ("The financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's campaign committees, or their authorized agents shall be considered to be a contribution to a candidate.").

[32] *See* Proposed Rule § 11.5.

[33] *See* Proposed Rule § 11.5(B)(4).

[34] *See* Proposed Rule § 11.7.

[35] *See* Proposed Rule § 11.8.

The Proposed Rule would ensure the Act is effective in accomplishing the goals set out by the legislature in passing the Act, including providing information to Rhode Island's electorate about sources of political spending to inform their decision-making when casting their ballots, better enabling self-government, ensuring responsive officeholders, and reducing corruption and the appearance of corruption in Rhode Island elections.

a. Disclosure and Disclaimers

As the Act recognizes, voters have the right to certain information about the political messages they receive — including information about who pays for those messages.[36] Disclosures and disclaimers allow voters to know who is funding a campaign or influencing government decision-making.[37] This helps voters determine who supports which positions and why, allowing them to make fully informed decisions at the ballot box. As the Supreme Court has repeatedly recognized in decades of decisions upholding campaign finance disclosure provisions:

> [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. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.[38]

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[36] The Supreme Court has long recognized the importance of transparency in a variety of contexts, including candidate elections, ballot initiatives and lobbying. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (candidate elections); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (ballot initiative); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . [and] will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" (second alteration in original)); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.,* 454 U.S. 290, 299 (1981) ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified . . ."); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding federal lobbying disclosure statute).

[37] *See Gaspee Project*, 13 F.4th at 91 ("The donor disclosure alerts viewers that the speaker has donors and, thus, may elicit debate as to both the extent of donor influence on the message and the extent to which the top five donors are representative of the speaker's donor base . . . [in *Citizens United*] the Court recognized that the disclaimers at issue were intended to insure that the voters are fully informed . . ."(internal quotations and citation omitted)).

[38] *Buckley*, 424 U.S. at 66-67 (internal quotation marks and footnote omitted). In *Buckley*, the Supreme Court articulated the constitutional standard for disclosure laws and upheld federal disclosure requirements, explaining that disclosure served three important purposes:

Requiring disclosure of the sources of funding for election-related speech has been a feature of American campaign finance law for more than a century,[39] and the Supreme Court has consistently rejected challenges to electoral transparency laws, repeatedly emphasizing their constitutional validity.[40]

The Supreme Court's decision in *Citizens United* opened the door to unlimited corporate independent expenditures and ultimately led to the creation of super PACs, making corporations an increasingly attractive vehicle to funnel unlimited funds to political committees and other independent spenders while concealing the true source of those funds.[41] The Court in *Citizens United* assumed that these new forms of unlimited spending would be transparent, observing that "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."[42]

Effective disclosure helps prevent wealthy special interests from secretly "hiding behind dubious and misleading names" to disguise who they are and

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"providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (listing the "important state interests" identified in *Buckley*), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The first of these, the public's informational interest, is "alone sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369; *see also*, *Gaspee Project* 13 F.4th at 86.

[39] *See* Publicity of Political Contributions Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 822-24 (1910).

[40] *See Buckley*, 424 U.S. at 64-68 (upholding Federal Election Campaign Act disclosure requirements); *McConnell*, 540 U.S. at 194-99 (upholding McCain-Feingold Act's federal disclosure requirements); *Citizens United*, 558 U.S. at 366-71 (same); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (expressing approval of disclosure in the ballot initiative context); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 & n.32 (1978) (striking down corporate expenditure ban in part because disclosure sufficed to enable "the people . . . to evaluate the arguments to which they are being subjected").

[41] *See Citizens United*, 558 U.S. at 365-69; *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc) (The D.C. Circuit's decision in *SpeechNow*, issued shortly after *Citizens United*, directly gave rise to super PACs by striking down the contribution limits applicable to political committees that make only independent expenditures).

[42]*Citizens United,* 558 U.S. at 370; *see also Buckley*, 424 U.S. at 67 ("A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.").

mask the source of their funding.[43] Indeed, the Supreme Court also held in *Citizens United* that "[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."[44]

The veiling of the true sources of electoral spending impairs democratic debate and decision-making. The Act, as implemented by the Proposed Rule, ends the shell game of wealthy special interests hiding behind other entities in multiple ways, unveiling the sources of funding behind independent expenditures and electioneering communications, and the Proposed Rule clarifies what spenders must do to fully comply with the Act.[45]

First, the Act requires entities making "covered transfers" to file disclosure reports in Rhode Island; this means that the true sources of election spending can no longer launder money through intermediaries to hide themselves, as each "covered transfer" transaction between different groups or entities must be reported.[46] The Proposed Rule makes this requirement meaningful by specifying the information independent spenders, including those making covered transfers, must report, along with the timeline and format for such reports.[47]

Second, the Act requires a spender's top five donors be named on their ads.[48] Top donor disclosures ensure that voters immediately know this important information about who sponsored and funded the ads at the time they encounter it. The Proposed Rule ensures these disclaimers are tailored to the various media where such ads appear and can be understood by the public.[49]

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[43] *McConnell*, 540 U.S. at 197. For example, some independent spending groups have acknowledged that it can be "much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'" *Id.* at 128 n.23 (citation omitted).

[44] *Citizens United*, 558 U.S. at 339. The Supreme Court has recognized that disclosure does not meaningfully inhibit First Amendment interests and actually advances those interests. *See id.*

[45] *See Gaspee Project*, 13 F.4th at 87-88.; s*ee also* R.I. Gen. Laws §§ 17-25.3-1, 17-25.3-3 and Proposed Rule §§ 11.5, 11.7.

[46] R.I. Gen. Laws § 17-25.3-1.

[47] *See* Proposed Rule § 11.5.

[48] R.I. Gen. Laws § 17-25.3-3(a).

[49] *See* Proposed Rule § 11.7.

By ensuring voters have the information needed to hold elected officials accountable, the Act's disclosure and disclaimer provisions, combined with the Proposed Rule's implementation, can ensure that officeholders remain responsive to the public.

Importantly, as the Board is aware, the First Circuit rejected constitutional challenges to several aspects of the Act and affirmed the important public interests it serves. Specifically, in *Gaspee Project v. Mederos*, the Court of Appeals considered a challenge to the Act's requirements that: (1) groups spending $1,000 or more to influence elections—through campaign spending or political ads—disclose donors who gave at least $1,000 and did not expressly prohibit their donation from being used for election-related purposes; (2) groups working to influence Rhode Island elections include disclaimers on advertisements stating who paid for them; and (3) certain organizations making election-related expenditures disclose their top five donors during the previous year on electioneering ads.[50] In upholding those requirements, the Court concluded the Act serves the state's vital interest in informing voters about those spending large sums of money to influence their votes.[51] Indeed, the Court explained that "a well-informed electorate is as vital to the survival of a democracy as air is to the survival of human life … ."[52]

Following *Gaspee Project,* other federal courts have continued to uphold campaign finance disclosure and top donor disclaimer laws. For example, in *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*, the U.S. Court of Appeals for the Ninth Circuit upheld San Francisco's "secondary-contributor disclaimer requirement," which required certain political committees to list major donors to their top contributors—so-called secondary contributors—in political ad disclaimers, in addition to the top direct contributors already required by California law.[53] As the Court explained, this secondary contributor information served the governmental interest in informing the electorate "[b]ecause the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible" for contributing to the political spender.[54]

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[50] *Id.* at 83.

[51] *Id.* at 95-96.

[52] *Id.*

[53] *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*, 62 F.4th 529, 532 (9th Cir. 2023).

[54] *Id.* at 541.

Similarly, in *Smith v. Helzer*, the federal district court upheld Alaska's requirement that that independent spenders identify the "true source" of all contributions over $2,000 along with an expansion to Alaska's existing top-three donor disclaimer requirements.[55] In doing so, the court explained that requiring disclosure of the true sources of independent spending in elections is "both substantially related and narrowly tailored to fulfill the State's informational interest in informing voters about the *actual identity* of those trying to influence the outcome of elections."[56]

While Alaska's true source disclosure requirement and San Francisco's secondary-contributor disclaimer requirement are not identical to the Act, they share the same goal of better informing voters about who is spending big money to influence their vote. Moreover, courts consistently upholding enhanced disclosure requirements make clear that they are a vital tool to enabling voters to participate in the robust public debate necessary for effective self-governance and protected by the First Amendment.[57]

b. Coordination

The coordination standards outlined in R.I. Gen. Laws § 17-25-23, incorporated in the Act, and included in the Proposed Rule[58] together address an ever-present issue in contemporary elections: Preventing wealthy special interests from bankrolling candidates' campaigns by covertly coordinating their spending with their preferred candidates. As decades of U.S. Supreme Court precedent has established, regulating coordinated spending between candidates and outside spenders is plainly constitutional and essential for reducing political corruption.

Beginning with its seminal decision in *Buckley v. Valeo*, the U.S. Supreme Court has consistently maintained that outside expenditures "controlled by or coordinated with a candidate" may be constitutionally limited in the same

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[55] *Smith v. Helzer*, 614 F. Supp. 3d 668, 672-75 (D. Alaska 2022) (internal citations omitted); *see also* Alaska Stat. § 15.13.400(19) (defining "true source" as "the person or legal entity whose contribution is funded from wages, investment income, inheritance, or revenue generated from selling goods or services; a person or legal entity who derived funds via contributions, donations, dues, or gifts is not the true source, but rather an intermediary for the true source; notwithstanding the foregoing, to the extent a membership organization receives dues or contributions of less than $2,000 per person per year, the organization itself shall be considered the true source").

[56] *Id.* at 690 (emphasis added).

[57] *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[58] *See* R.I. Gen. Laws §§ 17-25-23, 17-25.3-1; *see also* Proposed Rule § 11.4.

manner as direct contributions to the candidate's campaign.[59] Because coordinated expenditures are essentially in-kind contributions to candidates, limiting expenditures made in coordination with candidates furthers the same anti-corruption interests served by limits on direct campaign contributions and, critically, "prevent[s] attempts to circumvent the [limits] through prearranged or coordinated expenditures amounting to disguised contributions."[60]

Since the Supreme Court struck down the ban on corporate independent expenditures in *Citizens United v. FEC*,[61] coordination rules have become especially critical to enforcing statutory limits on contributions. Indeed, the majority opinion in *Citizens United* heavily relied on the assumption that *independent* expenditures, unlike direct campaign contributions, do not create a risk of "quid pro quo" corruption because they are made without "prearrangement and coordination" with candidates,[62] making clear the importance of the distinction between coordinated and independent spending.

As the Supreme Court recognized in *McConnell v. FEC,* coordinated expenditures need not be accompanied by "an agreement or formal collaboration" with a candidate,[63] and "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'"[64] The Act and the Proposed Rules help to ensure independent spending is truly independent, following the principles laid down by the Supreme Court to ensure that covertly organized coordinated expenditures do not undermine Rhode Island's limits on campaign contributions.

To help clarify the scope of the statutory requirement that independent expenditures be absent of "any arrangement, coordination, or direction" between a candidate and a spender, the Proposed Rule describes situations that fall under that requirement, including some that are not already

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[59] *Buckley,* 424 U.S. at 46-47.

[60] *Id.* at 45.

[61] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[62] *Id.* at 357.

[63] *McConnell v.* FEC, 540 U.S. 93, 220-23 (2003).

[64] *Id.* at 221 (quoting *FEC v. Colo. Republican Federal Campaign Committee*, 533 U.S. 421, 446 (2001)); *see also id.* at 222 ("A supporter could easily comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be virtually indistinguishable from a simple contribution." (internal quotation marks and brackets omitted)).

specifically enumerated under the statute.[65] For example, the Rule explains that the statute applies to situations where a candidate or political party "played any role in establishing, financing, fundraising for, or controlling the person making the expenditure or electioneering communication" within the previous two years[66] and where a spender republishes a candidate or political party's original campaign materials,[67] both common forms of more covert coordination between candidates and outside spenders.

The Proposed Rule also defines "agent," a commonly used term that is not defined in the statute, helping to delineate the range of conduct that constitutes coordination between a candidate's campaign and a third party that makes expenditures to support that candidate.[68] By clearly regulating coordination involving agents of a candidate, along with the actual candidate, the Proposed Rule would help to prevent circumvention of the restrictions on candidates and their campaigns coordinating with third-party groups.[69]

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[65] *See* R.I. Gen. Laws § 17-25-23(1); Proposed Rule § 11.4(C) ("An expenditure or electioneering communication is considered coordinated with a candidate . . . if . . . [t]he expenditure or electioneering communication is made by a person in cooperation, consultation or in concert with, or at the request, suggestion or direction of, or pursuant to an express or implied agreement, arrangement or understanding with, or with the advance knowledge of, the candidate or committee . . .")

[66] *See* Proposed Rule § 11.4(C)(2-3). Other state agencies have interpreted coordination laws to cover expenditures made by entities with close connections candidates and their former staffers. For example, California's Fair Political Practices Commission has adopted a rebuttable presumption that any expenditure made by an entity "established, run, or staffed" by a candidate's former senior staff is "coordinated" with such candidate. 2 Cal. Code Regs. § 18225.7(d)(6). In similar fashion, the Minnesota Campaign Finance & Public Disclosure Board has concluded that a candidate fundraising on behalf of an independent expenditure PAC "destroys the independence of any subsequent expenditures made by the IEPC to affect the Candidate's election." Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437, at 5 (Feb. 11, 2014), https://cfb.mn.gov/pdf/advisory_opinions/AO437.pdf?t=1525448588.

[67] While this practice is not explicitly enumerated in R.I. Gen. Laws § 17-25-23, it is classified as a campaign contribution. *See* R.I. Gen. Laws § 17-25-10.1(d) ("The financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's campaign committees, or their authorized agents shall be considered to be a contribution to a candidate.").

[68] *See*, *e.g.*, R.I. Gen. Laws § 17-25-10.1(d); *see also* Proposed Rule § 11.3(A)(1) (stating that "'Agent' means any person with actual authority, either express or implied, to engage in activities on behalf of another person. For purposes of this Part, an agent of a candidate or political committee includes any person who has served as a paid or unpaid employee of, or consultant to, the candidate or political committee at any time during the preceding two (2) years.").

[69] *See* R.I. Gen. Laws § 17-25-23.

By addressing sophisticated approaches to coordination, the Proposed Rule clarifies the reach of the statutory text, conforming to Supreme Court precedent to prevent illegal contributions in excess of statutory limits and ensure Rhode Island independent spenders are truly independent.

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In short, the Act and the associated Proposed Rule promote democratic self-government and responsive officeholders, help prevent corruption and the appearance of corruption, prevent circumvention of contribution limits, and aid Rhode Island voters in making informed decisions by protecting their right to know who is spending to influence their decisions when they cast their ballots.

CONCLUSION

We thank the Board of Elections for considering our comment regarding the Proposed Rule, and we applaud the agency's decision to provide clear guidance through the rulemaking process. We would be happy to answer questions or provide additional information to assist the Board's development of these regulations.

Respectfully submitted,

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