IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CENTRAL MAINE POWER COMPANY, et al., Plaintiffs, v. MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, et al., Defendants.	No. 1:23-cv-00450-JN

BRIEF OF AMICUS CURIAE PROTECT MAINE ELECTIONS IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Rules, Statutes, and Codes:

Other Authorities:

INTERESTS OF AMICUS CURIAE

Protect Maine Elections ("PME") is a nonpartisan campaign organization launched by Maine citizens for the purpose of passing Question 2, a citizen's initiative to restrict foreign influence in Maine elections, now codified at 21-A Me. Rev. Stat. § 1064 (the "Act"). PME has a unique interest in defending the Act and specialized knowledge about its purpose and design.

PME has argued and continues to maintain that the entirety of the Act is constitutional, including its three definitions of "foreign government-influenced entity" ("FGIE") at 21-A Me. Rev. Stat. § 1064(1)(E)(1), (2)(a) & (2)(b). *See* ECF No. 46. PME recognizes, however, that this Court held, and the First Circuit affirmed, that the definition of FGIE that rested on a foreign government's "ownership of 5% or more of the total equity" of an entity, *see* 21-A Me. Rev. Stat. § 1064(1)(E)(2)(a) ("5% threshold"), was likely unconstitutional, at least based on the evidentiary record before this Court in the preliminary injunction proceedings. *Cent. Maine Power Co. v. Maine Comm'n on Gov't Ethics & Election Practices*, 144 F.4th 9 (1st Cir. 2025) ("*CMP II*"). Any further defense of the 5% threshold would require further development of the factual record, but discovery is pending resolution of plaintiffs' motions for judgment on the pleadings. Order on Mot. to Stay Discovery, ECF No. 94. Therefore, in opposing plaintiffs' motions, PME will focus here on the other two prongs of the FGIE definition, i.e., those covering (1) "foreign government[s]," 21-A Me. Rev. Stat. § 1064(1)(E)(1), and (2) entities wherein a foreign government or foreign government-owned entity "[d]irects, dictates, controls or directly or indirectly participates in [the entity's] decision-making process" regarding its campaign spending, *id*. § 1064(1)(E)(2)(b) ("actual participation").

SUMMARY OF ARGUMENT

In the November 2023 election, an overwhelming 86% of the Maine electorate voted to pass Question 2, approving both a ban on campaign contributions and expenditures by FGIEs, *see*

21-A Me. Rev. Stat. § 1064(1)-(2) (the "spending ban"), and a separate disclosure provision requiring FGIEs to include disclaimers on their public lobbying communications, *see id*. § 1064(6).

Because the preliminary injunction briefing focused almost exclusively on the constitutionality of the 5% threshold, scant attention was paid to the alternative FGIE definition that covers "foreign governments" directly, *id.* § 1064(1)(E)(1). This latter provision breaks little new ground: the Federal Election Campaign Act ("FECA") for decades has barred "foreign nationals"—including "government[s] of a foreign country," 22 U.S.C. § 611(e)—from spending in either federal or state candidate elections, 52 U.S.C. § 30121(a)(1). This prong of the FGIE definition simply ensures that the foreign-money ban extends to Maine state ballot measure elections as well.

Although this Court acknowledged that application of the ban to foreign governments was likely constitutional, it "reserved the question" of severability, declining to decide whether the spending ban could be preserved in this application. *Cent. Maine Power Co. v. Maine Comm'n on Gov't Ethics & Election Practices*, 721 F. Supp. 3d 31, 55 (D. Me. 2024) ("*CMP I*"). As the First Circuit directed, the issue should be decided now by this Court on remand. *CMP II*, 144 F.4th at 31. The Act clearly "can be given effect," 1 M.R.S. § 71(8), even without the allegedly invalid "5% threshold" definition of FGIE. Indeed, banning the direct campaign spending of foreign governments is the application of the Act that is both simplest in execution and most central to Question 2's purposes.

The "actual participation" definition is likewise constitutional, *see* § 1064(1)(E)(2)(b), and is certainly so as further interpreted by the Commission in its rulemaking following this Court's 2024 preliminary injunction ruling. Plaintiffs' overbreadth and vagueness challenge rests entirely on a couple of hypothetical applications of this definition that they claim would be

impermissible—but none of these applications are compelled by the clear statutory language. And even plaintiffs' reading of the Act were tenable, it would not demonstrate that this definition is so "standardless" as to justify its facial invalidation. *United States v. Williams*, 553 U.S. 285, 304 (2008).

Finally, the First Circuit recognized that given the "rushed nature" the preliminary injunction proceedings, *CMP II*, 144 F.4th at 31, this Court was unable to analyze the Acts' disclaimer provision and media due diligence requirements in its 2024 ruling. The media requirements might be seen as auxiliary to the spending ban and PME will not address them here while discovery is stayed.[1] But the disclaimer requirement is a stand-alone provision subject to only intermediate scrutiny and supported by distinct and important informational interests. Indeed, the state's informational interests are particularly acute in connection to political advocacy conducted by foreign interests, as evinced by longstanding federal laws such as the Foreign Agents Registration Act, which also requires disclaimers on "informational materials" distributed for a foreign principal. 22 U.S.C. § 614(b).

For these reasons, this Court should (1) uphold, or reserve the question of the constitutionality of, the "5% ownership" definition of FGIE, 21-A Me. Rev. Stat. § 1064(1)(E)(2)(a); (2) preserve the spending ban as to foreign governments, *id*. § 1064(1)(E)(1), and entities wherein foreign governments exert actual participation, *id*. § 1064(1)(E)(2)(b); and (3) declare the disclaimer requirement at § 1064(6) constitutional with respect to all three FGIE definitions, but at the least, with respect to the "foreign government" and "actual participation" definitions. Plaintiffs' motions for judgment on the pleadings should be denied.

[1] PME's arguments supporting the constitutionality of the due diligence requirements were set forth in its initial amicus brief, *see* ECF No. 46 at 31-35.

BACKGROUND

Until passage of Question 2, Maine elections were protected from foreign spending only by FECA's limited foreign money ban at 52 U.S.C. § 30121.

FECA bars "foreign national[s]" from "directly or indirectly" making contributions or expenditures "in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a)(1). Section 30121 defines a "foreign national" to include: (1) "an individual who is not a citizen of the United States or a national of the United States, *id*. § 30121(b)(2); and (2) a "foreign principal, as such term is defined by section 611(b) of Title 22," *id*. § 30121(b)(1).

In turn, Section 611(b) of the Foreign Agents Registration Act ("FARA"), defines "foreign principal" to include, inter alia, "a government of a foreign country" and "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b)(1), (3).

FARA further defines a foreign government as:

> [A]ny person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

22 U.S.C. § 611(e).

FECA's ban on foreign campaign spending thus covers not only individual foreign nationals, but also entities like foreign governments and foreign corporations organized or doing business abroad.

But the federal foreign money ban is marked by two significant limitations. First, federal law has been understood to apply only to candidate elections, leaving state and local referenda vulnerable to foreign spending. In the last decade, the Federal Election Commission ("FEC") has

twice declined to find that FECA governed spending in state ballot measure elections, explaining that the Commission was "sensitive to the unique balance of power between the federal government and the states" and therefore would not extend the statute beyond its explicit terms.[2] *See* Statement of Reasons of Chair Broussard, MURs 7523 & 7512 (Nov. 2, 2021), at 3, https://www.fec.gov/files/legal/murs/7523/7523_28.pdf. *See also* Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter & Goodman, MUR 6678 (Apr. 20, 2015), at 2, https://www.fec.gov/files/legal/murs/6678/15044372963.pdf.[3] Notably, however, the FEC based these decisions on its interpretation of FECA, not on any constitutional concerns about prohibiting foreign money in state referenda. Indeed, the FEC has frequently urged Congress to amend FECA to explicitly cover ballot measure elections—confirming that the FEC believes such an extension would be constitutional. *See* FEC, *Draft Legislative Recommendations 2023* at 9, https://www.documentcloud.org/documents/24233992-2023-legislative-recommendations?responsive=1&title=1.

Second, the federal foreign money ban does not apply to corporations incorporated in the United States, even those wholly owned by foreign nationals or foreign governments. This limitation of federal law became much more important after *Citizens United v. FEC*, 558 U.S. 310

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[2] *See also* FEC Adv. Op. 1989-32 at 3, https://www.fec.gov/files/legal/aos/1989-32/1989-32.pdf ("The Commission has stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of [FECA]."); FEC Adv. Op. 1984-62 at 1 n.2, https://www.fec.gov/files/legal/aos/1984-62/1984-62.pdf (same).

[3] In this administrative proceeding, FEC took no action with respect to allegations that foreign nationals had violated FECA by financing a ballot measure campaign in a California state election. FEC Vote Certification, MUR 6678, https://www.fec.gov/files/legal/murs/6678/15044372942.pdf. One Commissioner issued a statement justifying this outcome by noting that California had banned foreign money in ballot measure elections and that the California Fair Political Practices Commission could have pursued enforcement. Suppl. Statement of Reasons of Comm'r Goodman, MUR 6678 (May 1, 2015), at 2, https://www.fec.gov/files/legal/murs/6678/15044372967.pdf.

(2010), because, before that decision, no corporation—regardless of its foreign ownership—could lawfully make contributions or expenditures from its treasury funds to influence federal elections. *See* 52 U.S.C. § 30118(a). This limitation of the federal foreign money ban was thus the product of Congress' reliance on the existence of longstanding statutory restrictions on corporate expenditures, not a decision compelled by constitutional concerns.[4]

Before *Citizens United*, corporations could make campaign expenditures only in those states and localities that did not ban corporate expenditures in their elections as FECA did for federal elections. This created a narrow opportunity for foreign-owned domestic corporations to make campaign expenditures—but only in these jurisdictions. In response, the FEC promulgated regulations, *see* 11 C.F.R. § 110.20(i),[5] to ensure that foreign nationals, such as a corporation's shareholders or board members, were barred from influencing these corporations' decisions with respect to their campaign spending in U.S. elections. *See* 67 Fed. Reg. 69928-01, 69946 (2002) (codified at 11 C.F.R. §§ 102, 110). The FEC has also issued case-by-case guidance in applying these regulations, explaining, for instance, what types of activities would constitute "directly or indirectly participat[ing]," *id*., in an entity's political decisionmaking. *See*, *e.g.*, FEC Adv. Op. 2006-15, https://www.fec.gov/files/legal/aos/2006-15/2006-15.pdf (determining that two U.S. subsidiaries of a foreign corporation could make expenditures in state elections so long as all

[4] Insofar as CMP suggests otherwise in arguing that the FEC has "exclude[ed]" "domestic subsidiaries of foreign corporations" from the federal foreign money ban, it is incorrect. CMP Mot. 25. The FEC's position was the result of the agency's interpretation of the federal statute, after considerable debate, not the First Amendment. *Compare*, *e.g.*, FEC Adv. Op. 1989-29, https://www.fec.gov/files/legal/aos/1989-29/1989-29.pdf, *and* Dissent of Comm'rs McDonald and Thomas, https://www.fec.gov/files/legal/aos/1989-29/1061516.pdf.

[5] 11 C.F.R. § 110.20(i) ("A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities.").

decisions regarding spending were made by U.S. citizens, except foreign board members and officeholders could help determine overall political budget amounts); FEC Adv. Op. 1990-8, https://www.fec.gov/files/legal/aos/1990-08/1990-08.pdf (ruling that foreign members of a U.S. corporation's board could not vote on matters concerning a corporate PAC's political activities or to select the individuals to operate the PAC).

ARGUMENT

I. The Ban Is Constitutional With Respect to "Foreign Governments."

A. Prohibiting foreign governments from spending in Maine elections is constitutional.

Plaintiffs devote little attention to the constitutionality of the ban as to "foreign governments," and for good reason. Federal campaign finance law already bars foreign governments, defined in precisely the same terms, from spending in federal and state candidate elections. Section 1064(1)(E)(1) simply extends this longstanding prohibition to state ballot measure elections.

It is unclear whether plaintiffs purport to specifically challenge Maine's spending ban as applied to the contributions and expenditures of a "foreign government." *See also CMP II*, 144 F.4th at 25 (noting that "[n]o party challenges [the district court's] conclusion" that the "ban on campaign spending by foreign governments is likely narrowly tailored and thus constitutional"). Indeed, none of the plaintiffs would appear to have standing to bring such a challenge. But in opposing any attempt to tailor the scope of an injunction—and in arguing that the Act is not severable—plaintiffs effectively are asking this court to block even this narrow application of the ban. CMP Mot. 29-30, ECF No. 98; Versant Mot. 30, ECF No. 99.

Further, in attacking the other prongs of the FGIE definition, plaintiffs claim that only an interest in preventing corruption will justify restrictions like the Act's spending ban, including,

presumably, its ban on campaign spending by foreign governments. CMP Mot. 5. This argument completely foreclosed by *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge court), *summ. aff'd*, 565 U.S. 1104 (2012). There, the three-judge court upheld the federal foreign money ban based exclusively on the government's interest "in preventing foreign influence over U.S. elections." 800 F. Supp. 2d at 288. *Bluman* did not even reference the anti-corruption interest except to note that it was "not the governmental interest at stake in this case." *Id*. at 288 n.3.[6] While of course a state might *also* seek to prevent political corruption by enacting a foreign spending ban, the "compelling interest" recognized by *Bluman* was "in limiting the participation of foreign citizens in activities of American democratic self-government." *Id.* at 288. This interest alone justified the federal foreign money ban and likewise justifies the Act here.

Nor is *Bluman*'s interest in "preventing foreign influence" limited to candidate elections. *See* CMP Mot. 15-16. *Bluman* discussed the distinction between candidate elections and ballot referenda only to reject the plaintiffs' claim there that FECA was underinclusive because it failed to cover the latter. The three-judge court explained it was "reasonable" for Congress to "proceed piecemeal in this area" and focus first on candidate elections, *Bluman*, 800 F. Supp. 2d at 291, and in no way suggested this focus was constitutionally compelled.

Further, plaintiffs also overlook that *Bluman* instead had highlighted that foreign nationals could be constitutionally excluded from a wide range of "activities of democratic self-

[6] CMP highlights that *FEC v. Cruz*, 596 U.S. 289 (2022), stated that "prevention of 'quid pro quo' corruption" was the only "permissible ground" for campaign restrictions, CMP Mot. 15—but *Cruz* was clarifying the type of corruption sufficient to justify the campaign loan repayment regulations at issue there. 596 U.S. at 305-306 (comparing "quid pro quo" corruption to the "the general influence a contributor may have over an elected official"). *Cruz* in no way presumed to address foreign nationals, nor overrule *Bluman*, which of course the Supreme Court had summarily affirmed. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("The Supreme Court does not overrule prior opinions sub silentio.").

government"—regardless of their connection to a formal "electoral process." 800 F. Supp. 2d at 288. If exclusion is permissible with respect to employment as a public school teacher, *see Ambach v. Norwick*, 441 U.S. 68 (1979), it is all the more urgent in connection to the state's actual processes of direct self-governance. Indeed, referenda may represent the zenith of both direct democracy and state concerns about the "integrity of the electoral process," given that citizens are exercising delegated legislative authority to enact state laws directly for their polity. *John Doe No. 1 v. Reed*, 561 U.S. 186, 199 (2010). As the Court has already recognized, "[w]hen Maine citizens vote on referenda they are certainly participating in an activity of democratic self-government." *CMP I*, 721 F. Supp. 3d at 51.

The reasoning of *Bluman* thus supports state laws banning foreign spending in both candidate elections and ballot referenda. So concluded a Washington state court of appeals that held that it was bound by *Bluman* to uphold Washington state's law prohibiting foreign spending ballot measure campaigns. *See OneAmerica Votes v. State*, 518 P.3d 230, 247 (Wash. Ct. App. 2022) ("[Washington] State's interest in prohibiting foreign nationals from making political contributions and the corresponding interest in prohibiting citizens or domestic organizations from using money from foreign nationals to make such contributions is a compelling one.").

This interest in preventing foreign influence over state and local referenda is widely shared. Together with Maine and Washington, today over *twenty* states have enacted laws prohibiting foreign nationals from spending to influence their citizen-initiated ballot measure processes. *See*, *e.g.*, Cal. Gov't Code § 85320; Colo. Rev. Stat. § 1-45-107.5; Fla. Stat. § 106.08(12)(b); Idaho Code Ann. § 67-6610d; Md. Code, Elec. Law § 13-236.1; Neb. Rev. Stat. § 49-1479.03; Nev. Rev. Stat. § 294A.325; N.D. Cent. Code § 16.1-08.1-03.15; S.D. Codified Laws § 12-27-21. *See also* Wash. Rev. Code § 29B.40.050. Indeed, in just the two years following this Court's 2024 decision,

ten states enacted such a ban.[7] As this growing consensus attests, states have a compelling interest in preventing foreign governments from spending money to influence U.S. elections at any level; plaintiffs identify no authority suggesting otherwise.

B. The definition of "foreign government" is not vague.

Two years after commencing this case, plaintiffs now raise the argument that the Act's definition of "foreign government," 21-A Me. Rev. Stat. § 1064(1)(D), is unconstitutionally vague. Again, it is unclear whether plaintiffs mean to challenge this term in all its applications or only with respect to the 5% ownership threshold for the spending ban. Regardless, these belated claims of confusion as to the "foreign government" definition both strain credulity and lack merit.

In so arguing, plaintiffs make a transparent attempt to exploit the initial confusion in oral argument expressed by one of the judges on the First Circuit panel about the term's scope and origin. Tr. of Oral Arg. at 14:23-16:22, *CMP II*, No. 24-1265 (1st Cir. Oct. 9, 2024), *available at* https://www.courtlistener.com/audio/94483/central-maine-power-company-v-me-commn-on-govt-ethics-and-election/?. As counsel to defendants clarified in a subsequent letter, however, the Act drew its definition of "foreign government" virtually verbatim from FARA's definition of "government of a foreign country." Ltr. of Suppl. Auth., *CMP II*, No. 24-1265 (1st Cir. Oct. 17, 2024), Doc. 00118203355.

This issue was neither raised by the parties on appeal nor discussed by the panel majority. Judge Aframe, however, in his concurrence, wondered whether corporations would find it difficult to determine whether their shareholders were "foreign governments" as defined by the Act. *CMP*

[7] *See* Ark. Code Ann. §§ 7-9-416, -417, -418; Conn. Gen. Stat. §§ 9-622(17), (18); Ind. Code §§ 3-9-1-25(c), 3-9-2-11 & 3-9-2-11.5; Kan. Stat. Ann. § 25-4180; Ky. Rev. Stat. § 121.254; Mo. Rev. Stat. § 130.179; Mont. Code. Ann. § 13-37-505; Ohio Rev. Code Ann. § 3517.121(B); Tenn. Code Ann. §§ 2-10-502, -503, -504; Wyo. Stat. Ann. § 22-24-202.

II, 144 F.4th at 36 (Aframe, J., concurring). He further asked whether this term might be vague in the context of Maine's spending ban, even if it was permissible with respect to FARA's registration and disclaimer requirements. *Id*. However, because this question did not benefit from adversarial briefing, the Judge may have been unaware that this term is also part of FECA's foreign spending *ban* because that provision explicitly incorporates FARA's definition of "foreign principal" and, by extension, FARA's definition of "government of a foreign country." 52 U.S.C. § 30121(b)(1) (prohibiting contributions and expenditures by a "foreign principal, as such term is defined by section 611(b) of Title 22"); 22 U.S.C. § 611(b)(1) (defining "foreign principal" to include, inter alia, "a government of a foreign country"). *See also supra* at 4. FECA's foreign money ban thus relies on the same definition for "foreign government" as Maine does—and this federal ban *already* applies to state candidate elections, including Maine's.

Moreover, the concurrence focused only on "[c]lose cases," *United States v. Williams*, 553 U.S. 285, 306 (2008), asking whether, for instance, the Houthis in Yemen or Boko Haram in Nigeria would constitute a "foreign government" under the Act. *CMP II*, 144 F.4th at 36. But a statutory term is not unconstitutionally vague merely because one can "imagine" an extreme or hypothetical application that may test the statute's scope. *Id*. In the vast majority of cases, the term "foreign government" will not be difficult to apply—as is true in this litigation, where there is no apparent dispute that the City of Calgary qualifies. Further, a statutory term is not read in isolation but rather within the "context" of the statute as a whole—here, the Act's spending ban. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010). A corporation would only need to consider the governmental status of Boko Haram or another insurgent group in the highly unlikely event that the insurgent group holds more than 5% of its shares *and* that corporation wishes to make campaign

expenditures in Maine elections. The concurrence's "close cases" are not only hypothetical but, in the context of the Act, wildly implausible.[8]

Finally, even on their own terms, these arguments pertain only to the question of whether the term "foreign government" is vague with respect to the 5% ownership threshold for FGIE status, *see* 21-A Me. Rev. Stat. § 1064(1)(E)(2)(b). The direct application of the ban to "foreign governments" under § 1064(1)(E)(1) will not raise even these hypothetical concerns, and of course, this definition does not immediately cover any of the plaintiffs here. The only entities that will need to "understand what conduct [§ 1064(1)(E)(1)] prohibits," *Hill v. Colorado*, 530 U.S. 703, 732 (2000), are foreign governments who are active in Maine politics and defendants, who would be responsible for enforcing this narrow ban.

II. The Ban Is Constitutional with Respect to the "Actual Participation" Prong.

Although this Court found the "actual participation" definition of FGIE, *see* 21-A Me. Rev. Stat. § 1064(1)(E)(2)(b), "overly broad and too unclear," *CMP I*, 721 F. Supp. 3d at 54, it noted that this preliminary ruling might be reconsidered "if the State adopts a rule that clarifies that the foreign government or foreign government-owned entity must actually participate in the decision-making process regarding election spending," *id*. at 55 n.21. The state has adopted such a rule, allaying any constitutional concerns.

In the preliminary injunction proceedings, plaintiffs argued that § 1064(1)(E)(2)(b) was vague and overbroad because the language "directly or indirectly participates" could be interpreted to cover "a domestic corporation with no foreign ownership" that received an "unsolicited email"

[8] Plaintiffs assert no overbreadth challenge to the term "foreign government"—nor could they. Even as they profess confusion about whether certain insurgent groups are covered by the definition, there is no question that the groups comprise "foreign nationals" and thus are regulable under *Bluman*.

from a foreign government or foreign-government owned entity "about an election-related issue." 721 F. Supp. 3d at 54. Although, as PME argued, this hypothetical was implausible on its face, this Court was concerned that the Commission's proposed rules might broaden the statutory definition by "read[ing] out" the requirement that "foreign government or foreign government-owned entity participate in the [corporation's] actual decision-making process." *Id.* at 55. But, following these proceedings, the Commission did not adopt these initial proposed rules, but instead revised them, ultimately adopting only the revised regulations. 94-270 C.M.R., ch. 1 (amended May 29, 2024), *available at* https://perma.cc/CVX4-5NHQ.

The initial proposed rules were revised in part to address this Court's expressed concerns about the scope of § 1064(1)(E)(2)(b). The new rules make clear that to "participate" in an entity's decision-making process regarding its campaign spending requires the participant to acquire "the invitation, consent, or acquiescence" of the entity "to deliberate or vote on a decision . . . concerning donations and disbursements to influence the nomination or election of a candidate or the initiation or approval of a referendum." 94-270 C.M.R., ch. 1, §16(1)(L). The rule also makes clear that "[p]articipation does not include" either "sending an unsolicited communication regarding a decision-making process" or "participating in an entity's decision-making process for general budget decisions, including setting overall budgets for political donations and disbursements." *Id*.

Recognizing that these new rules effectively foreclose their original vagueness argument, plaintiffs take the extraordinary step of urging the Court to simply ignore them. CMP theorizes that the initial proposed rule "rightly" interpreted the statutory "actual participation" prong by making clear that the statute captures "the mere passive receipt of an unsolicited communication from a foreign actor"—and characterizes the final regulation as just a "convenient litigating

position."[9] CMP Mot. 21, 23. But the initial rulemaking did not cover—or even mention—the "passive receipt of unsolicited communications, *id*., and CMP cites no support for its invented alternative history of the rulemaking. *See* ECF No. 60-1 at 1-2. But even if the initial rulemaking *had* meant to capture the passive receipt of communications from foreign governments—which it did not—the final revised rules define "participate" to specifically and expressly exclude this scenario. CMP's already tenuous interpretation of the Act is now entirely unsustainable.

Putting aside CMP's attempt to rewrite history, plaintiffs make no real attempt to show that statutory definition, particularly as further clarified by the Commission's regulations, would give rise to a "substantial number" of unconstitutional applications "judged in relation to the statute's plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021). Although they hypothesize about some "close cases," Versant Mot. 26,[10] a handful of conjectural applications of § 1064(1)(E)(2)(b) is not valid grounds to hold the provision facially unconstitutional.

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[9] CMP cites *Kisor v. Wilkie*, 588 U.S. 558, 579 (2019), for the proposition that no deference is owed to an agency's "post hoc rationalization" for its past actions, but this principal has no application here. CMP Mot. 22-23. The Commission is not justifying its past "reading of a rule," but rather defending the constitutionality of its governing statute; moreover, the defense in question is a final regulation with the force of law, not merely a "litigating position." *Kisor,* 588 U.S. at 579.

[10] Versant hypothesizes a series of putatively impermissible applications of the Act, but none are actually covered by the statutory definition. Versant Mot. 26 (suggesting Act would bar foreign governments from corporate discussions about "a resolution calling for greater transparency in a corporation's political spending" or "establishing a separate board committee to approve all political spending"). Versant's scenarios do not involve a foreign government's participation in corporate decisions about contributions or expenditures to influence a specific Maine election, but instead concern corporate governance questions or risk assessments connected to political spending in general. And notably, similar fact patterns have already been addressed by the FEC in administering the very similar federal rule. *See*, *e.g.*, FEC Adv. Op. 2000-17, https://www.fec.gov/files/legal/aos/2000-17/2000-17.pdf (opining that a corporate board with foreign members could make "the general corporate policy decision" to establish PAC but not "decisions concerning the administration" of the PAC).

Finally, as this Court has recognized, the "actual participation" definition "bears a close resemblance" to a long-standing FEC regulation, 11 C.F.R. § 110.20(i), which has governed foreign campaign activity at the federal level "for over twenty years without any significant challenge." *CMP I*, 721 F. Supp. 3d at 54. Although the First Circuit pointed out that Maine's "actual participation" provision differs from its federal counterpart because it covers "foreign government-owned entities" as well, i.e., entities wherein a foreign government holds 50% or more ownership, *see CMP II*, 144 F.4th at 29, it failed to appreciate that Maine's law remains far narrower than 11 C.F.R. § 110.20(i). The federal rule bars the participation of *all* individual foreign nationals, corporations, and governments in a domestic corporation's election-related decisionmaking and with respect to *all* candidate elections at the federal, state, and local level.[11] By contrast, Maine's "actual participation" provision covers only foreign governments and corporations that are majority owned by a foreign government—and that wish to engage in political activities in a Maine election—a category that is vanishingly small. *See also supra* n.4.

Further, while amicus does not contend that the Act's "similarity to a federal regulation" alone proves that Maine's definition is constitutional, *see CMP II*, 144 F.4th at 29, the federal rule does, at a minimum, demonstrate that the "actual participation" standard has been workable for the agency and intelligible to the regulated community. And insofar as the Court has any lingering doubts as to the scope of that standard, it can draw upon decades of FEC precedents interpreting

[11] Further narrowing Maine's actual participation definition is the Commission's creation of a "safe harbor" shielding any shareholder under the 5% threshold from coverage. 94-270 C.M.R. ch. 1, § 16(1)(L)(1). Inexplicably, Versant *objects* to this regulatory protection, claiming it "compounds overbreadth." Versant Mot. 27. But a safe harbor, by definition, does not "broaden" a law, and if Versant instead meant to argue that the rule rendered the definition underinclusive, it entirely failed to even plead, much less demonstrate, the criteria for such a challenge. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448–49 (2015) (underinclusiveness requires showing that the "government is [not] in fact pursuing the interest it invokes" or that a "law does not actually advance" the governmental interest).

the federal rule. *See supra* at 6-7. Finally, if indeed the Commission were to apply § 1064(1)(E)(2)(b) in an arbitrary or overbroad manner, "individual challenges, including those alleging that the requirements impose an unusual burden in particular circumstances . . . [could] be brought in the form of as-applied challenges." *Gaspee Project v. Mederos*, 13 F.4th 79, 93 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022).

Plaintiffs' claim rests on the unsupported assertion that the "actual participation" definition reaches situations wherein foreign governments "simply participat[e] in routine corporate governance" or have "passive involvement in corporate affairs." Versant Mot. 27-28. But saying this does not make it so. Plaintiffs' reading of the definition contradicts the language of the Act, is foreclosed by the Commission's rules, and of course has never been adopted by the Commission in any rulemaking, enforcement, or legal proceeding. Conjecture alone cannot sustain a pre-enforcement challenge.

III. The Stand-Alone Disclaimer Requirement Is a Constitutional Measure That Advances Distinct Informational Interests.

In addition to the ban on foreign spending, the Act contains a separate disclosure provision requiring FGIEs to include a disclaimer identifying themselves as a "foreign government" or a "foreign government-influenced entity" on any public communication "to influence the public or any state, county or local official or agency regarding the formulation, adoption or amendment of any state or local government policy or regarding the political or public interest of or government relations with a foreign country or a foreign political party." 21-A Me. Rev. Stat. § 1064(6).

The disclaimer law is constitutional with respect to all three definitions of FGIE in the original Act, including the 5% threshold at 21-A Me. Rev. Stat. § 1064(1)(E)(2)(a). As the Supreme Court and this Circuit have repeatedly recognized, the information provided by political disclaimers enables citizens 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), and "generat[es] discourse that facilitates the ability of the public to make informed choices," *Gaspee Project*, 13 F.4th at 91.

A. Disclosure laws warrant only exacting scrutiny and are supported by important informational interests.

This Court's earlier analysis of the spending ban does not implicate the constitutionality of the disclaimer provision because the two types of laws are subject to different standards of scrutiny and supported by different governmental interests.

Unlike a substantive restriction on campaign spending, a disclosure requirement "impose[s] no ceiling on campaign-related activities," *Citizens United*, 558 U.S. at 367 (internal quotations omitted), and is consequently reviewed under "exacting," not strict, scrutiny, *id.* at 366-67. Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and that the requirement be "narrowly tailored" to meet the governmental interest. *Bonta*, 594 U.S. at 607.

The principal governmental interest advanced by disclosure laws is informational: to enable citizens to "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 370-71. Plaintiffs are thus simply wrong to suggest that only an anti-corruption interest will justify a disclosure law, *see* CMP Mot. at 28: the Supreme Court has expressly held that the informational interest "alone is sufficient" to justify reporting and disclaimer requirements. *Citizens United*, 558 U.S. at 368-69. In particular, on-ad disclaimers like Maine's have been endorsed by the courts because they facilitate citizens' instantaneous appraisal of election or lobbying communications, making them "a more efficient tool" for public education than mere disclosure reports. *Gaspee Project*, 13 F.4th at 91. Finally, this informational interest is distinct from those furthered by the foreign government spending ban—although the

utility of information is especially strong in connection to political advocacy conducted by foreign interests—as evinced by longstanding federal laws such as FARA, *see* 22 U.S.C. § 614(b).

Because the distinctions between campaign spending limits and disclaimers are so significant in First Amendment jurisprudence, disclosure laws are often upheld even as the substantive campaign finance restrictions they accompany are struck down. *Citizens United*, 558 U.S. at 365-66, 367-371 (striking down corporate expenditure restriction while upholding related disclosure requirements); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc) (invalidating contribution limits as applied to super PACs but sustaining the disclosure regime applicable to such PACs).

Maine's disclaimer requirement is thus on firm constitutional ground even if this Court were to permanently enjoin the spending ban in whole or part. The courts have consistently upheld campaign disclaimer requirements, *see, e.g.*, *Citizens United*, 558 U.S. at 367; *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003); and lobbying disclosure laws, *see United States v. Harriss*, 347 U.S. 612 (1954);[12] as well as FARA, the federal law upon which § 1064(6) was modeled, *see Att'y Gen. of U.S. v. Irish People, Inc.*, 684 F.2d 928, 935 & n.23 (D.C. Cir. 1982), *cert. denied sub nom. Irish People Inc. v. Smith*, 459 U.S. 1172 (1983) (holding that "it is well settled that FARA is constitutional" and collecting cases).[13]

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[12] In *Harriss*, the Supreme Court upheld federal disclosure requirements for both legislative lobbying and grassroots lobbying of the public, holding that "the full realization of the American ideal of government" depends on the "ability to properly evaluate [the] pressures" posed by those who engage in or fund lobbying campaigns." 347 U.S. at 625-26. Following *Harriss*, all 50 states have enacted some form of lobbying disclosure. *See* Lobbyist Registration Requirements, Nat'l Conf. of State Legislatures (last updated Jan. 29, 2025), https://www.ncsl.org/ethics/lobbyist-registration-requirements; *see also* 3 Me. Rev. Stat. §§ 313, 313-A.

[13] *Att'y Gen. v. Irish Northern Aid Committee*, 530 F. Supp. 241, 264 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982) (rejecting plaintiff's constitutional challenge to FARA by pointing out that the "validity of the statute . . . [has] been upheld").

Further, exacting scrutiny does not impose the stringent "least restrictive means" test associated with strict scrutiny, *see Bonta*, 594 U.S. at 608, and thus this Court's concerns about the tailoring of the spending ban do not necessarily apply to the review of a disclosure law. Indeed, given that disclaimers can be—and often are—required from U.S. citizens and domestic entities in connection to their political communications, it is unclear what "tailoring" is even required with respect to the definitions of FGIE. The question under exacting scrutiny is not whether the 5% threshold and "actual participation" definitions define with enough precision those entities that are sufficiently "foreign" to be subject to a campaign spending *ban*, but rather whether the disclaimers the Act requires provide voters with useful information about the sponsors of lobbying communications—including their foreign ownership. This is precisely what the Act's disclaimers do: by "promot[ing] the dissemination of information about those who deliver and finance political speech, [they] encourag[e] efficient operation of the marketplace of ideas." *Nat'l Org. for Marriage ("NOM") v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011).

B. Maine's disclaimer requirement replicates the Foreign Agents Registration Act at the state level.

Since its enactment in 1938, FARA has required "agents" representing a "foreign principal"—a term that includes "government[s] of a foreign country" and foreign corporations—to register with the Department of Justice and file regular reports disclosing their activities, receipts, and disbursements on behalf of the foreign principal. 22 U.S.C. § 612(a), (b). FARA also requires registered agents to include "conspicuous" disclaimers on "informational material" distributed for a foreign principal that identifies the agent and its foreign principal. *Id.* § 614(b). *See also* 28 C.F.R. §§ 5.400, -.402. These provisions aim to ensure "public disclosure" from "persons engaging in propaganda activities and other activities for or on behalf of foreign governments . . . so that the Government and the people of the United States may be informed of

the identity of such persons and may appraise their statements and actions in the light of their associations and activities." *Irish People, Inc.*, 684 F.2d at 939-40.

In its disclaimer requirements, the Act creates a more streamlined version of FARA for FGIEs at the state level—to ensure Maine citizens are informed when foreign interests attempt to influence state and local legislation and policy. As discussed in *supra* Part I.B, the Act incorporates many of FARA's terms, including its definition of "government of a foreign country," but is far narrower than federal law. FARA requires agents of foreign principals to include disclaimers on "any informational materials for or in the interests of such foreign principal," 22 U.S.C. § 614(b), as well as to file copies of such communications with the Department of Justice and make them available for public inspection, *id.* at § 614(a), (c). Maine, by contrast, requires only a short disclaimer on a narrowly-defined class of public lobbying communications (regarding "the formulation, adoption or amendment of any state or local government policy"), and imposes no registration or recordkeeping obligations. 21-A Me. Rev. Stat. § 1064(6).

Maine's disclaimer provisions are thus further justified by the unique informational interests animating FARA. *See, e.g.*, *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y. 1972), *aff'd*, 465 F.2d 1405 (2d Cir. 1972) (explaining that "purpose of [FARA]" is to "require[e] complete public disclosure by persons acting for . . . foreign principals where their activities are political in nature" thereby "enabl[ing] [citizens] to understand the purposes for which they act"). Like FARA, Maine's disclaimer requirement offers a "reasonable and minimally restrictive method of furthering First Amendment values." *Buckley*, 424 U.S. at 82.

CMP complains nonetheless that the label "foreign government-influenced" is "pejorative" in nature. CMP Mot. 27.[14] But it is a factual description that refers to covered entities' own shareholders or operations—hardly information inimical to their purpose or public profile. And it falls far short for the high bar set by the Supreme Court for what disclaimers will be deemed inaccurate or "pejorative" in terms of describing foreign sources. In *Meese v. Keene*, 481 U.S. 465 (1987), the Court upheld a FARA requirement that communications distributed on behalf of foreign principles be labeled "foreign propaganda," even though it acknowledged that the term hardly had a positive connotation in colloquial usage. It nevertheless approved the disclaimer because the statutory definition of "propaganda" was a "broad, neutral one, rather than a pejorative one." *Id*. at 483. Here, Maine's definitions of "foreign government-influenced entity" are similarly objective, even as the term itself is far more neutral and factual in tone.

IV. The Act Is Severable.

As this Court acknowledged, its 2024 opinion "reserved the question" whether § 1064(1)(E)(2)(a) and (b) could be severed from the Act in the event either or both definitions were found unconstitutional. *CMP I*, 721 F. Supp. 3d at 55. This Court also declined to analyze whether plaintiffs' challenge to the stand-alone disclaimer provision had any merit. At the same time, this Court and the First Circuit both noted that the spending ban as to "foreign governments" was likely constitutional. *See CMP II*, 144 F.4th at 25. The First Circuit allowed for this delay given the

[14] Plaintiffs argue that strict scrutiny is warranted because the disclaimer requirement unconstitutionally "compels" speech, *see* CMP Mot. 27, but no court has so viewed an informational disclaimer requirement for political ads, nor applied strict scrutiny on this basis. *See Gaspee Project*, 13 F.4th at 95 (rejecting an "attempt to analogize" Rhode Island's top-five contributor disclaimer requirement to the compelled speech regulations that have elicited strict scrutiny). *See also No on E v. Chiu*, 85 F.4th 493, 507 (9th Cir. 2023) (rejecting argument that strict scrutiny applied to a disclaimer that required information about a campaign ad's sponsor and top donors).

"rushed nature" of the preliminary injunction proceedings, but noted that defendants' severability argument was "colorable" and directed this Court to "decide the issue" on remand. *Id.* at 31.

Maine law contains a clear presumption of severability, and this Court should now take steps to preserve the ban as to 21-A Me. Rev. Stat § 1064(1)(E)(1) ("foreign government") and/or § 1064(1)(E)(2)(b) ("actual participation"), and to declare the disclaimer requirements constitutional as to all three definitions of FGIE.

Under Maine law, if a provision or application of a law is invalid, but its "invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application," the law is severable. 1 Me. Rev. Stat. § 71(8). *See also Pharm. Care Mgmt. Ass'n v. Maine Att'y Gen.*, 324 F. Supp. 2d 71, 72 (D. Me. 2004). Indeed, applying Maine law, courts have taken steps to sever even individual words and phrases in order to preserve an otherwise permissible campaign finance statute. *NOM v. McKee*, 723 F. Supp. 2d 245 (D. Me. 2010), *aff'd in part, vacated in part*, 649 F.3d 34 (1st Cir. 2011) (severing the language "influence" and "influence in any way" as vague from Maine's disclosure statute for independent expenditures in ballot measure elections).

Plaintiffs make no case against severability except to reiterate their constitutional challenges to the Act. CMP Mot. 29-30; Versant Mot. 30; Electors Mot. 29-30, ECF No. 100. This is unsurprising—because there is little question that the spending ban could "be given effect," as to foreign governments alone. The "foreign government" definition in no way depends on operation of the 5% threshold or actual participation definitions. Indeed, thus construed, the ban would be the mirror image of FECA's ban on spending by "government[s] of a foreign country," 22 U.S.C. § 611(e), only as applied to state ballot measure elections. Plaintiffs make no argument against such an outcome except for their belated vagueness challenge to the Act's definition of

"foreign government"—and by extension, to FARA's and FECA's definition of the same—which lacks any merit. Indeed, as limited to "foreign governments," the ban would not even apply to plaintiffs, casting doubt on whether they even have standing to press this charge.

Equally straightforward would be the preservation of the "actual participation" definition of FGIE. The ban can be applied to entities wherein foreign governments and foreign government-owned entities exert actual participation without substantial reliance on the 5% threshold, *see supra* n.9, even if the latter definition were to be severed from the Act. And although the "actual participation" definition, unlike the "foreign government" definition, is potentially applicable to plaintiffs' operations, any possible burden is exceedingly minimal. Versant has alleged that it has already established internal systems to prevent the City of Calgary from having any "ability whatsoever to participate in [its] operations or management," Versant Mot. 4; similarly, CMP has not alleged that any foreign government or foreign government-owned entity has any current role in its operations or governance. Thus, it does not appear that § 1064(1)(E)(2)(b) will have any immediate—or even future—impact on their political activities.

Finally, the disclaimer requirement is a distinct, freestanding law and could be given effect in its entirety, even if the spending ban were struck down with respect to any or all the FGIE definitions. Beyond their common reliance on the three definitions of FGIE at § 1064(1)(E), the disclaimer and the spending ban are unconnected. The disclosure requirement in no way turns on the operation of the spending ban, nor is it intended to implement the ban. The ban is thus hardly "so integral to the Act" that the disclaimer law "would have to be struck down." *Opinion of the Justs.*, 2004 ME 54, ¶ 24, 850 A.2d 1145, 1152.

The disclaimer law is constitutional with respect to all three definitions of FGIE in the original Act, including the 5% threshold at 21-A Me. Rev. Stat. § 1064(1)(E)(2)(a). As argued

supra in Part III.A, even insofar as this Court has overbreadth concerns with respect to the 5% threshold in the context of the spending ban, this analysis has little relevance to a disclosure requirement that receives more relaxed scrutiny and serves entirely different government interests. However, if this Court elects to sever the 5% threshold definition from the Act, the disclaimer requirement remains functional—and effective—even insofar as it requires disclosure from only "foreign governments," *id.* § 1064(1)(E)(1), and/or those entities covered by the "actual participation" prong of the definition, *id*. § 1064(1)(E)(2)(b). Maine citizens would still benefit from receiving information about the involvement of foreign governments in the public lobbying communications they see and hear.

CONCLUSION

For these reasons, plaintiffs' motions for judgment on the pleadings should be denied.

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Respectfully submitted,

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