UNITED STATES COURT OF APPEALS
For the First Circuit

No. 10-2304

NATIONAL ORGANIZATION FOR MARRIAGE, INC.,
Plaintiff – Appellant,
v.
JOHN DALUZ, in his official capacity as chairman of the Rhode Island Board of Elections; FRANK REGO, in his official capacity as vice chairman of the Rhode Island Board of Elections; and RICHARD DUBOIS, FLORENCE GORMLEY, MARTIN JOYCE, JR., RICHARD PIERCE, and WILLIAM WEST, in their official capacities as members of the Rhode Island Board of Elections,

Defendant – Appellee.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AMICI BRIEF OF GAY & LESBIAN ADVOCATES & DEFENDERS AND COMMON CAUSE RHODE ISLAND IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMING THE DISTRICT COURT'S DECISION

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DISCLOSURE STATEMENT

The Gay & Lesbian Advocates & Defenders (GLAD) is a non-profit organization organized under 26 U.S.C. § 501(c)(3) that has made an election under 26 U.S.C. § 501(h)(3). Common Cause Rhode Island is a non-profit organization organized under 26 U.S.C. § 501(c)(4). Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned state that GLAD and Common Cause Rhode Island are not corporations that issue stock or have parent corporations that issue stock.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE AMICI BRIEF

GLAD and Common Cause Rhode Island (together, "Amici"), granted leave to participate as *amici curiae* in support of the Defendants (collectively "Board") before the District Court (*see* Joint Appendix ("JA") at A7, text order entered December 14, 2010), now urge the Court to reject the interlocutory appeal of Plaintiff National Organization for Marriage, Inc. ("NOM") from the District Court's denial of NOM's motion for preliminary injunction.

As elaborated upon in more detail in the Motion of GLAD and Common Cause Rhode Island for Leave to File a Joint Amici Brief in Support of the Defendant-Appellees, pursuant to which this Brief is attached and to which they seek authority to file this Brief pursuant to Fed.R.App.P. 29(b):

GLAD is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. It has pursued marriage equality, as both a party and amicus curiae in litigation, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (amicus); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (party). GLAD is also currently litigating a federal constitutional challenge to Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, now pending in the U.S. Court of Appeals for the First Circuit. *See Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal pending*, First Circuit No. 10-2207.

In addition to its litigation efforts, GLAD works in partnership with grassroots and advocacy organizations across New England to advance marriage equality efforts in the court of public opinion, as well as in the legislative arena. This work has included initiative, referenda and constitutional convention activities in Massachusetts; legislative efforts and ballot campaigns in Maine; constitutional convention votes in Connecticut; and legislative activity in New Hampshire. In Rhode Island, GLAD is a founding member of the Rhode Island Marriage Coalition and is deeply committed to public education and communications efforts around the issue of equal marriage for same-sex couples.

In all of those efforts over a number of years, GLAD, as a 501(c)(3) organization, has consistently followed all state and federal rules applicable to its activities, including reporting its activities wherever and whenever required. As an advocate speaking on the same topic in opposition to NOM, GLAD seeks a transparent and an informed electorate.

Common Cause Rhode Island is a nonprofit, nonpartisan citizen advocacy organization that for decades has been dedicated to promoting representative democracy in the State of Rhode Island, by advocating for open, ethical and accountable government processes. Part of its advocacy mission has included participating as amicus curiae in lawsuits that may have a long lasting impact on

Rhode Island governmental and democratic processes.[1] One of Common Cause Rhode Island's advocacy interests is with respect to campaigns and elections, and the extent to which they are influenced by money contributed to, and spent on behalf of or in opposition to, candidates for political office. While such expenditures are a form of political expression, Common Cause Rhode Island supports the notion that the disclosure of the financial sources of political communications furthers the First Amendment interests of individual citizens seeking to make informed choices in the marketplace of political ideas and messages. To that end, Common Cause Rhode Island has worked, as one example, to gain passage of legislation that would require campaign finance reports to be filed with the Rhode Island Board of Elections electronically, and then published on the Board's website.

Because Common Cause Rhode Island members too are citizens of Rhode Island, NOM's lawsuit also directly challenges their interests in acquiring information that would permit them to make informed electoral choices.

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[1] *See*, *e.g.*, *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993); *Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Begin*, 431 F.Supp.2d 227 (D.R.I. 2006); *Irons v. Rhode Island Ethics Commission*, 973 A.2d 1124 (R.I. 2009); *In re Request for Advisory Opinion from the House of Representatives (Coastal Resources Management Council)*, 961 A.2d 930 (R.I. 2008); *Almond v. Rhode Island Lottery Commission*, 756 A.2d 186 (R.I. 2000); *In re Advisory Opinion to the Governor*, 732 A.2d 55 (R.I. 1999); *In re Advisory Opinion from the Governor*, 633 A.2d 664 (R.I. 1993); *In re Advisory Opinion to Governor (Ethics Commission)*, 612 A.2d 1 (R.I. 1992).

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel state that: a) no party's counsel authored any part of this brief; and b) no person, party or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

Amici support the State's position. The challenged Rhode Island statute, R.I. Gen. Laws § 17-25-10(b), with a $100 reporting threshold and requirement that the advocate report expenditures to the Board, is constitutional, reasonable, not burdensome and serves important public interests.[2]

Disclosure requirements such § 17-25-10(b) further the government's compelling interest in keeping the electorate informed of campaign spending, and the public has a legitimate and strong interest in acquiring information about persons who spend money to support candidates for public office.[3] The specific

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[2] NOM's verified complaint for declaratory and injunctive relief was filed shortly before the November 2, 2010 state-wide Rhode Island election. In light of the impending election NOM sought a preliminary injunction enjoining enforcement of the reporting requirement of § 17-25-10(b), but that motion was denied 12 days prior to the election. It is from that order that NOM has appealed, but there is no record evidence concerning what NOM did or did not do with respect to the 2010 election. Consequently NOM is in the anomalous position of asking this Court to reverse the lower court's denial of a preliminary injunction sought with respect to a completed election. Thus the appeal with respect to the 2010 election is now moot, and it is not entirely clear whether NOM, during the travel of this case from the lower court to this one, has transformed its claim to one seeking a preliminary injunction with regard to the 2012 election.

[3] Amici acknowledge appeal Nos. 10-2000 and 10-2049 in the case of *National Organization for Marriage v. McKee*, in which NOM raises some of the same issues addressed in this action, but in the context of Maine's reporting requirements. Amici also note that the District Court on February 18, 2011, granted summary judgment for the defendants and against the plaintiffs in that action. *See National Organization for Marriage v. McKee*, Civil No. 09-538-B-H, Decision and Order on Cross-Motions for Summary Judgment (Hornby, J. Feb. 18, 2011). Amici support the defendants' position in that action and the points

reporting requirements of § 17-25-10(b) bear a substantial relationship to the state's interest in keeping the electorate informed. A $100 reporting threshold is rational in light of the public's overriding interest in the source of campaign spending and in potential connections between candidates and advocates. The requirement that the advocate report expenditures to the Board of Elections and to the candidate imposes insignificant burdens on NOM (and other advocates) while, at the same time, providing critically important information to the public.

Finally, NOM's vagueness complaints are unfounded because the statute is clear on its face and particularly when read in conjunction with the Board's regulations promulgated thereunder. NOM's vagueness argument also fails because NOM's expenditures were for proposed ads that clearly constitute advocacy to "support or defeat" specific candidates. Therefore, it cannot be heard to raise any theoretical vagueness concerns.

ARGUMENT

Reporting and disclosure requirements "may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' . . . and 'do not prevent anyone from speaking.'" *Citizens United v. Federal Election Comm.*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. Federal Election Comm.*, 540 U.S. 93, 201 (1993)). Nevertheless, because

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addressed herein are equally applicable to NOM's arguments against the State of Maine.

reporting requirements do impose some burden on speech, such requirements are subject to "exacting scrutiny." *Citizens United,* 130 S. Ct. at 914. Under this standard, a reporting requirement must bear a "substantial relation" to a ""sufficiently important' governmental interest." *Id*. (quoting *Buckley*, 424 U.S. at 64). Due Process also requires that a statute such as § 17-25-10(b), which provides for criminal penalties, "provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal . . . ." *Buckley*, 424 U.S. at 77. Section 17-25-10(b) easily clears these hurdles.

I. DISCLOSURE REQUIREMENTS ARE CRITICALLY IMPORTANT TO SOCIETY AND AN INDISPENSIBLE MEANS OF ALLOWING THE ELECTORATE TO CAST EDUCATED VOTES.

Free speech is a right to which the Amici hold dear. While in theory a reporting requirement may impose a burden on speech in requiring certain (accurate) disclosure, minimally burdensome requirements such as that imposed under § 17-25-10(b) enhance, not limit, core political speech and debate by providing transparency and contributing to an informed electorate.

In the context of independent expenditures to advocate for or against candidates, disclosure is "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 66). *See also Daggett v. Comm'n on Govern. Ethic.*, 205 F.3d 445, 465-66 (1st Cir. 2000), citing

Vote Choice, Inc. v. Stefano, 4 F.3d 26, 32 (1st Cir. 1993) ("In *Vote Choice*, we explained that the state has a "compelling interest in keeping the electorate informed about which constituencies may command a candidate's loyalties.") This "informational interest alone is sufficient to justify" the enactment and application of mandatory reporting requirements. *Citizens United*, 130 S. Ct. at 915-16.

Although NOM reluctantly acknowledges the role that disclosure plays in informing the electorate, it minimizes the significance of that role. The Supreme Court repeatedly has recognized that disclosure requirements not only minimally burden an advocate's First Amendment rights, but help *foster* First Amendment rights of members of the public at large. "[I]ndividual citizens seeking to make informed choices in the political marketplace" have "First Amendment interests" in learning how electoral advocacy is funded. *McConnell,* 540 U.S. at 197 (citation omitted). Disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82.

The Ninth Circuit Court of Appeals' discussion of these countervailing First Amendment concerns is worth quoting at length:

> The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view. One goal of the First Amendment, then, is to ensure that the individual citizen has available all the

> information necessary to allow him to properly evaluate speech.
>
> Information about the composition of a candidate's constituency, the sources of a candidate's support, and the impact that such financial support may have on the candidate's stand on the issues or future performance may be crucial to the individual's choice from among the several competitors for his vote. The allowance of free expression loses considerable value if expression is only partial. *Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensible to the proper and effective exercise of First Amendment rights.*

FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987) (emphasis added).

In the wake of *Citizens United* and its affirmation of the right of corporations to spend an unlimited amount of money to advocate for or against particular candidates, disclosure laws take on even more importance. Corporations and other wealthy proponents have the unique ability and expertise to use their money to shape the outcome of candidate elections. Full financial disclosure allows the public to make connections between candidates and their otherwise anonymous supporters. Knowing the amount and source of funding for campaign advertisements allows the electorate to better evaluate candidates for public office and the consequences of voting for or against them. "The sources of a candidate's financial support . . . alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67. The First Amendment thus supports the

government's right to enact reporting requirements that "ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech" in the context of candidate elections. *Furgatch*, 807 F.2d at 862.

Given the importance of the public's right to acquire information about independent expenditures, NOM's broad-based conceptual complaints about expenditure reporting requirements are not furthered, but rather undermined, by interests protected under the First Amendment.

II. THE REPORTING MECHANISMS OF § 17-25-10(b) ARE NARROWLY TAILORED TO ACHIEVE RHODE ISLAND'S IMPORTANT INTEREST IN PROVIDING THE ELECTORATE WITH INFORMATION ABOUT THE SOURCES OF ELECTION-RELATED SPENDING.

NOM takes aim at the requirement that expenditures of over $100 must be reported to the board and to the candidate's treasurer. According to NOM, this threshold is unconstitutional because the government has no interest in compelling disclosure of expenditures until they reach some undefined amount greater than $100. NOM also complains that it cannot constitutionally be required to inform the campaign treasurer for the beneficiary of the ads of the expenditures. These claims lack merit. Contrary to NOM's factually unsupported contention, the public has an important interest in knowing who has spent $100 or more to support a particular candidate. And by requiring such expenditures also to be reported to the

candidate's treasurer and posted by the candidate, the State facilitates the means by which the public can easily acquire such critical information.

A. THE $100 THRESHOLD FURTHERS RHODE ISLAND'S SUBSTANTIAL INTEREST IN INFORMING THE ELECTORATE OF THE SOURCES OF CAMPAIGN SPENDING.

A $100 reporting threshold is a narrowly tailored means of providing important information to the electorate about a candidate, as reflected by the analyses of reporting thresholds in *Buckley*, 424 U.S. 1; *Vote Choice*, 4 F.3d 26; and *Daggett*, 205 F.3d 445.

Buckley set the foundation for evaluating reporting threshold requirements. There, the Supreme Court explained that given the importance of disclosure to the government, the legislative branch should be given wide latitude to determine the appropriate reporting threshold. In evaluating the constitutionality of a $10 recordkeeping threshold and a $100 disclosure threshold, the Court held that decisions about "the appropriate level at which to require recording and disclosure" are "necessarily . . . judgmental" and, therefore, best left to legislative discretion. 424 U.S. at 83.

This Court first had occasion to apply this principal in *Vote Choice*. There, the Court analyzed the constitutionality of a Rhode Island statute that imposed a "first dollar" disclosure requirement on contributors to a Political Action Committee ("PAC"). Recognizing the state's interest in keeping the electorate

informed about candidates' "possible allegiances and interests," the Court acknowledged that disclosure requirements advance important governmental interests. 4 F.3d at 32.

In determining whether the state was justified in requiring "first dollar" disclosures, the Court recognized that the size of a contribution is relevant. Although the value of disclosure may drop "as the disclosure threshold drops toward zero," disclosure even of nominal contributions may provide important information to the electorate. *Id.* Regardless of the size of a contribution,

> signals are transmitted about a candidate's positions and concerns not only by a contribution's size but also by the contributor's identity . . . . Since the identify of a contributor is itself informative, *quite apart form the amount of the contribution*, a candidate's ideological interests may often be discerned as clearly from a $1 contribution as from a $100 contribution.

Id. (emphasis added). Therefore, the Court held, there is a "substantial link between data revealed by first dollar disclosure and the state's compelling interest in keeping the electorate informed about which constituencies may command a candidate's loyalties." *Id.* Consequently, a first dollar contribution disclosure requirement "is not, in all cases, constitutionally proscribed." *Id.* at 33.

Despite the theoretical propriety of a first dollar reporting requirement, the Rhode Island statute in *Vote Choice* was overbroad when read in the context of the entire reporting scheme. The problem with the reporting requirement at issue was

that it applied only to contributions to PACs, and not to individuals who contributed directly to candidates. Individuals who contributed directly to candidates would need to report only once their contributions exceeded $100. This disparity in reporting requirements unfairly burdened would-be PAC contributors' associational rights without sufficiently furthering the state's important interest. *Id.* at 35. Consequently, although a first dollar reporting requirement might justifiably be enacted, Rhode Island's requirement was unconstitutional.

Building on *Vote Choice*, in *Daggett* the Court analyzed a Maine state statute that imposed a $50 threshold for *expenditure* reporting. Although *Vote Choice* dealt with contribution reporting requirements, the Court reiterated the concept that the government's interest in informing the electorate about '"which constituents may command a candidate's loyalties"' justified disclosure of expenditures. *Daggett*, 205 F.3d at 466 (quoting *Vote Choice*, 4 F.3d at 32).

Rejecting an argument that the information to be derived from a $50 threshold was too insignificant to justify any burden on speech, this Court recognized that the "reporting requirement allows voters access to information about who supports a candidate financially and it allows the Commission to effectively administer" other provisions of the statute. It also "deters corruption and its appearance." *Id.* Following the lead of *Vote Choice,* the Court in *Daggett* repeated that determinations of reporting thresholds are '"best left to legislative

discretion' and will be deferred to unless 'wholly without rationality."' *Id.* (quoting *Vote Choice*, 4 F.3d at 32). Such reporting requirements, this Court stated, are not unduly burdensome, with a close nexus to the important interests they serve. *Daggett*, 205 F.3d at 466 ("the modest amount of information requested is not unduly burdensome and ties directly and closely to the relevant government interests").

Collectively, the decisions in *Buckley*, *Vote Choice* and *Daggett* instruct that the legislative branch has broad discretion in imposing reporting thresholds. As long as the threshold is not "wholly without rationality," it will be affirmed. And given the significance of the information that may be derived from a contribution as low as $1, the constitution will respect a legislated threshold as long as it does not disparately impact the associational rights of some people, but not others. Based on these concepts, Courts around the country have agreed that reporting thresholds that are equal to, or lower than, Rhode Island's pass constitutional muster.[4]

Daggett also confirms Rhode Island's compelling interest in informing the electorate of the identity of those making expenditures for candidates. The public

[4] *See*, *e.g.*, *Buckley*, 424 U.S. at 83 ($100); *Frank v. City of Akron*, 290 F.3d 813, 819 (6th Cir. 2002) ($50); *Daggett*, 205 F.3d at 466 ($50); *National Organization for Marriage v. McKee*, 723 F.Supp.2d 245, 265 (D.Me. 2010) ($100); *Protectmarriage.com v. Bowen*, 599 F.Supp.2d 1197, 1223-24 (E.D. Cal. 2009) ($100).

benefits from knowing who is financially supporting whom, allowing them to make informed decisions at the ballot box. And, unlike the reporting provision that was struck down in *Vote Choice*, § 17-25-10(b) applies to all advocates making expenditures, not just those advocates who expend money through certain channels.

Additionally, here, NOM has failed to provide any evidence to support its assertion that a $100 expenditure is too insignificant to warrant disclosure. Much can be purchased for $100. Local radio ads may reach thousands of listeners and have been offered for as little as $15/segment. Bumper stickers, placards and signs may be purchased and displayed to countless potential voters. A little may go a long way toward helping a candidate get elected.

Although NOM contends that there is no danger of perceived or actual corruption as a result of an independent expenditure, this contention also belies reality, and NOM has provided no support for its position contrary to that of the Legislature itself. Particularly in the context of local elections, $100 may be significant in comparison to a candidate's war chest. Corruption concerns aside, the electorate reasonably may view a $100 expenditure to be a proportionately significant act of support that could engender the candidate's considerable allegiance to the advocate upon election.

In sum, Rhode Island's reporting threshold is not "wholly without rationality." *See Daggett*, 205 F.3d at 466. The public's has a right to be informed, and Rhode Island's minimal burden easily withstands constitutional security.

B. DISCLOSURE TO THE CANDIDATE FURTHERS RHODE ISLAND'S SUBSTANTIAL INTEREST IN INFORMING THE ELECTORATE OF THE SOURCES OF CAMPAIGN SPENDING.

In evaluating the constitutionality of a particular reporting mechanism, the Court balances the burden of complying with the requirement and the benefit to be derived from it. *Buckley*, 424 U.S. at 68. Providing notice of an expenditure to a candidate imposes a nominal additional burden on NOM – or any other advocate. Reporting to the state is an unremarkable expectation. Sending the same report to the candidate requires nothing more than sending the same paperwork to another address.

Rhode Island's candidate notification requirement provides at least two important benefits to the public. First, such notification assures that candidates know who is speaking out in favor of them. This assures that candidates can respond accordingly. A candidate who does not want the "support" of a particular advocate will not have the opportunity to distance herself from the speaker unless the candidate is aware of the expenditure. The Supreme Court recognized in *Buckley* that "it is of particular importance that candidates have the . . .

opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." 424 U.S. at 52-53. Providing information to the candidates regarding their supporters allows them to reduce the risk that the public will mistakenly assume a candidate's allegiance to the supporter, *Vote Choice*, 4 F.3d at 32, or that the candidate welcomes the endorsement. This, in turn, could cause would-be voters to turn against an otherwise attractive candidate based on improper assumptions that the candidate did not have the opportunity to rebut.

Section 17-25-10(b) also does not merely require the speaker to report the expenditure to the candidate. Once a candidate receives such notification, the candidate must also report that independent expenditure (with proper attribution to the advocate) directly. This gives the public the opportunity to learn easily the identity of all individuals and entities that have financially supported the candidate's bid for election – whether by contribution or by independent expenditure. In effect, for the cost of a photo copy and a single postage stamp, the candidate notification requirement facilitates the creation of a "clearinghouse" where the public can acquire a comprehensive picture of the candidate's support simply by obtaining the candidate's reporting statements. Without such a

mechanism, the electorate would be forced to search all independent expenditure reports to piece together a roster of a candidate's financial supporters.

In sum, the reporting mechanisms of § 17-10-25 impose minimal burdens on speech, while providing an efficient and effective means of keeping the electorate fully informed.

III. SECTION 17-25-10(b) IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE PERSONS OF ORDINARY INTELLIGENCE UNDERTAND WHEN AN EXPENDITURE IS MADE TO "SUPPORT" OR "ON BEHALF" OF A CANDIDATE.

Rhode Island law requires that political advocates report certain expenditures made in support of, or in opposition to, candidates for public office. In pertinent part, § 17-25-10(b) provides that any person making an expenditure over $100 "to support or defeat a candidate" must file a report with the Board and notify the campaign treasurer of the candidate "on whose behalf the expenditure . . . was made." Intentional violations of this statute may result in criminal or civil penalties. R.I. Gen. Laws § 17-25-3.

To provide further clarification of Rhode Island's reporting requirements in light of *Citizens United*, the Board enacted regulations, attached to NOM's Brief at Addendum Exh. 4 (and found at http://sos.ri.gov/rules/index.php?page=details&erlid=6126) ("Rules and Regulations.) Section 3 of these regulations addresses reporting requirements for independent expenditures and explains that a report is required whenever an

advocate makes an expenditure "expressly advocating the support or defeat of a candidate . . . ." Section 2(6), in turn, defines "expressly advocating" to include "communications of slogans or individual words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers and advertisements." *See id.*

Despite the simplicity of the statutory language and the further refinement provided by these regulations, NOM maintains that the reporting requirement of § 17-25-10(b) is unconstitutionally vague because the statute does not define the term "support" or the phrase "on whose behalf." This argument not only defies ordinary understanding of English, it has been rejected by the Supreme Court.

A. A DISCLOSURE STATUTE MEETS DUE PROCESS REQUIREMENTS WHEN INDIVIDUALS OF ORDINARY INTELLIGENCE, INFORMED BY AUTHORITATIVE GUIDANCE, CAN UNDERSTAND THE REQUIREMENTS IMPOSED.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal . . . ." *Buckley*, 424 U.S. at 77. A higher level of specificity is required when, as in the case of a campaign expenditure reporting statute, a regulation potentially infringes on First Amendment rights. *Id.* "To comport with the strictures of due process, a law must define an offense '[1] with sufficient definiteness that ordinary people

can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *URI Student Senate v. Town of Narragansett*, Appeal No. 10-1209, ___F.3d. ___, 2011 WL 17610, *9 (1st Cir. Jan. 5, 2011) (quoting *Skilling v. U.S.*, 130 S. Ct. 2896, 2927-28 (2010)).

Even when First Amendment rights are at issue, common sense is no stranger to the vagueness analysis.

> [W]ords are rough-hewn tools, not surgically precise instruments. Consequently, some degree of inexactitude is acceptable in statutory language. Consistent with this reality, 'the fact that a statute requires some interpretation does not perforce render it unconstitutionally vague.' It follows that 'reasonable breadth' in the terms employed by an ordinance does not require that it be invalidated on vagueness grounds."

Id. (internal citation omitted).

In determining whether a statute is impermissibly vague, words must not be evaluated in a vacuum. *Id.* Rather, the court must consider the statute as a whole and in the context in which it was enacted. *Id.* at *10 (looking to "additional terms that supply concrete guidance"); *U.S. v. Williams*, 553 U.S. 285, 294-95 (2008) (examining "neighboring words" to hold that the term "promotes" is sufficiently clear in a statute that criminalizes promotion of child pornography). The examined context includes explanatory regulations: "[w]hen confronting a vagueness challenge to the face of a state statute, [the court] is obligated to accept any limiting construction that a state agency has authoritatively proffered." *McCullen*

v. Coakley, 571 F.3d 167, 183 (1st Cir. 2009) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982)).

B. SECTION 17-25-10(b) IS CLEAR ON ITS FACE.

Applying these principles, the language of § 17-25-10(b) is not vague. Even viewed in isolation, the terms and phrases that NOM targets – "support" and "on whose behalf" – are abundantly clear, as the Supreme Court has noted.

In *Buckley*, the Supreme Court concluded that vagueness problems associated with a statute that purported to require reporting of expenditures "relative to" a candidate could be *cured* by making the reporting requirement contingent upon expenditures for ads using words of "express advocacy" to support or oppose a candidate, such as "promote," "oppose," "attack," "support," "defeat" and "reject." *Buckley*, 424 U.S. at 44 n.2. In *McConnell*, the Court explained that those words are "magic words" of clarity. *McConnell*, 540 U.S. at 191. These "magic words" "clearly set forth the confines within which potential party speakers must act in order to avoid triggering the" reporting requirements, "'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* at 170 n.64 (citation omitted).

Thus, in the context of a campaign finance statute such as § 17-25-10(b), the word "support" is not only clear, but is *so clear* that it could be used as a "magical"

remedy to save an otherwise ambiguous statute. *See id.* *See also Human Life of Washington, Inc. v. Brumsickle*, No. C08-0590, 2009 WL 62144, *15 (W.D. Wash. 2009) (holding that the words "support" and "oppose" are clear in an expenditure reporting statute), *aff'd*, 624 F.3d 990 (9th Cir. 2010).

Section 17-25-10(b), moreover, pairs the word "support" with the word "defeat"; the statute applies to expenditures made "to support or defeat" a candidate. The proximity of these terms is significant under the "commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 294-95. When paired with the term "defeat," which NOM does not contend is vague, it is patently evident that the term "support" requires advocacy to solicit votes for candidates.

Nor can there be any question about the meaning of § 17-10-25's requirement that expenditures must be reported to the candidate "on whose behalf" the expenditure was made. *See Bang v. Chase*, 442 F. Supp. 758, 769-70 (D. Minn. 1977) ("Although the quoted phrase ['expenditures on behalf of any candidate'] is not expressly defined in the Act, its meaning is sufficiently plain from the statutory context in which it appears."), *aff'd sub nom. Bang v. Noreen*, 436 U.S. 941 (1978). Under the Rhode Island law, once an advocate makes an expenditure to "support" a clearly identified candidate, § 17-25-10(b) deems the

expenditure to have been made "on behalf of" that candidate, and once an advocate makes an expenditure to "defeat" a clearly identified candidate, § 17-25-10(b) deems the expenditure to have been made "on behalf of" that candidate's opponent.

Even if § 17-25-10(b) were ambiguous on its face – which it is not – any doubt about the expectations of the statute would be resolved by consulting the Board's regulations, which make clear that reporting is necessary only when an ad contains "communications of slogans or individual words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates . . . ." Rules and Regulations, R.I. Admin. Code 23-1-25:2 and 3. This test comports with the Supreme Court's test for the "functional equivalent" of express advocacy articulated most recently in *Citizens United*, 130 S. Ct. at 890 ("there is no other reasonable interpretation of *Hillary* than as an appeal to vote against Senator Clinton"). If that standard provides sufficient guidance for the Supreme Court, it unquestionably meets the level of clarity to satisfy Due Process requirements. *See NOM v. McKee*, 723 F. Supp. 2d 245, 266 (D. Me. 2010) (holding that a nearly identical regulation clearly explains the application of Maine's reporting requirement).

Finally, many other states' campaign finance statutes and regulations employ these same standards. *See, e.g.*, Or. Rev. Stat. Ann. §260.005(10)(c);

S.D. Codified Laws §12-27-1(9); W.Va. Code §3-8-1a(12)(b) and(c); Conn. Agencies Regs. §9-714-1(b); Code Me. R. 94-270, Ch. 1, § 10. A claim that this language, carefully crafted by these many legislators and executive branch representatives to meet Supreme Court guidance, somehow does not convey its meaning to individuals of ordinary intelligence insults what ordinary intelligence is, and reveals this appeal for what it is: an effort to challenge *any* reporting requirement no matter how clear, benign or, tellingly, useful to the voting public.

C. SECTION 17-25-10(b) CLEARLY APPLIES TO NOM'S PROPOSED EXPENDITURES.

Even if NOM could conceive of a hypothetical expenditure that might raise a question of whether § 17-25-10(b) would apply, it could not raise such concerns here. A party's right to raise vagueness challenges is limited by its particular situation. "[E]ven to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). NOM's refusal to report expenditures for its proposed ads would be "clearly proscribed" by § 17-25-10(b) because the ads at issue unquestionably advocate for the "support or defeat" of identified candidates, the standard for triggering the statute. In determining whether an ad

constitutes an advocacy piece to support or defeat a candidate, the focus is on the ad itself. The analysis in *Citizens United* illustrates this point.

In *Citizens United*, one question addressed was whether a documentary about Hillary Clinton was the "functional equivalent of express advocacy" against her election for president, such that the expenditure disclosure requirement of federal law would apply. 130 S. Ct. at 889-90. Although the documentary did not explicitly urge people to vote against Clinton, it contained "historical footage, interviews with persons critical of her, and voiceover narration" that portrayed her negatively. *Id.* at 890. "The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency." *Id.* The movie asked rhetorically whether Clinton was "the most qualified" candidate, stated that "Americans have never been keen on dynasties" and concluded by reminding viewers "what's at stake – the well being and prosperity of our nation." *Id.* Against that backdrop, the Supreme Court readily agreed that "there is no reasonable interpretation of [the movie] other than as an appeal to vote against Senator Clinton" and, consequently, "the film qualifies as the functional equivalent of express advocacy." *Id.* On that basis, the Court upheld the application of the expenditure reporting requirements of federal law. *Id.* at 915-16.

Like the documentary at issue in *Citizens United*, NOM's ads do not expressly urge voters to "support" or "oppose" a particular candidate. Nevertheless, their message is equally unmistakable.

NOM proposed making expenditures to air, circulate or post five radio, television and written ads attached to its First Amended Verified Complaint and Exhibits 2-6 (*See* JA, at A10, ¶9 and pp. A17-A38.) NOM's four radio and television ads are similar. All begin with a scenario in which a child tells her mother that she learned about marriage for same sex couples in school that day. The ads quickly move to a statement that "legalizing gay marriage" will have "consequences for kids" and that first and second grade students in other states learned that "boys can marry other boys" and went on a field trip to a "same sex wedding, calling it a 'teachable moment.'" From there, the ads provide a negative assessment of such lessons:

> Kids have enough to deal with already, without pushing gay marriage on them. And it's not just kids who'll face the consequences. The rights of people who think marriage means a man and a woman will no longer matter: We'll all have to accept same-sex marriage whether we like it or not.

The clear message of the ads is that marriage for same sex couples is a repugnant concept that is being forced on young children, families, and "people who think marriage means a man and a woman." Even without hearing the tone of

the announcer, the negativity of the ads' portrayal of marriage for same sex couples is palpable.

Having established the thesis that the audience should oppose marriage for same sex couples, the radio and television ads turn their attention to specific candidates. In this regard, the "support" and "opposition" messages differ. In the supportive ads, the narrator identifies a specific candidate and states that he "knows that in these troubled times in Rhode Island, we don't have time to push gay marriage on Rhode Island families." The ads also urge the listener to call the candidate to say "Thank you for standing up for marriage."

The opposition ads take aim at candidates whom NOM identifies as being tolerant of marriage for same sex couples. After attempting to degrade the concept of marriage for same sex couples, the attack ads identify a specific candidate as someone who "can't fix the real problems in these troubled times" and asks rhetorically and sarcastically why the candidate has "time to push gay marriage on Rhode Island families"? The ads then urge the listener to call the candidate "and tell him: 'Don't mess with marriage.'"

Juxtaposed against the criticism of marriage for same sex couples, the television and radio ads' support of, or opposition to, the candidates is readily apparent. The unmistakable message is that voters should support a specific candidate who opposes marriage for same sex couples and who "knows . . . we

don't have time to push gay marriage." In contrast, according to the ads, other specific candidates "can't fix real problems" and are willing to "push gay marriage" and the associated parade of horribles that NOM suggests surely would follow. Given the explicit language of NOM's ads and their overall context, the only credible assessment of them is that they urge the support or defeat of specific candidates. Therefore, § 17-25-10(b) applies and "clearly proscribes" expenditures for these ads without complying with the reporting requirements.

Although different in presentation, NOM's "Jumbo Postcard" sends the same clear message. This ad champions certain incumbent candidates who oppose marriage for same sex couples as being: "A proven Fighter for Rhode Island Families and Children"; "An Effective Fiscal Conservative"; "A Tireless Taxpayer Advocate"; and "A Dedicated Community Volunteer." The ad goes on to praise the incumbent for having "proudly and effectively represented his/her District" and for being a "dedicated public servant for the entire state of Rhode Island." Like the television and radio ads, the Jumbo Postcard is a clear message of support of particular candidates.

Just as the overall presentation and tone of the documentary reviewed in *Citizens United* constituted an unmistakable piece of advocacy, the tone and presentation of NOM's ads are not susceptible to any "reasonable interpretation . . . other than as an appeal to vote" for or against identified candidates, which clearly

triggers § 17-25-10(b). There is no question that the reporting requirements apply, and NOM's vagueness arguments are unfounded.[5]

CONCLUSION

For the reasons set forth herein, as well as in Appellees' Brief, Amici respectfully assert that the Court should reject NOM's appeal and affirm the District Court's denial of NOM's motion for preliminary injunctive relief.

[5] NOM contends that § 17-25-10(b) is unconstitutionally overbroad because it is vague. NOM Br. at 36 (arguing that the statute is "vague, and therefore overbroad"). Although not clearly articulated, it appears NOM is arguing that the alleged vagueness of § 17-25-10(b) permits it to be applied to speech that the government has no important interest in regulating. This argument conflates the concepts of vagueness and overbreadth. "While related, these two doctrines derive from somewhat different policies and look to different effects. Overbreadth analysis looks to whether a law 'sweeps within its ambit (protected) activities' as well as unprotected ones, . . . while a vagueness inquiry focuses on whether a law states its proscriptions in terms sufficiently indefinite that persons of reasonable intelligence 'must necessarily guess at its meaning.'" *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1126 n.9 (1st Cir. 1981) (citation omitted)). Although a statute could theoretically be overbroad if it is vague, § 17-25-10(b) is not vague. Therefore, this component of NOM's overbreadth argument goes nowhere.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

The type-volume limitation of Fed. R. App. P. 32(a)(7)(B) imposes a 14,000 word limitation on a party's principal brief. Pursuant to Fed. R. App. P. 29(d), an amicus brief may be no more than one-half the length authorized for a party's principal brief. This brief complies with Rules 29(d) and 32(a)(7)(B) because it contains 5,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), including the Statement of Interest.

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CERTIFICATE OF SERVICE

I certify that the within brief has been electronically filed with the Clerk of the Court on March 2, 2011. All attorneys of record are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing.

s/ Catherine R. Connors