

United States District Court
for the District of Maine

**The National Organization for Marriage,
and American Principles In Action**

Plaintiffs,

v.

**Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C. Marsano,
and Edward M. Youngblood**, all in their
official capacity as members of the
Commission on Governmental Ethics and
Election Practices; **Matthew Dunlap**, in his
official capacity as Secretary of State of the
State of Maine; **Mark Lawrence, Stephanie
Anderson, Norman Croteau, Evert Fowle,
R. Christopher Almy, Geoffrey Rushlau,
Michael E. Povich**, and **Neal T. Adams**, all
in their official capacity as District Attorneys
of the State of Maine; and **Janet T. Mills**, in
her official capacity as Attorney General of
the State of Maine,

Defendants.

Cause No. _____
(CIVIL)

**Plaintiff's Motion for Temporary
Restraining Order and Supporting
Memorandum**

**(ORAL ARGUMENT REQUESTED;
INJUNCTIVE RELIEF SOUGHT)**

**Plaintiff's Motion for Temporary Restraining Order
(Oral Argument Requested; Injunctive Relief Sought)**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs American Principles In Action ("APIA") and the National Organization for Marriage ("NOM") hereby move this court to temporarily restrain the enforcement of 21-A M.R.S.A. §1056-B, for the reasons stated in Plaintiffs' supporting memorandum.

Memorandum Supporting Plaintiffs’ Motion for Temporary Restraining Order

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” In *Volle v. Webster*, 69. F. Supp. 2d 171 (D. Ma. 1999), this Court held that Maine’s political action committee (“PAC”) registration statute was unconstitutional because it placed burdens on the First Amendment rights of speech and association that were not justified by any compelling government interest. In like manner, Maine’s ballot question committee (“BQC”) registration statute, codified in Maine Revised Statutes Annotated (“M.R.S.A.”), Title 21-A § 1056-B is unconstitutional both facially and as applied to Plaintiffs.

Facts

The facts of this case are set out in Plaintiffs’ Verified Complaint (“VC”), and will be briefly summarized here.

NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation dedicated to preserving the traditional definition of marriage. VC ¶ 6. APIA is a nonprofit 501(c)(4) organization dedicated to promoting equality of opportunity and ordered liberty. VC ¶ 7. Both NOM and APIA operate nationwide, and neither has as its major purpose the initiation, promotion, defeat, or influence in any way a Maine ballot question. VC ¶ 25, 46.

Maine law requires “any person¹ not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action

¹A “person” is defined by 21-A M.R.S.A. § 1001 as “an individual, committee, firm, partnership, corporation, association, group or organization.”

committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question” to register within 7 days as a BQC with the Maine Commission on Governmental Ethics and Election Practices (the “Commission”). 21-A M.R.S.A. § 1056(B)

The BQC registration form makes clear that a report must be filed at registration, and that a BQC must report “all contributions and expenditures” including “expenditures such as those associated with the collection of signatures, paid staff time, travel reimbursement, and fundraising expenses.” *Registration: Ballot Question Committees: For Persons and Organizations Other Than PACs Involved in Ballot Question Elections* (Exhibit 7.) The registration form requires the personal information of a “Treasurer,” “Principal Officer[s],” “Primary Fundraisers and Decision Makers,” and requires a “Statement of Support or Opposition,” indicating “whether the committee supports or opposes a candidate, political committee, referendum, initiated petition or campaign.”² *Id.*

Thereafter, BQCs must file reports, which are required according to the schedule for reporting by PACs, listing the personal information of any “contributor” donating, in aggregate, more than \$100, all expenditures “to support or oppose” made to “a single payee or creditor aggregating in excess of \$100” and must categorize the expenditure according to types provided by the Commission, and provide “remarks” for “expenditures” for “Campaign consultants,” “Professional services,” and those reported as “Other.” *2009 Campaign Finance Report—Ballot Question Committees: For Persons and Organizations Involved in Ballot Question Elections*

²A Registration must be filed whether or not the organization knows, at the time of registration, whether it “supports or opposes” any of these. *Id.*

(Other Than PACs) (Exhibit 8.) Records must be kept for four years, and BQCs must “keep a detailed account of all contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and all expenditures made for those purposes” and “retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50.”

The failure to register as required under 21-A M.R.S.A. § 1056-B is punishable by a \$250 fine. 21-A M.R.S.A. § 1062-A(1). VC ¶ 17. The failure to file reports as required by 21-A M.R.S.A. § 1056-B or § 1059 is punishable by a maximum fine of \$10,000. 21-A M.R.S.A. § 1062-A(4). VC ¶ 20. Further, “[a] person who fails to file a report as required by this subchapter within 30 days of the filing deadline is guilty of a Class E Crime.” 21-A M.R.S.A. § 1062-A(8). VC ¶ 21.

Currently, an initiative regarding marriage of same-sex couples is scheduled to be voted upon by the people of Maine at the November 2009 election. Between May 6, 2009 and September 4, 2009, NOM distributed emails to its subscribers discussing efforts in various states, including, at times, Maine, to recognize same-sex marriage. *See* VC, Exhibit 5. Each of the emails contained a hyperlinked “Donate” button which sent potential donors to the donations screen at <http://www.nationformarriage.org>. VC ¶ 39. The donation screen at <http://www.nationformarriage.org> provides that “[n]o funds will be earmarked or reserved for any political purpose.” *Id.* In July of 2009, NOM distributed a newsletter to subscribers. One of the articles in this newsletter described NOM’s efforts to preserve the traditional definition of marriage in Maine and stated: “Your support of NOM is critical to the success of this effort.” The

newsletter also included a contribution card and return envelope for donations to NOM.

APIA has filmed two brief video advertisement concerning the issue of same-sex marriage and Maine at a cost of approximately \$3,000. APIA intends to buy television time in Maine to air this advertisement and to solicit donations for this purpose, but will not because donations received might be considered “contributions” and trigger BQC status and the accompanying registration and reporting requirements, which APIA does not wish to do.

The definitions of “expenditure” and “contribution” in § 1056-B are vague and substantially overbroad, and depending on whether the donations from NOM’s emails and newsletter are considered “contributions” for purposes of § 1056-B, NOM is either near or has already exceeded the \$5,000 threshold for ballot question committee status. NOM does not believe that the emails and newsletter resulted in \$5,000 in “contributions” or that it has received and/or made, in aggregate, \$5,000 in “contributions” and “expenditures” as those terms are constitutionally required to be defined. Likewise, APIA is chilled from its activities by the prospect of having to register as a BQC and meet the reporting and other requirements of § 1056-B and § 1059, as the disbursement for the production and television airing costs of their advertisement might be considered by Maine to be an “expenditure” under § 1056-B, and the donations received to fund the airing might be considered “contributions” under § 1056-B(2-A). Because Maine’s definitions of those terms are vague, APIA or NOM cannot know whether it has or will cross the \$5,000 threshold. And because the definitions plainly reach beyond that which is constitutionally regulable, they are substantially overbroad as a matter of law.

Moreover, even if APIA or NOM’s efforts to further their purposes in preserving the

traditional definition of marriage in Maine were regulable, their disbursements for these activities were but a small portion of the total expenditures made by them that year. Thus, it is not APIA's or NOM's major purpose to initiate, promote, or advocate the defeat of a ballot measure in Maine. VC ¶¶ 25, 46.

Enforcement proceedings against NOM or APIA would have the effect of punishing them for the exercise of their rights, privileges, and immunities guaranteed by the Constitution of the United States. Moreover, the threat of enforcement proceedings has a chilling effect on the First Amendment rights of NOM and APIA, in that the threat of enforcement proceeding deters them from fully and vigorously exercising their rights.

Although Plaintiffs NOM and APIA believe that the statutes at issue herein are unconstitutional, and therefore, cannot be legally enforced, they are chilled in the exercise of their rights to engage in the kinds of communications and expenditures outlined in the complaint because of the threat and fear that the defendants will attempt to enforce the statutes against them, thereby subjecting them to the burden and expense of defending themselves and the potential risk of severe penalties in the event that the regulations are held to be valid.

Plaintiffs have no adequate remedy at law.

Argument

I. NOM and APIA Meet the Standard for a Temporary Restraining Order.

The First Circuit uses the same standard to for temporary restraining orders and preliminary injunctions. *See Northeast Express Regional Airlines, Inc. v. Northwest Airlines, Inc.*, 169 B.R. 258, 260 (D. Maine 1994). The court must take into account: "(1.) The likelihood

of success on the merits; (2.) The potential for irreparable injury; (3.) A balancing of the relevant equities (most importantly, the hardship to the nonmovant if the restrainer issues as as contrasted with the hardship to the movant if interim relief is withheld); and (4.) The effect on the public interest of a grant or denial of the restrainer.” *Narragansett Indian Tribes v. Gilbert*, 934 F.2d 4,7 (1st Cir. 1991). For the reasons that follow, Plaintiffs are likely to succeed on the merits, Plaintiffs will suffer irreparable injury if the injunction is not granted, injury to Plaintiffs outweighs any harm that granting injunctive relief would inflict upon Defendants, and a temporary restraining order serves the public interest.

II. NOM and APIA Are Likely to Succeed on the Merits.

A. Strict Scrutiny Applies Because Maine Chose PAC-Style Reporting Over One-Time Reporting.

While BQC status under § 1056-B is nominally distinct from PAC status under Maine law, BQC status imposes organizational and conduct burdens similar to those imposed on a PAC. Individuals and organizations falling under § 1056-B must undergo registration, must appoint a treasurer, must use a designated account, must keep detailed records for four years, including invoices for amounts over \$50, must report contributions and expenditures at frequent intervals, and must disclose information about persons making contributions over \$100.³

These PAC-style requirements impose substantial burdens on the individuals and organizations subject to them. *See Davis v. FEC*, 127 S. Ct. 2759, 2774-75 (2008) (*quoting*

³ It should be noted that, while Plaintiffs NOM and APIA are organizations, the requirements of 1056-B apply equally to individuals who meet the \$5,000 threshold. In the First Amendment context, a plaintiff is not limited to alleging constitutional defects in a statute as applied to him, but may allege constitutional infirmities in the statute generally. *See Houston v. Hill*, 482 U.S. 451 (1987).

Buckley, 424 U.S. at 64) (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”); *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995) (recognizing that a person may wish to avoid disclosure for “fear of economic or official retaliation, concern about social ostracism, or merely . . . a desire to preserve . . . privacy”); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 253 (1986) (“*MCFL*”) (“Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.”); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (“[t]he [*MCFL*] Court recognized that reporting and disclosure requirements are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy.”)

Because the registration and reporting requirements at issue here seriously burden core political speech, § 1056-B is subject to strict scrutiny. *See MCFL*, 479 U.S. at 256 (“When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.”); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) (“The Act imposes requirements similar to those in the federal statute involved in *MCFL* Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. [citations omitted] Thus, they must be justified by a compelling state interest.”) That strict scrutiny is appropriate here is also clear from *Volle*, which held that “advocacy concerning referendum-type elections . . . involves ‘core political speech,’ and state regulation of election advocacy accordingly requires ‘exacting scrutiny’ to ensure that the regulation is ‘narrowly

tailored’ to an ‘overriding state interest.’” *Volle*, 69 F. Supp. 2d at 172 (quoting *McIntyre*, 514 U.S. at 347).

As this Court noted in *Volle*, the Supreme Court has recognized that it is “legitimate for a state to require sponsors of ballot initiatives to disclose to the State the names of proponents of the petition and the amount being spent” as a means of informing voters about “the source and amount of money spent by proponents to get a measure on the ballot.” *Volle*, 69 F. Supp. 2d at 174 (quoting *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203 (1999) (“*Buckley II*”). Such, disclosure, however, falls far short of the PAC-style registration and reporting requirements at issue in this case.

The Supreme Court has repeatedly held that the state’s interest in one-time disclosure does not justify imposing PAC-style requirements on an individual or organization. In *MCFL*, for example, the Supreme Court held that one-time reporting of independent expenditures was a less restrictive means of achieving the state’s legitimate informational interest than imposing the “full panoply of regulations that accompany status as a political committee.” *MCFL*, 479 U.S. at 262. Similarly, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Supreme Court struck down contribution limits for political action committees, noting that “[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed.” *Id.* at 299-300.

In *Volle* this Court likewise held unconstitutional Maine’s PAC registration statute, which imposed registration and reporting burdens similar to those imposed by § 1056-B. *Volle* acknowledged that Maine had an interest in disclosure, but nonetheless held that “Maine’s

registration statute goes considerably beyond what is permitted and is therefore unconstitutional.” *Volle*, 69 F. Supp. 2d at 176. Since any informational interest Maine has in contributions to or expenditures by NOM and APIA related to Maine ballot measures could be achieved via one-time reporting, § 1056-B is not narrowly tailored to this interest, but is instead unconstitutional facially and as applied to Plaintiffs.

B. Section 1056-B Is Unconstitutional Facially and as Applied to Plaintiffs, Because It Imposes PAC-style Burdens on Individuals and Organizations that Do Not Have Ballot Measure Advocacy as Their Major Purpose.

Further, § 1056-B is unconstitutional because it imposes PAC-style requirements without regard to whether the individual or organization in question has as its major purpose the initiation, promotion or defeat of a ballot measure. The right of association is a “basic constitutional freedom” that is “closely allied to freedom of speech and a right which, like free speech lies at the foundation of a free society.” *Buckley*, 424 U.S. at 25. To protect that right and to assure that registration requirements do not chill core political speech, *Buckley* established the “major purpose” test, which is used to determine whether a particular group must register as a political committee under federal election law. That test, in the context of political speech for candidates, provides that an organization is a political committee *only if* it is “under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* at 79 (emphasis added). The purpose of the test is to reduce the burden on First Amendment speech by groups that are only incidentally involved in advocating the election or defeat of a candidate. Similarly, in the case of a political organization that does not have as its major purpose the passage or defeat of a ballot measure, a registration requirement which ignores the “major

purpose” of an organization unconstitutionally chills political speech. *See id.* at 75-80; *MCFL*, 479 U.S. at 248-49.

Maine’s BQC registration statute, however, contains no major purpose requirement. “Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question” is defined as a BQC under the law.

Here, NOM is nonprofit issue-advocacy corporation dedicated to preserving the traditional definition of marriage. NOM is a national organization active in all fifty states with a projected budget for 2009 of \$7 million. While NOM has referenced the Maine same-sex marriage ballot measure in some of its communications since May of 2009, donations arising from such communications make up only a small portion of the total donations received by NOM this year. Nor do expenditures made by NOM relating to the Maine same-sex marriage ballot measure make up more than a small portion of its overall expenditures. Thus, it is not NOM’s major purpose to initiate, promote or advocate the defeat of ballot measures.

Likewise, APIA is a nonprofit issue-advocacy organization dedicated to promoting equality of opportunity and ordered liberty. It is a national organization, and while APIA intends to buy television time in Maine to air an advertisement regarding the same-sex marriage issue in Maine, such disbursements will make up only a small portion of the total disbursements made by APIA this year. Thus, it is not NOM’s major purpose to initiate, promote or advocate the defeat of ballot measures.

NOM wishes to continue soliciting donations referencing the Maine same-sex marriage referendum in excess of the \$5,000 threshold for BQC status. APIA wishes to make disbursements regarding the Maine same-sex ballot referendum in excess of \$5,000. VC ¶ 20. These donations and disbursements may constitute “contributions” and “expenditures” for purposes of § 1056-B. However, it is *not* NOM or APIA’s major purpose to advocate on behalf of Maine’s ballot measures. Because the definition of a ballot committee includes those individuals or organizations whose major purpose is *not* to influence the passage or defeat of Maine’s ballot measures, 21-A M.R.S.A. § 1056-B is unconstitutionally overbroad on its face and as applied to Plaintiffs. Thus, § 1056-B must be deemed unconstitutional.

C. Section 1056-B Is Vague and Regulates the Receipt of Donations that Are Not Contributions.

The definition of “contribution” contained in § 1056-B is also unconstitutional, both facially and as applied to Plaintiffs. In *Buckley*, the Supreme Court recognized that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *Id.* at 41, n.48 (citation omitted). Accordingly, *Buckley* limited “contributions” to “funds provided to a candidate or political party or campaign committee”⁴ or specifically “*earmarked for political purposes*,” by which *Buckley* clearly meant *regulable* political purposes, i.e., express-advocacy “independent expenditures” or “contributions,” *Id.* at 23 n.24 (“So defined, ‘contributions’ have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.”). That the Court meant “for political

⁴ The first *Buckley*-approved definition of “contribution” is not at issue here. Neither APIA nor NOM is a candidate, political party, or a committee formed to elect a candidate or pass or defeat a ballot measure.

purposes” includes only *regulable* activities was recognized by the Second Circuit in *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) (“*SEF*”).

In *SEF*, the Second Circuit noted that “[t]he only contributions ‘earmarked for political purposes’ with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA.” 65 F.3d at 295. *See also id.* (“*Buckley*’s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions”). “Accordingly,” the court noted, “disclosure is only required under [2 U.S.C.] § 441d(a)(3) for solicitations of contributions that are earmarked for activities or ‘communications that expressly advocate the election or defeat of a clearly identified candidate.’” *Id.* (quoting *Buckley*, 424 U.S. at 80).

The Second Circuit also addressed the “earmarked” requirement in *SEF*, ruling that if a communication does not itself contain express advocacy but “*contains solicitations clearly indicating* that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office,” or, in this context, a ballot measure in Maine, it “may still fall within the reach of [regulation].” 65 F.3d at 295 (emphases added).

This is in keeping with the well-established doctrine that the constitution requires that a would-be speaker must know, *based on the meaning of the words he is using in his communication*, whether or not his communication is regulable; a regulation of speech that instead relies on surmising the intent or effect suffers a constitutional defect. *Thomas v. Collins*, 323 U.S. 516 (1945); *see also Buckley*, 424 U.S. at 43; *McConnell v. FEC*, 540 U.S. 93, 192 (2003). In *FEC v. Wisconsin Right to Life, Inc.*, the Supreme Court confirmed that determining

the regulability of political speech on the basis of its intent and effect was rejected as impermissibly vague and overbroad more than thirty years ago, as such an approach “would afford no security for free discussion.” 551 U.S. 449, 467 (2007) (“*WRTL II*”) (internal quotations omitted). And the Court in *WRTL II* also confirmed that “*McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject.” *Id.* 551 U.S. at 467. A test delineating regulable political speech “should provide a safe harbor for those who wish to exercise First Amendment rights,” and “should also reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* (internal quotations omitted).

Maine law imposes BQC status on any individual or non-PAC that “solicits and receives contributions or makes expenditures . . . aggregating in excess of \$5,000 *for the purpose of initiating, promoting, defeating or influencing in any way a ballot question*”(emphasis added). The definition of “contribution” provided in § 1056-B(2-A) includes: (1) “Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question”; and (2) “Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient’s activities regarding a ballot question.” 21-A M.R.S.A. § 1056-B.

The practical necessity of *Buckley*’s constitutional requirement is obvious here. How can APIA or NOM know whether a particular solicitation did or would “lead the contributor to

believe” that her donation will be used to expressly advocate for the passage or defeat of a ballot question in Maine? Or how can either know whether Maine will, after the fact, “reasonably determine[],” “in the context of the contribution and the recipient’s activities regarding a ballot question” that donations were “provided by the contributor” to expressly advocate for or against a ballot question in Maine? Some of NOM’s solicitations mentioned Maine. Given that some would-be donors might be aware of the current ballot question in Maine, is that enough to make all funds donated as a result of all those solicitations “contributions” in Maine? Would the mention of Maine in the context of a solicitation discussing same-sex marriage allow Maine to “reasonably . . . determine[]” “when viewed in the context of . . . recipient’s activities” that the funds resulting from that solicitation were, in fact, “for the purpose of” expressly advocating the passage or defeat of a ballot question in Maine? If APIA solicits donations to be used in activities that included but are not limited to airing in Maine, or in other states, does that mean that the funds received are “contributions” for purposes of imposing Maine BQC status? Facing an investigation and possible enforcement action if it fails to correctly predict Maine’s contextual, intent-and-effect conclusion that donations were, in fact “earmarked,” certainly “afford[s]” “[APIA] no security for free discussion.” *WRTL II*, 551 U.S. at 467 (citations omitted). Maine’s definition of “contribution” for BQCs is unconstitutionally vague and overbroad. It must, but does not, limit regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes.

In *Volle*, this Court noted and apparently accepted Maine’s argument that the phrases “for the purpose of” and “to influence in any way” in Maine’s definition of a PAC “apply only to

monies raised or spent for the express advocacy of the passage or defeat of a specific ballot measure and thereby comply with the language of *Buckley*.” 69 F. Supp. 2d at 175.

Even assuming, arguendo, that the construction proffered by Maine in *Volle* is binding on those phrases and the phrase “in connection with” in the definitions of BQC and “contribution” here,⁵ Maine considers amorphous and subjective contextual factors in determining whether donations to an organization are *earmarked* for regulable activities and trigger registration and reporting as a BQC for the organization receiving them. Maine defines donations to an organization as “contributions” triggering BQC status if they are (1) “provided in response to a solicitation *that would lead the contributor to believe* that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question”; or if those donations (2) *can reasonably be determined to have been provided by the contributor* for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient’s activities regarding a ballot question.” 21-A M.R.S.A. § 1056-B(2-A)(B, C) (emphases added). Because it does not limit regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes, § 1056-B’s contribution definition is unconstitutionally vague

⁵ “[Maine] is not forever bound, by estoppel or otherwise, to the view of the law that it assert[ed] in th[at] litigation.” *Vermont Right to Life, Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). *See also id.* at 383-84 (collecting cases with similar holdings). If Defendants no longer adhere to the construction of these terms accepted as authoritative in *Volle*, then § 1056-B’s definition of BQC, and “contribution” are unconstitutionally vague and overbroad as a matter of law because they target non-express advocacy for or against a ballot question. *See Volle*, 69 F. Supp.2d at 174 n.4 (explaining that under *Buckley* and *MCFL*, regulation of core political speech in elections must be limited to “express advocacy of the election or defeat” and pointing out the countervailing lack, in the ballot measure context, of a compelling government interest in averting corruption).

and overbroad.

D. Section 1056-B Is Unconstitutional Facially and As Applied to Plaintiffs, Because Its \$100 Reporting Requirement Fails Strict Scrutiny.

Maine law requires that all BQC reports “must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of \$100 in any election,” as well as contributor information “for any person who has made contributions exceeding \$100 in the aggregate.” BQCs are required “to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes.” 21-A M.R.S.A. § 1056-B(2). Apart from any other constitutional infirmities, § 1056-B’s \$100 reporting threshold is unconstitutional because it is not narrowly tailored to any compelling government interest.

The only interest the Supreme Court has recognized as compelling in the ballot measure context is the informational interest that “allows voters to place each candidate in the political spectrum” and that the “sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance.” *Buckley*, 424 U.S. at 67.⁶ Even this rationale, it should be noted, is

⁶ While *Buckley* also recognized state interests in the prevention of corruption and the enforcement of contributions limits, *id.* at 66, 68, subsequent cases have held that these interests do not apply in the ballot measure context. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (“Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular

attenuated in the ballot measure context, as there is no “political spectrum” and certainly no “future performance,” involved in a ballot measure. *Id. See also Buckley v. Am. Constitutional Law Found., Inc.* (“*Buckley II*”), 525 U.S. 182, 203 (1999) (noting that ballot-measure expenditure reporting adds little insight as to the measure). Nevertheless, states have an interest in providing voters with the information necessary to determine “who [is] really behind [a] proposition.” *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 (9th Cir. 2007). This interest is applicable in the ballot measure context, as it serves to prevent “the wolf from masquerading in sheep’s clothing,” alleviating concerns that donors who donate an amount substantial enough to influence a campaign are masking their support for, or opposition to, a particular ballot measure, and causing voter ignorance. *Getman*, 328 F.3d at 1106 n.24.

The \$100 reporting threshold of § 1056-B is not narrowly tailored to the State’s interest in avoiding the “wolf in sheep’s clothing” problem. Maine may have an interest in providing voters with the information necessary to determine “who [is] really behind [a] proposition.” *Randolph*, 507 F.3d at 1179. However, common sense dictates that the “value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.” *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009). Voters gain little, if any, information from the disclosure of small donors. *Id.* at 1036 (Noonan, J., concurring) (“How do the names of small contributors affect

vote on a public issue.”); *see also Emily’s List v. Federal Election Com’n*, 2009 WL 2972412 *12 (D.C. Cir. Sep. 18, 2009) (“Donations to and spending by a non-profit cannot corrupt a candidate or officeholder.”); *Volle*, 69 F. Supp.2d at 175 n.7; *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (citing *McConnell v. FEC*, 540 U.S. 93, 196 (2003)) (enforcement interest not present in ballot measure context because contribution limits do not apply).

anyone else's vote? Does any voter exclaim, 'Hank Jones gave \$76 to this cause. I must be against it!'"") A disclosure threshold that requires an organization to disclose the name, address, occupation, employer, and employer's address for a person that contributes as little as \$100 and then publishes that information on the Internet is so widely overinclusive and far removed from the State's interest in providing voters with information as to the major donors supporting or opposing a particular ballot measure that it cannot survive strict scrutiny.

III. Absent an Injunction, NOM and APIA Will Suffer Irreparable Harm.

The Supreme Court has long recognized that the "loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, NOM and APIA are forced to either forego their First Amendment rights to free speech and association or face the substantial registration and reporting burdens imposed by § 1056-B. Because there is no remedy at law for the chilling effect on First Amendment rights, NOM and APIA are irreparably harmed by this unconstitutional statute.

IV. The Balance of Harms Tips in the Favor of NOM and APIA.

NOM and APIA will suffer irreparable harm if Maine is allowed to continue to enforce § 1056-B. However, Maine, which cannot legitimately enforce statutes that unconstitutionally impinge on First Amendment rights, cannot be harmed by an injunction that forbids it to exercise power that it does not have. At most, the State will be prevented for a short time from prosecuting Plaintiffs. Thus, NOM and APIA have shown that the balance of harms tips in their favor.

V. A Temporary Restraining Order Serves the Public Interest.

The First Amendment “was designed to ‘secure the widest possible dissemination of information from diverse and antagonistic sources,’ and ‘to assure the unfettered interchange of ideas for the bringing about of social changes desired by the people.’” *Buckley*, 424 U.S. at 48-49. Therefore, the purposes of the First Amendment, and the public interest, would be served by granting Plaintiffs’ request for injunctive relief.

CONCLUSION

For the reasons given above, 21-A M.R.S.A. § 1056-B is unconstitutional both facially and as applied to Plaintiffs. All the required elements for a temporary restraining order are met. Plaintiffs therefore respectfully ask this Court to expeditiously grant the requested injunctive relief.

Respectfully submitted,

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