

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

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**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; **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.*

Civil Cause No. 1:09-cv-538

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**First Amended Verified Complaint for Declaratory and Injunctive Relief  
(INJUNCTIVE RELIEF SOUGHT)**

Come now Plaintiffs the National Organization for Marriage (“NOM”), and American Principles In Action (“APIA”), and for their Complaint against the Defendants, state the following:

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. This case concerns the constitutionality of Maine’s ballot question committee (“BQC”) registration statute, codified in Maine Revised Statutes Annotated (“M.R.S.A.”), Title 21-A § 1056-B.

2. Plaintiffs complain that 21-A M.R.S.A. § 1056-B is unconstitutional in that it infringes protected First Amendment speech and freedom of association and is not narrowly tailored to serve a compelling state interest.

### **Jurisdiction**

3. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

4. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction of the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b). The defendants are officers, employees or agents of the State of Maine.

### **Parties**

6. Plaintiff NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation incorporated in Virginia dedicated to preserving the traditional definition of marriage.

7. Plaintiff APIA is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy organization incorporated in the District of Columbia dedicated to promoting equality of opportunity and ordered liberty.

8. Defendants Walter F. McKee, Andre G. Duchette, Michael P. Friedman, Francis C. Marsano, and Edward M. Youngblood are all residents of Maine and are members of the Commission on Governmental Ethics and Election Practices (the “Commission”). The Commission is charged under 21-A M.R.S.A. §§ 1003 and 1127 with the enforcement of the

provisions of Chapters 13 and 14, respectively, of Title 21-A. The Defendants are sued in their official capacity and are subject to the jurisdiction of this Court.

9. *Deleted from Original Complaint.*

10. Defendant Janet T. Mills is a resident of the State of Maine and serves as Attorney General. The Attorney General is charged with enforcing Maine’s election laws pursuant to 21-A M.R.S.A. §§ 33, 1003, and 1062-A. She is sued in her official capacity.

11. Defendants Mark Lawrence, Stephanie Anderson, Norman Croteau, Evert Fowle, R. Christopher Almy, Geoffrey Rushlau, Michael E. Povich, and Neal T. Adams are residents of the State of Maine and serve as District Attorneys throughout the State. District Attorneys are charged with enforcing Maine’s election laws pursuant to 21-A M.R.S.A. § 33, 30-A M.R.S.A. §§ 282 and 283. Each is sued in his or her official capacity.

### **Regulatory Scheme**

12. 21-A M.R.S.A. § 1056-B, which provides as follows:

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 must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of influencing in any way a ballot question. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee. In the case of municipal election, the registration and reports must be filed with the clerk of that municipality.

13. A “person” is defined by 21-A M.R.S.A. § 1001 as “an individual, committee,

firm, partnership, corporation, association, group or organization.”

**14.** For purposes of the \$5,000 threshold requirement, “contribution” “includes, but is not limited to”:

- A. Funds that the contributor specified were given in connection with a ballot question;
- B. 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;
- C. 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; and
- D. Funds or transfers from the general treasury of an organization filing a ballot question report.

21-A M.R.S.A. § 1056-B(2-A)

**15.** 21-A M.R.S.A. § 1056-B(1) further requires that “A report required by this section must be filed with the commission according to the reporting schedule in section 1059.”

**16.** Reports required for BQCs:

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; the date of each contribution; the date and purpose of each expenditure; and the name and address of each contributor, payee or creditor; and the occupation and principal place of business, if any, for any person who has made contributions exceeding \$100 in the aggregate. The filer is 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).

**17.** 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.” Commission on Governmental Ethics and Election Practices, *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.” (Exhibit 7.)

**18.** 21-A M.R.S.A. § 1056-B(4) provides that “[a] person filing a report required by this section shall keep records as required by this section for 4 years following the election to which the records pertain.” BQCs must also “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.”

**19.** 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).

**20.** 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).

**21.** 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).

### **Facts**

**22.** On May 6, 2009, Governor John Baldacci signed into law legislation recognizing same-sex marriage in Maine. On May 7, 2009, opponents of the measure submitted the required

paperwork necessary to launch a “people’s veto” campaign, which would leave the matter to be decided via statewide referendum.

**23.** Plaintiff NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation dedicated to preserving the traditional definition of marriage. NOM is a national organization active in all fifty states.

**24.** NOM solicits and receives most of its funds as undesignated donations from major donors and national organizations. The remainder of its funds are received primarily as undesignated donations from direct mail solicitations. NOM’s projected budget for 2009 is \$7 million.

**25.** NOM does not have as its major purpose the promotion or defeat of any Maine referendum or ballot question.

**26.** On May 6, 2009, NOM distributed an email update to subscribers focused on a proposed referendum in Maine that would overturn then pending legislation in Maine regarding same-sex marriage. The May 6th email stated: “Your support today will allow us to start the referendum process immediately when the law is signed, ensuring that the measure does not take effect before the people of Maine have had their say. Can you afford a gift of \$35, \$50 or \$100 today to help stop same-sex marriage not just in Maine, but in New Hampshire, Iowa, and other states as well?” (Exhibit 5, at 2-3.) NOM estimates that it received approximately \$2,469 in donations as a result of the May 6th email.

**27.** On May 8, 2009, NOM distributed an email update to subscribers describing efforts to enact same-sex marriage in the District of Columbia, Maine, and New Hampshire. After describing events in Maine, the email also stated: “You can fight back! Can you help

defend marriage in Maine and across the country, by donating \$5, \$10, or even, if God has given you the means, \$100 or \$500?” (Exhibit 5, at 4) (Emphasis in original.) NOM estimates that it received approximately \$1,055 in donations as a result of the May 8th email.

**28.** On May 15, 2009, NOM distributed an email update to subscribers. The email focused on events relating to same-sex marriage in New York and New Hampshire, but contained a sentence stating: “We will fight to be your voice in New Hampshire, Maine (more on that next week), Iowa, New York, New Jersey, D.C. and all across this great and God-blessed country of ours.” (Exhibit 5, at 7.)

**29.** On May 22, 2009, NOM distributed an email update to subscribers. The email focused on events relating to same-sex marriage in New Hampshire, New York, and Massachusetts, but contained a sentence stating “I’m back in Maine today – we’ll keep you updated on progress in building the coalition to push back gay marriage in Maine. We will need your help – all the help you can spare!” (Exhibit 5, at 8-9) (Emphasis in original.) NOM estimates that it received approximately \$285 in donations as a result of the May 22nd email.

**30.** On June 12, 2009, NOM distributed an email update to subscribers focused on events relating to same-sex marriage in New York. The email also includes a paragraph regarding Maine, stating: “[i]n Maine, I’ve joined the board of the new coalition to fight to overturn the gay marriage law. It’s called StandforMarriageMaine.com. If you live in Maine, go there right now and find out how you can sign a petition, or collect signatures to get marriage on the ballot this November . . . I was up in Maine this week and the signature gathering effort is gathering great steam.” (Exhibit 5, at 11.) The June 12th also asked “[t]o help us in Maine and all 50 states, can you make a monthly donation?” (Exhibit 5, at 11.)

**31.** On July 8, 2009, NOM distributed an email update to subscribers describing the efforts of Stand for Marriage Maine, a registered Maine PAC, to overturn recently enacted Maine same-sex marriage legislation via referendum. The email asked readers to “[m]ake an online donation at [StandforMarriageMaine.com](http://StandforMarriageMaine.com).” (Exhibit 5, at 13.)

**32.** On July 10, 2009, NOM distributed an email update to subscribers describing efforts to overturn recently enacted Maine same-sex marriage legislation via referendum. The email also stated that “[t]he National Organization for Marriage worked hard with [StandforMarriageMaine](http://StandforMarriageMaine.com) to make this happen. But it could not have happened without your help! You are the ones who made this happen... and we need you to help secure this victory: Can you help us with \$10, 25, or \$100 so that Maine – and our country – can recover the true meaning or marriage?” (Exhibit 5, at 14) (Emphasis in original.) NOM estimates that it received approximately \$350 in donations as a result of the July 10th email.

**33.** On July 17, 2009, NOM distributed an email update to subscribers. The email focused mainly on events related to same-sex marriage in the District of Columbia, but with a brief description of recent events in Maine. NOM estimates that it received approximately \$40 in donations as a result of the July 17th email.

**34.** On July 31, 2009, NOM distributed an email update to subscribers focused on events related to same-sex marriage in Maine, and mentioned that “[StandforMarriageMaine.com](http://StandforMarriageMaine.com) has turned in an extraordinary 100,000 signatures to overturn gay marriage.” (Exhibit 5, at 20.) NOM estimates that it received approximately \$255 in donations as a result of the July 31st email.

**35.** On August 7, 2009, NOM distributed an email update to subscribers describing

the efforts to overturn recently enacted Maine same-sex marriage legislation via referendum. The email asked readers to “[v]isit [StandforMarriageMaine.com](http://StandforMarriageMaine.com) today to make your contribution in the fight to protect marriage in Maine!” (Exhibit 5, at 23) (Emphasis in original.) The email also added that readers could “[u]se this hyperlink to help support NOM’s work not only in Maine but around the country, wherever the need arises.” (Exhibit 5, at 23) (Emphasis in original.) NOM estimates that it received approximately \$60 in donations as a result of the August 7th email.

**36.** On August 26, 2009, NOM distributed an email update to subscribers focused on events related to same-sex marriage in New Jersey and New York. The email included one reference to a Maine resident, but otherwise did not discuss the Maine referendum.

**37.** On August 28, 2009, NOM distributed an email update to subscribers describing a recent article on NOM executive director Brian Brown and focusing on events related to same-sex marriage in Iowa. One sentence in the email stated “Help us fight to protect marriage in Iowa, Maine and everywhere across this great land – donate today!” (Exhibit 5, at 28) (Emphasis in original.) NOM estimates that it received approximately \$395 in donations as a result of the August 28th email.

**38.** On September 4, 2009, NOM distributed an email update to subscribers update. This email stated that “Marriage is now officially on the ballot in Maine this November” and twice urged readers to donate to Stand for Marriage Maine. (Exhibit 5, at 30.)

**39.** Each of the above listed emails contained a hyperlinked “Donate” button which sent potential donors to the donations screen at <http://www.nationformarriage.org>. The donation screen at <http://www.nationformarriage.org> provides that “[n]o funds will be earmarked or reserved for any political purpose.”

**40.** In July of 2009, NOM distributed newsletter to subscribers. One of the articles in this newsletter described NOM's participation in the Maine same-sex marriage referendum effort, and stated: "Your support of NOM is critical to the success of this effort." The newsletter also included a donation card and return envelope for donations to NOM. (Exhibit 6, at 4.)

**41.** On August 13, and 24, 2009, the Commission received email correspondence from Fred Karger of Californians Against Hate, alleging that NOM, as well as several other organizations, was engaged in "money laundering" by contributing to Stand for Marriage Maine PAC. (Exhibits 9, 10.)

**42.** On October 1, 2009, the Commission conducted a preliminary fact gathering regarding Mr. Karger's allegations. While the Commission took no action at this meeting regarding Mr. Karger's specific allegations, the Commission did decide to authorize its staff to conduct an investigation regarding whether NOM had violated Section 1056-B by failing to register as a BQC, with a suggested scope for the investigation to be outlined at a future meeting of the Commission. (Exhibit 11.)

**43.** Depending on which, if any, of the donations for the above listed emails and newsletters are considered "contributions" for purposes of section 1056-B, NOM is either near or has already exceeded the \$5,000 threshold for ballot question committee status.

**44.** NOM intends to distribute further emails and newsletters mentioning Maine and soliciting donations, which will exceed \$5,000, both during the current election cycle and in future elections. However, NOM fears enforcement under section 1056-B based on any such future activities, as well as for activities already engaged in.

**45.** Plaintiff APIA is a nonprofit 26 U.S.C. § 501(c)(4) organization dedicated to

promoting equality of opportunity and ordered liberty.

**46.** APIA does not have as its major purpose the promotion or defeat of any Maine referendum or ballot question.

**47.** APIA intends to produce a 30 second video entitled “Bigot” relating to same-sex marriage in Maine and place it on its website. The script for the ad is as follows:

Girl: Mommy, are you a bigot?

Mother: What?

Girl: At school, we learned that people who are against gay marriage are bigots.

Mother: No, dear. I believe that homosexuals should be treated fairly--but I also believe that marriage should be just for one man and one woman. That doesn't make me a bigot.

Girl: What about Reverend Jones and Father Diego? Are they bigots?

Mother: Did you learn that at school too?

*Girl nods*

VO: Think that gay marriage won't affect your family? Think again.

*Vote Yes Graphic*

**48.** APIA also intends to produce a 30 second video entitled “The New Curriculum” relating to same-sex marriage in Maine and place it on its website. The script for the ad is as follows:

School Administrator (*talking to an off-camera mic/reporter--as he talks, we see images of teachers in classrooms reading from blurred-out books, GLSEN-style posters, etc.*):

No, we're very proud of the new curriculum. It's all about teaching kids to embrace different lifestyles and explore their own sexuality.

*Switching from images of sex ed classrooms to little boy on a bench in a darkened school hallway. We can see an adult male (not his face, we're looking from the perspective of the child and the view never includes his head) come out of an office, take the boy's hand, lead him into the office, and close the door. Freeze on the closed door, which has a sign that says, "Counseling Session: Do Not Disturb"*

Reporter (VO) : Yes, but is it appropriate for kindergartners to be receiving counseling about whether they might be gay?

School Admin (VO): Sure, we've had a few complaints, but there's not much parents can do. It's the law, after all.

VO: Think gay marriage won't affect your family? Think again.

*Vote Yes Graphic*

**49.** APIA estimates that the total cost of producing “Bigot” and “The New Curriculum” and placing them on its website is approximately \$3,000.

**50.** APIA intends to buy television time in Maine to air “Bigot” and “The New Curriculum.” APIA is chilled from doing so, however, by the prospect of having to register as a BQC and meet the reporting and other requirements of sections 1056-B and 1059.

**51.** Further, APIA intends to solicit donations in order to defray the cost of producing and airing “Bigot” and “The New Curriculum,” as well as other expenses, both during the current election cycle and in future elections. However, APIA fears that in doing so it will be deemed a BQC under Section 1056-B, and will be subject to the reporting and other requirements of sections 1056-B and 1059.

**52.** Immediate and irreparable injury, loss, and damage will result to Plaintiffs by

reason of the regulation's chilling effect on Plaintiffs' free speech and associational rights and by the potential for enforcement of Section 1056-B against NOM and APIA.

53. Plaintiffs have no adequate remedy at law.

### **Count I**

#### **Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That It Imposes Burdensome Registration and Reporting Requirements on Individuals and Organizations Based on Ballot Measure Advocacy.**

54. Plaintiffs reallege the preceding paragraphs.

55. Section 1056-B imposes substantial organizational and conduct burdens on individuals and organizations which qualify as a BQC. Individuals and organizations falling under Section 1056-B must undergo registration, must appoint a treasurer, must use a designated account, must keep detailed records for four years, must report contributions and expenditures at prescribed intervals, and must disclose information about persons making contributions over \$100.

56. “[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). In addition, “reporting and disclosure requirements are more burdensome for multi-purpose organizations . . . than for political action committees whose sole purpose is political advocacy.” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).

57. Because Section 1056-B imposes substantial burdens on political speech and association, it is subject to strict scrutiny. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986).

58. The Supreme Court has held that three governmental interests may justify

campaign disclosure laws if the regulations are narrowly tailored to serve those interests. *See Buckley*, 424 U.S. at 66-68. First, “disclosure provides the electorate with information as to where the political campaign money comes from and how it is spent by the candidate.” *Id.* at 66. This information alerts voters to the “interests to which a candidate is most likely to be responsive.” *Id.* at 67. Second, disclosure can deter actual corruption and avoid the appearance thereof. *Id.* Lastly, disclosure requirements are an essential “means of gathering the data necessary to detect violations of [contribution limits].” *Id.* at 68.

**59.** However, *Buckley* involved candidate elections, and the Supreme Court has since clarified that the Corruption Interest is simply not present in the context of ballot measure elections. *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 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 v. Webster*, 69 F. Supp.2d 171, 175 n.7 (D. Me. 1999).

**60.** The enforcement interest is likewise not applicable in the context of ballot measure elections because Maine lacks contribution limits with respect to ballot measures. *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)).

**61.** The Supreme Court has held that one-time reporting of independent expenditures is 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.” *Massachusetts*

*Citizens for Life*, 479 U.S. at 262; *see also Volle v. Webster*, 69 F. Supp. 2d 171, 176 (holding that by imposing “the full panoply of registration and reporting requirements that *Buckley I* examined under the Federal Election Campaign Act . . . Maine’s registration statute goes considerably beyond what is permitted and is therefore unconstitutional.”)

62. Because Section 1056-B would subject NOM and APIA to the “full panoply of registration and reporting requirements” rather than the less restrictive means of one-time disclosure of expenditures, the provision is unconstitutional both facially and as applied to NOM and APIA.

### **Count II**

#### **Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That It Imposes Burdensome Registration and Reporting Requirements on Individuals and Organizations That Do Not Have Ballot Measure Advocacy As Their Major Purpose.**

63. Plaintiffs reallege the preceding paragraphs.

64. Section 1056-B imposes substantial organizational and conduct burdens on individuals and organizations which qualify as a BQC. Individuals and organizations falling under Section 1056-B must undergo registration, must appoint a treasurer, must use a designated account, must keep detailed records for four years, must report contributions and expenditures at prescribed intervals, and must disclose information about persons making contributions over \$100.

65. 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 v. Valeo*, 424 U.S. 1, 25 (1976).

66. To protect that right and to assure that registration requirements did not chill core

First Amendment speech, the *Buckley* Court promulgated its “major purpose” to determine whether a particular group must suffer the burden of registering and reporting as a political committee under federal election law.

67. That test, in the context of political speech regarding 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.

68. Similarly, in the case of a political organization that does not have as its major purpose the initiation, promotion 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.

69. 21-A M.R.S.A. § 1056-B requires individuals and organizations to register as a BQC without regard to whether the major purpose of the individual or organization is the passage or defeat of a ballot measure.

70. Neither NOM nor APIA has as its major purpose the initiation, promotion or defeat of a ballot measure.

71. Because Section 1056-B would subject NOM and APIA to burdensome registration and reporting requirements without regard to whether they have as their major purpose the initiation, promotion or defeat of a ballot measure, the provision is unconstitutional both facially and as applied to Plaintiffs.

### Count III

**Section 1056-B’s Definition of “Contribution” is Unconstitutional Facially and As Applied to Plaintiffs, in That It is Unconstitutionally Vague and Overbroad.**

72. Plaintiffs reallege the preceding paragraphs.

73. The definition of “contribution” in 21-A M.R.S.A. § 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.”

74. The vagueness doctrine bars enforcement of a statute whose terms are “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *U.S. v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005) (quoting *U.S. v. Lanier*, 520 U.S. 259, 264 (1997)).

75. NOM and APIA have and would like to solicit donations to support their activities. But neither can know whether those solicitations could be interpreted to result in “contributions” that trigger BQC status.

76. A statute will be facially invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *McCullen v. Coakley*, 571 F.3d 167, 182 (1st Cir. 2009) (quoting *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 n.6 (2008)).

77. A person’s right to freedom of speech cannot be contingent on the reaction to, or interpretation of, that speech by third parties. As the Supreme Court noted in *Buckley*, making the legitimacy of speech turn on the interpretation of third parties is problematic, as it “puts the

speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.” *Buckley*, 424 U.S. at 43.

78. By counting towards the \$5,000 threshold solicitations for donations that “lead the contributor to believe” donations will be used for ballot measure activity, Section 1056-B potentially imposes burdensome registration and reporting requirements on NOM and APIA based on how others interpret and/or react to their speech. For this reason, the definition of “contribution” in Section 1056-B is substantially overbroad.

#### **Count IV**

#### **Section 1056-B is Unconstitutional Facially and As Applied to Plaintiffs, in That Its \$100 Reporting Requirement Fails Strict Scrutiny.**

79. Plaintiffs reallege the preceding paragraphs.

80. Reports required for BQC “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).

81. In *Buckley*, the Supreme Court held that any significant encroachment on First Amendment rights must survive exacting scrutiny, which requires the government to craft a narrowly tailored law to serve a compelling government interest. *See Buckley*, 424 U.S. at 64.

82. The \$100 threshold reporting requirement is not narrowly tailored to the state’s

interest in avoiding corruption, as this interest does not apply in the ballot measure context. *Bellotti*, 435 U.S. at 790.

**83.** Further, Section 1056-B is not narrowly tailored to the state’s informational interest in disclosure, as it requires reporting for contributions and expenditures so low as to give no meaningful information to voters. *Canyon Ferry*, 556 F.3d at 1033. 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 anyone else’s vote? Does any voter exclaim, ‘Hank Jones gave \$76 to this cause. I must be against it!’”)

**84.** Since the \$100 reporting threshold of Section 1056-B is not narrowly tailored to any compelling government interest, the provision is unconstitutional facially and as applied to NOM and APIA.

**Additional Facts and Claims Regarding Plaintiff NOM  
Upon Filing First Amended Verified Complaint**

**Plaintiff NOM and its Future Speech**

**85.** Plaintiff NOM, a non-profit corporation exempt from federal income taxation under I.R.C. § 501.c.4 (2006), is a non-sectarian and non-partisan organization. It is not connected with any political candidate or political party. Nor is it connected with any political committee other than its own.

**86.** Consistent with its mission,<sup>1</sup> NOM seeks in 2010 to engage in multiple forms of speech in Maine, including radio ads,<sup>2</sup> direct mail,<sup>3</sup> and publicly accessible Internet postings of its radio ads and direct mail. *Cf.* ME. REV. STAT. title 21-A, § 1014.1 (2009).

**87.** None of NOM's speech at issue in the amendment to the complaint will contain express advocacy as defined in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52, 80 (1976), *vis-à-vis* state or local office in Maine.

**88.** Nevertheless, the speech has characteristics that are significant under constitutional and Maine law. The speech will have clearly identified candidates for state or local office in Maine, including certified "Maine Clean Elections" candidates. *Cf.* ME. REV. STAT. title 21-A, § 1019-B.1.B (2007 & 2009 (effective 2011)). The speech will be targeted to the relevant electorate in that it can be received in areas where individuals can vote for the clearly identified candidates. Some of the speech – including speech with certified "Maine Clean Elections" candidates, *cf. id.* – will run in the 21 days before a primary or 35 days before a general election ("21-35 Day Windows"), *cf. id.* §§ 1019-B.1.B, 1014.2-A, and therefore also in the 30 days before a primary or 60 days before a general election ("30-60 Day Windows").

**89.** However, some of the speech will not be a broadcast, cable, or satellite ("Broadcast") communication. Plaintiff NOM fears Defendants will say some of this speech

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<sup>1</sup>FIRST AM. VERIFIED COMPL. ("VC") Exh. 12, *available at* [http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About\\_NOM.htm](http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm) (all Internet sites visited Nov. 18, 2009).

<sup>2</sup>VC Exhs. 13-14.

<sup>3</sup>VC Exh. 15.

passes the appeal-to-vote test, *i.e.*, Plaintiff NOM fears Defendants will say the only reasonable interpretation of the speech is as an appeal to vote for or against the clearly identified candidates.

90. Other speech will be Broadcast, yet what is Broadcast will have a reasonable interpretation other than as an appeal to vote for or against the clearly identified candidates.

### **What NOM Does and Does Not Do**

91. To pay for its speech, NOM receives and spends more than \$5000 in each calendar year, *cf. id.* § 1052.5.A.4-5 (2009), with each communication costing more than \$100. *Cf. id.* § 1019-B.3.B.

92. NOM does make direct contributions to Maine political committees, yet not to candidate committees. NOM does not coordinate any of its speech with any candidate for state or local office in Maine, the candidate's agents, or the candidate's committee.<sup>4</sup>

93. Nor is any of the speech at issue here a contribution NOM receives that is earmarked for (1) a Maine political committee or (2) express advocacy as defined in *Buckley vis-à-vis* state or local office in Maine.<sup>5</sup>

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<sup>4</sup>Although it is not material, NOM does not make contributions to any candidate committee or coordinate its speech with any candidate, the candidate's agents, or the candidate's committee.

<sup>5</sup> Although it is not material, none of the speech at issue here is a contribution NOM receives that is earmarked for (1) *any* political committee or (2) express advocacy as defined in *Buckley vis-à-vis any* office.

94. Nor does NOM do any electioneering communications as defined in the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* (“FECA”), whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate for state or local office in Maine.<sup>6</sup>

#### **Maine Law: Regulation of NOM as a Political Committee**

95. Maine law does not chill<sup>7</sup> Plaintiff NOM *vis-à-vis* the speech at issue in the amendment to the complaint. Instead, Plaintiff will comply with the challenged law while asking the Court to declare the law unconstitutional so compliance is no longer necessary.

96. First, Maine law defines a “political action committee” (“PAC”) as:

(4) Any organization, including any corporation or association, that has as its major purpose *initiating, promoting, defeating or influencing a candidate election, campaign* or ballot question and that receives *contributions* or makes *expenditures aggregating more than \$1,500 in a calendar year* for that purpose, including for the collection of signatures for a direct initiative or referendum in this [s]tate; and

(5) Any organization that *does not have as its major purpose promoting, defeating or influencing candidate elections but that receives contributions* or makes *expenditures aggregating more than \$5,000 in a calendar year for the purpose of promoting, defeating or influencing* in any way the nomination or election of any candidate to political office . . . .

ME. REV. STAT. title 21-A, § 1052.5.A (emphasis added). Maine then defines “contribution” and “expenditure” with exceptions that do not apply here. “Contribution” includes a “gift, subscription,

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<sup>6</sup> Although it is not material, NOM does not do any electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate for *any* office.

<sup>7</sup> The term “pre-enforcement” applies before civil enforcement or criminal prosecution. The term “chill” is a subset of “pre-enforcement” and applies in the First Amendment context when speakers, fearing civil enforcement or criminal prosecution, will not engage in their speech. *See, e.g., New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13-14 (1st Cir. 1996) (“NHRL”). Thus, “pre-enforcement” applies to all of Plaintiff’s speech at issue in the amendment to the complaint.

loan, advance or deposit of money or anything of value made to a” PAC, while “expenditure” includes a “purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made for the purpose of influencing the nomination or election of any person to political office; or for the initiation, support or defeat of a campaign ... .” *Id.* § 1052.3-4. NOM is a “person,” because it is a “corporation, association or organization.” *Id.* § 1001.3 (2007).

97. NOM is not under the control of a candidate or candidates for state or local office in Maine.<sup>8</sup> In addition, NOM’s organizational documents – *i.e.*, its articles of incorporation<sup>9</sup> and by-laws<sup>10</sup> – and public statements<sup>11</sup> do not indicate it has the major purpose of nominating or electing a candidate or candidates for state or local office in Maine, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, a candidate or candidates for state or local office in Maine.<sup>12</sup> “Independent expenditure” means express advocacy as defined in *Buckley* and not coordinated with a candidate, a candidate’s committee, or a candidate’s agent, which is the standard under the Constitution. 424 U.S. at 39-51; *cf.* 2 U.S.C. § 431.17 (2002) (following *Buckley* by limiting the statutory independent-expenditure definition to express advocacy).<sup>13</sup>

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<sup>8</sup> Although it is not material, NOM is not under the control of *any* candidate or candidates.

<sup>9</sup> VC Exh. 1.

<sup>10</sup> VC Exh. 2.

<sup>11</sup> *E.g.*, VC Exh. 12.

<sup>12</sup> *See* VC Exh. 16 (IRS Form 990).

<sup>13</sup> Although it is not material, nothing in NOM’s organizational documents or in its public statements indicates that NOM has the major purpose of nominating or electing *any* candidate or candidates, and NOM does not spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

**98.** Nevertheless, NOM reasonably fears that, based on its speech, Defendants will say NOM is an organization, corporation, or association that “has as its major purpose initiating, promoting, ... or influencing a candidate election [or] campaign” and receives more than \$1500 in “contributions,” or makes more than \$1500 in “expenditures,” in a calendar year for that purpose. ME. REV. STAT. title 21-A, § 1052.5.A.4. NOM also reasonably fears that, based on its speech, Defendants will say NOM is an organization that “does not have as its major purpose promoting, defeating, or influencing candidate elections” but that it receives more than \$5000 in “contributions,” or makes more than \$5000 in “expenditures,” in a calendar year to promote or influence in some way “the nomination or election of any candidate to political office ... .” *Id.* § 1052.5.A.5. Either way, NOM will have to comply with a panoply of burdens that Maine imposes on PACs such as NOM, *see, e.g., id.* § 1053-B (2009) (addressing out-of-state PACs), including:

- Registration (including treasurer-designation and bank-account) and termination requirements. *Id.* §§ 1053 (2009), 1054 (2007), 1061 (2009).
- Recordkeeping requirements. *Id.* §§ 1057 (2009).
- Extensive reporting requirements. *Id.* §§ 1056-A (1993), 1058 (2007 & 2009 (effective 2011)), 1059 (2007 & 2009 (effective 2011)), 1060 (2009), and
- Contribution-source bans. 2 U.S.C. §§ 441b.a, 441b.b.2 (2002) (national banks and national corporations), 441e (2002) (foreign nationals).

**99.** Because NOM does not want to bear the burdens of being a PAC, NOM seeks a declaratory judgment that the PAC and expenditure definitions are unconstitutional as applied to NOM’s speech and facially. NOM further asks that the Court preliminarily and then later

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permanently enjoin their enforcement. This will allow NOM to do its speech, and materially similar speech in the future, without complying with the PAC burdens.

**Maine Law: Regulation of What Maine Calls “Independent Expenditures”**

**100.** Second, Maine defines “independent expenditure” as

any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate’s authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate . . . .

ME. REV. STAT. title 21-A, § 1019-B.1.A. However, Maine does not limit its express-advocacy definition to express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80. Instead, it considers the context of speech, *see* 94-270 ME. CODE R. § 10.2.B (2009) (“campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)”);<sup>14, 15</sup> and – by referring to “no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)” – includes speech whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate or candidates. This is the appeal-to-vote test. *Compare* 94-270 ME. CODE R. § 10.2.B<sup>16</sup>

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<sup>14</sup> Available at [http://www.state.me.us/ethics/pdf/laws/commission\\_rules.pdf](http://www.state.me.us/ethics/pdf/laws/commission_rules.pdf) and <http://www.maine.gov/sos/cec/rules/90/94/270/270c001.doc>. Maine rules in general are at <http://www.maine.gov/sos/cec/rules/rules.html>.

<sup>15</sup> See also *Advice Regarding Independent Expenditures for the 2008 General Election* at 1 (Maine Comm’n on Gov’t Ethics & Election Practices 2008) (VC Exh. 17) (“words [that] in context can have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates”), available at <http://www.state.me.us/ethics/pdf/IEMemofor2008GeneralElection.pdf>.

<sup>16</sup> See also *id.*

with *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (“*WRTL II*”) (“no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).

**101.** Furthermore, Maine presumes *any* speech in the 21-35 Day Windows “involving a candidate who is certified as a Maine Clean Election Act candidate” is an independent expenditure, regardless of any other factors. *Id.* § 1019-B.1.B. Then the speaker must either rebut the presumption, *id.* § 1019-B.2, or report the speech itself and more.

**102.** The reporting requirements for what Maine calls “independent expenditures” provide:

A report ... must contain an itemized account of each *contribution* or *expenditure* aggregating in excess of \$100 in any one candidate’s election, the date and purpose of each contribution or expenditure and the name of each payee or creditor. The report must state whether the contribution or expenditure is in support of or in opposition to the candidate and must include ... whether the contribution or expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate.

*Id.* § 1019-B.3.B (emphasis added). With exceptions that do not apply here, “contribution” includes a “gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing the nomination or election of any person to state, county or municipal office ...,” and “expenditure” includes a “purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing the nomination or election of any person to political office ... .” *Id.* § 1012.2.A.1, 1012.3.A.1 (2007).

**103.** Although no contribution *made* by NOM is at issue in the amendment to the complaint, Section 1019-B.3.B does not limit reporting to contributions *made*. Rather, Section 1019-B.3.B also includes contributions *received*. Plaintiff NOM – being either a “person,” PAC, or both – reasonably fears having to report all of its speech as an “independent expenditure” and as an “expenditure.” NOM also reasonably fears having to report all of the “contributions” – as Maine

defines them – which NOM receives. Moreover, Plaintiff reasonably fears Maine will say the “independent expenditures” support or oppose the clearly identified candidates. Then Maine will regulate all the “independent expenditures” under Section 1019-B.1.A; Maine will further regulate under Section 1019-B.1.B all the “independent expenditures” “involving a candidate who is certified as a Maine Clean Election Act candidate” when the speech occurs in the 21-35 Day Windows. The regulation of “independent expenditures” will then occur either under Section 1019-B.2 or under Section 1019-B.3.B. Meanwhile, the regulation of contributions will occur under Section 1019-B.3.B.

**104.** Therefore, Plaintiff NOM seeks a declaratory judgment that the independent-expenditure definition, contribution definition, expenditure definition, express-advocacy definition, and reporting requirements are unconstitutional as applied to NOM’s speech and facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement. This will allow NOM to do its speech, and materially similar speech in the future, without having to comply with the regulation of what Maine calls “independent expenditures.”

#### **Maine Law: Attribution and Disclaimer Requirements**

**105.** Third, Maine law requires attribution and disclaimers on particular speech.

- It requires them when any “person” does an “expenditure,” as Maine defines it, *id.* § 1012.3.A.1, for express advocacy – as Maine defines it – not authorized by a candidate, *id.* § 1014.2, through

broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications . . . .

*Id.* § 1014.1. The attribution and disclaimers

must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 10-point bold print, Times New Roman font, the words “NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE.”

*Id.* § 1014.2.

● Maine law further requires attribution and disclaimers on any “expenditure” – as Maine defines it, *id.* § 1012.3.A.1 – *via* these same media by any “person” naming or depicting a clearly identified candidate in the 21-35 Day Windows. *Id.* § 1014.2-A. The attribution and disclaimers

must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate. The disclosure is not required if the communication was not made for the purpose of influencing the candidate’s nomination for election or election.

*Id.* § 1014.2-A.

**106.** NOM, being a “person,” reasonably fears Defendants will say NOM’s speech through media listed in Sections 1014.1 is an “expenditure” under Section 1012.3.A.1 and is express advocacy as Maine defines it. Then NOM will have to comply with the attribution and disclaimer requirements in Section 1014.2.

**107.** Plaintiff also reasonably fears Defendants will cite Section 1014.2-A and say Plaintiff’s speech is an “expenditure” and is “for the purpose of influencing the candidate’s nomination for election or election.” Then Plaintiff will have to comply with the attribution and disclaimer requirements for speech in the 21-35 Day Windows.

**108.** Even if Plaintiff’s speech did not sweep it into PAC status, NOM reasonably fears

Maine law will subject it to attribution and disclaimer requirements that will burden NOM's limited resources.

**109.** Nor does NOM want Maine, through attribution and identification requirements, to regulate the content of NOM's speech itself.

**110.** Therefore, Plaintiff NOM seeks a declaratory judgment that the expenditure definition, the express-advocacy definition, plus the attribution and disclaimer requirements are unconstitutional as applied to Plaintiff's speech and facially. Plaintiff further asks that the Court preliminarily and then later permanently enjoin their enforcement. This will allow NOM to do its speech, and materially similar speech in the future, without having to comply with the attribution and disclaimer requirements.

#### **Maine Law: Political Committee Disclosure Threshold**

**111.** Fourth, because some persons will donate more than \$50 to NOM and because NOM, with its limited resources, does not wish to bear the bureaucratic burden of reporting all those who contribute more than \$50, *cf. id.* § 1060.6, Plaintiff NOM seeks a declaratory judgment that the Section 1060.6 political-committee disclosure threshold is unconstitutional as applied to NOM's speech and facially. Plaintiff further asks that the Court preliminarily and then later permanently enjoin its enforcement. This will allow NOM to do its speech, and materially similar speech in the future, without disclosing all those who contribute more than \$50, if the Court holds Maine may regulate NOM as a PAC.

**112.** Plaintiff further asks that the Court expunge the records, *i.e.*, NOM's reports it will file before the conclusion of this action, of the information regarding those contributing more than \$50.

### **Maine Law: Donors to NOM**

**113.** Fifth, multiple persons have donated more than \$50 to NOM in a calendar year and wish to continue doing so. At least some have based previous donations on NOM's assurance that it will not disclose them. These persons will not donate if that means being disclosed on PAC reports, *see id.*, or elsewhere. They wish to protect their privacy for its own sake, regardless of whether they fear harassment, retaliation, or social ostracism. They especially wish to protect their privacy, given the reasonable probability of harassment, retaliation, or social ostracism, which they reasonably fear will follow disclosure through PAC reports, if the Court holds Maine may regulate NOM as a PAC. Therefore, Plaintiff NOM seeks a declaratory judgment that the Section 1060.6 political-committee disclosure threshold is unconstitutional as applied to NOM's speech and facially. Plaintiff further asks that the Court preliminarily and then later permanently enjoin its enforcement. This will allow NOM to do its speech, and materially similar speech in the future, without disclosing all those who contribute more than \$50, if the Court holds Maine may regulate NOM as a PAC.

**114.** Plaintiff further asks that the Court expunge the records, *i.e.*, NOM's reports it will file before the conclusion of this action, of the information regarding those contributing more than \$50.

### **Future Speech**

**115.** In materially similar situations in the future, Plaintiff NOM intends to do speech materially similar to all of its planned speech such that Maine law will apply as it does now. NOM's future communications, for example, will mention public figures who are candidates and will occur not only during the 21-35 Day Windows, when public interest is at a peak, but also at other times.

There is a strong likelihood that such similar situations will recur, given that such activity is common and regularly recurring for NOM.

### **Irreparable Harm**

**116.** Unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

### **Count V: The Unambiguously Campaign Related Principle**

**117.** Government may regulate political speech only when it is “unambiguously related to the campaign of a particular ... candidate” in the jurisdiction in question, *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or “unambiguously campaign related” for short. *Id.* at 81.<sup>17</sup> This flows from the principle that law regulating First Amendment liberties must not be overbroad. *Id.* at 80 (“impermissibly broad”). To ask whether political speech is unambiguously campaign related is to ask this straightforward question: Is this a form of political speech that courts allow the jurisdiction to regulate? *See, e.g., NCRL III*, 525 F.3d at 281-82.

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<sup>17</sup>*See also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (“*NCRL IIP*”) (quoting *Buckley*, 424 U.S. at 80); *New Mexico Youth Organized v. Herrera*, No. CIV 08-1156 JCH/WDS, order at 12-13 (D.N.M. Aug. 3, 2009) (“*NMYO*”) (quoting *Buckley*, 424 U.S. at 80) (VC Exh. 18), *appeal docketed*, No. 09-2212 (10th Cir. Sept. 3, 2009), *available at* <http://www.nmcourt.fed.us/Drs-Web/view-file?full-path-file-name=%2Fdata%2Fdrs%2Fdm%2Fdocuments%2Fndd%2F2009%2F08%2F03%2F0002481726-0000000000-08cv01156.pdf>; *Broward Coal. of Condos., Homeowners Ass’ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at \*5 (N.D. Fla. May 22, 2009) (summary-judgment order (quoting *Buckley*, 424 U.S. at 80)) (VC Exh. 19); *Center for Individual Freedom v. Ireland*, 613 F. Supp.2d 777, 785 (S.D. W.Va. 2009) (“*CFIF IP*”) (quoting *Buckley*, 424 U.S. at 80); *Broward*, 2008 WL 4791004 at \*7 (N.D. Fla. Oct. 29, 2008) (preliminary-injunction order (quoting *Buckley*, 424 U.S. at 80)), *clarified on other grounds*, 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008) (VC Exh. 20); *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1141 (D. Utah 2008) (quoting *Buckley*, 424 U.S. at 80), 1144 (citing *Buckley*, 424 U.S. at 80).

**118.** Courts have recognized three categories of unambiguously-campaign-related speech. *See NMYO*, order at 14-18.

**119.** In the first category are contributions received by and spending by organizations the jurisdiction may regulate as “political committees,” because they (1) fall under a political-committee definition that is not unconstitutionally vague and (2) pass the proper “under the control of a candidate” or major-purpose test. *Buckley*, 424 U.S. at 74-79. “Expenditures of candidates and political committees so construed ... are, by definition, campaign related.” *Id.* at 79, *quoted in McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003). The same is true of contributions they receive. These include contributions they receive *directly* from contributors. *See id.* at 23 n.24, 78. These also include spending for political speech coordinated with a candidate, the candidate’s agents, the candidate’s committee, *see id.* at 78, *quoted in FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 294 (2d Cir. 1995), or a party, *McConnell*, 540 U.S. at 219-23, which the law may treat as a contribution to the candidate’s committee or the party, respectively. *See Buckley*, 424 U.S. at 46-47 & n.53; *McConnell*, 540 U.S. at 219-23. So defined, contributions that political committees receive are connected with candidates or their campaigns. *Buckley*, 424 U.S. at 78.

**120.** In the second category are donations that courts allow the jurisdiction to regulate even though they are received by persons the jurisdiction may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79:

- Contributions intermediaries receive that are earmarked for political committees, *i.e.*, *indirect* contributions to political committees. *See id.* at 23 n.24, 78, *quoted in Survival Educ. Fund*, 65 F.3d at 294.
- Contributions the persons receive that are earmarked, *id.* at 23 n.24, 78, for expenditures, *Survival Educ. Fund*, 65 F.3d at 295, *i.e.*, express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80; *Survival Educ. Fund*, 65 F.3d at 295.

- Contributions received by persons who do electioneering communications as defined in FECA, *McConnell*, 540 U.S. at 195-99, whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457, 469-70, 474 n.7 (2007) (“*WRTL II*”), and
- Contributions received under particular parts of 2 U.S.C. § 441i, *see McConnell*, 540 U.S. at 161-89 (upholding 2 U.S.C. § 441i.b, d, e, f (2002)), which FECA pre-empts state and local governments from superseding. *See* 2 U.S.C. § 453.a (2002).

So defined, contributions that persons other than political committees receive are connected with candidates or their campaigns. *Buckley*, 424 U.S. at 78.

**121.** In the third category is spending for political speech that courts allow the jurisdiction to regulate even though the spending is by persons the jurisdiction may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79. This includes (1) express advocacy as defined in *Buckley*, *id.* at 44 & n.52, 80, and (2) electioneering communications as defined in FECA<sup>18</sup> whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate, *i.e.*, electioneering communications as defined in FECA that pass the appeal-to-vote test. *WRTL II*, 551 U.S. at 457, 469-70, 474 n.7.

**122.** While only a ban on electioneering communications as defined in FECA was at issue in *WRTL II*, 551 U.S. at 460, 464, *WRTL II* repeatedly states the First Amendment protects such electioneering communications, *id.* at 474 n.7, not just from “restriction,” *e.g.*, a ban, but more broadly from “regulation.” *Id.* at 476-81, 465, 457, 471.

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<sup>18</sup>Electioneering communications as defined in FECA are communications that (1) are broadcast, cablecast, or satellite communications (“Broadcast”), 2 U.S.C. § 434.f.3.A.i (2002), (2) run in the 30 days before a primary or 60 days before a general election (“30-60 Day Windows”), *id.* § 434.f.3.A.i.II, (3) have a clearly identified candidate in the jurisdiction in question, *see id.* § 434.f.3.A.i.I, (4) are targeted to the relevant electorate, *id.* § 434.f.3.A.i.III, and (5) do not expressly advocate. *See id.* § 434.f.3.B.ii; *see also* 2 U.S.C. § 434.f.3.B (additional exceptions not material here).

**123.** If political speech does *not* fit a particular category of unambiguously-campaign-related speech, then government may not regulate it as such, and law regulating speech *via* a category in which the speech does not fit is unconstitutional.<sup>19</sup>

**124.** Plaintiff NOM’s speech at issue in the amended complaint fits into none of the three unambiguously-campaign-related categories.

**125.** First, Maine may not regulate NOM as a political committee, because its PAC definition is unconstitutionally vague.<sup>20</sup> *See National Right to Work*, 581 F. Supp.2d at 1152-54 (applying the unambiguously-campaign-related principle and holding a political-committee definition vague). This suffices to conclude the political-committee inquiry.

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<sup>19</sup>*See Buckley*, 424 U.S. at 80-81; *NCRL III*, 525 F.3d at 281 (quoting *Buckley*, 424 U.S. at 80); *NMYO*, order at 12-13 (quoting *Buckley*, 424 U.S. at 80); *Broward*, 2009 WL 1457972 at \*5 (quoting *Buckley*, 424 U.S. at 80); *CFIF II*, 613 F. Supp.2d at 785 (quoting *Buckley*, 424 U.S. at 80); *Broward*, 2008 WL 4791004 at \*7 (quoting *Buckley*, 424 U.S. at 80); *National Right to Work*, 581 F. Supp.2d at 1141 (quoting *Buckley*, 424 U.S. at 80), 1144 (citing *Buckley*, 424 U.S. at 80); *see also Virginia Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 383 (4th Cir. 2001) (“*VSHL IP*”) (recognizing in effect that government may regulate spending for political speech only when it is unambiguously campaign related (quoting *Buckley*, 424 U.S. at 79-80)); *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir.) (same) (quoting *Buckley*, 424 U.S. at 80), *cert. denied*, 484 U.S. 850 (1987); *Vermont Right to Life Comm., Inc. v. Sorrell*, 19 F. Supp.2d 204, 215 (D. Vt. 1998) (“*VRLC I*”) (same) (quoting *Buckley*, 424 U.S. at 80), *rev’d on other grounds*, 221 F.3d 376, 386, 389-91 (2d Cir. 2000) (rejecting a narrowing gloss).

If political speech *is* unambiguously campaign related, *i.e.*, if it fits into one or more of the three categories of unambiguously-campaign-related speech, one proceeds to the next set of questions to determine whether the law regulating the speech in the category or categories is constitutional. These questions involve whether the law is unconstitutionally vague, and therefore overbroad. Apart from vagueness, a court also asks whether the law passes the appropriate level of constitutional scrutiny.

<sup>20</sup>*Infra* at 40-41.

**126.** Moreover, NOM is not under the control of, nor does it have the major purpose of nominating or electing, a candidate or candidates, *see Buckley*, 424 U.S. at 79;<sup>21</sup> *Volle v. Webster*, 69 F. Supp.2d 171, 174-77 (D. Me. 1999); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007) (“*CRLC*”); *NCRL III*, 525 F.3d at 287-90, for state or local office in Maine. After all, FECA pre-empts state law. 2 U.S.C. § 453.a (2002); *Bunning v. Kentucky*, 42 F.3d 1008, 1012 (6th Cir. 1994) (citation omitted); *Teper v. Miller*, 82 F.3d 989, 999 (11th Cir. 1996) (Carnes, J., concurring). Given states’ sovereignty over their own, though not other states’, elections, *see, e.g., NCRL III*, 525 F.3d at 281, what remains after pre-emption for *each state* to regulate as *state* political committees is organizations that are under the control of candidates *for state or local office in that state* and organizations that have the major purpose of nominating or electing candidates *for state or local office in that state*.

**127.** NOM is not “under the control of a candidate” or candidates for state or local office in Maine. *Cf. FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). Further, NOM has not indicated in its organizational documents, *see MCFL*, 479 U.S. at 241-42, 252 n.6, or in public statements, *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), that it has the major purpose of nominating or electing such candidates, and NOM does not spend the majority of its money on contributions to, or independent expenditures<sup>22</sup> for, *CRLC*, 498 F.3d at 1152; *NCRL III*, 525 F.3d at 289, such candidates.

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<sup>21</sup>*Followed in McConnell*, 540 U.S. at 170 n.64, and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986).

<sup>22</sup>Meaning express advocacy as defined in *Buckley* and not coordinated with a candidate, which is the standard under the Constitution. *See* 424 U.S. at 39-51; *cf.* 2 U.S.C. § 431.17 (2002).

**128.** Second, when it comes to persons Maine may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79, the *only* contributions received that Maine *may* regulate are:

- Contributions intermediaries receive that are earmarked for Maine political committees.
- Contributions the persons receive that are earmarked for expenditures, i.e., express advocacy as defined in *Buckley vis-à-vis state or local office in Maine*, and
- Contributions received by persons doing electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate for state or local office in Maine. This is because of pre-emption of state law in federal matters and states' sovereignty over their own, though not other states', elections. No such contributions received by NOM are at issue here, so NOM's speech does not fit into this second category of unambiguously-campaign-related political speech.

**129.** Third, when it comes to persons Maine may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79, the *only* spending for political speech Maine *may* regulate is:

- Express advocacy as defined in *Buckley vis-à-vis state or local office in Maine*, and
- Electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate *for state or local office in Maine*.

This is because of pre-emption of state law in federal matters and states' sovereignty over their own, though not other states', elections.

**130.** No such spending by NOM is at issue here, *see, e.g., NCRL III*, 525 F.3d at 281-82, so NOM's speech does not fit into this third category of unambiguously-campaign-related political speech. NOM's speech is not such express advocacy. Nor is it such electioneering communications: While it has such clearly identified candidates and NOM will target it to the relevant electorate, none of it will be Broadcast *and* run in the 30-60 Day Windows *and* pass the appeal-to-vote test in Maine.

**131.** Turning to the first category of unambiguously-campaign-related political speech, it is unconstitutional for Maine to regulate organizations such as NOM as PACs, both because Maine’s PAC definition is unconstitutionally vague, and therefore overbroad, and because such organizations do not pass the proper “under the control of a candidate” or major-purpose test. Nevertheless, Maine does just this through its PAC definition, ME. REV. STAT. title 21-A, § 1052.5.A.4-5, because it is unconstitutionally vague, and therefore overbroad, and because Maine does not limit the PAC definition to organizations that are under the control of, or have the major purpose of nominating or electing, state or local candidates in Maine. Thus, this definition is unconstitutional as applied to Plaintiff NOM’s speech. *See NCRL III*, 525 F.3d at 287-90; *NMYO*, order at 18-20, 26-29; *Broward*, 2009 WL 1457972 at \*7; *Broward*, 2008 WL 4791004 at \*9, 12-13.

**132.** Turning to the second and third categories of unambiguously-campaign-related political speech, other aspects of Maine law are unconstitutional as applied to Plaintiff NOM’s speech.

**133.** Maine reaches beyond unambiguously-campaign-related-*contributions-received* boundaries through the regulation of what Maine calls “independent expenditures,” whose reporting requirements for contributions received extend beyond (1) contributions intermediaries receive that are earmarked for Maine PACs, (2) contributions the persons receive that are earmarked for express advocacy *vis-à-vis* state or local office in Maine, and (3) contributions received by persons doing electioneering communications as defined in FECA that pass the appeal-to-vote test in Maine. *See NMYO*, order at 14 (considering what contributions were unambiguously campaign related as of *Buckley*).

**134.** Maine reaches beyond the unambiguously-campaign-related *spending-for-political-speech* boundaries as well. This occurs through the regulation of what Maine calls “independent expenditures” and through the attribution and disclaimer requirements.<sup>23</sup>

**135.** As for the regulation of what Maine calls “independent expenditures,” Maine does not limit its express-advocacy definition to express advocacy as defined in *Buckley*. See 424 U.S. at 44 & n.52, 80. Instead, it considers the context<sup>24</sup> of speech, see 94-270 ME. CODE R. § 10.2.B, which *WRTL II* all but forecloses. See 551 U.S. at 467-73. In addition, the express-advocacy definition includes speech whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate or candidates. This is the *WRTL II* appeal-to-vote test, which does not apply to express advocacy. Rather, it applies only to electioneering communications as defined in FECA, *WRTL II*, 551 U.S. at 457, 469-70, 474 n.7, which by definition are not express advocacy. Compare *Buckley*, 424 U.S. at 44 & n.52, 80 (limiting “expenditure” to express advocacy) with 2 U.S.C. § 434.f.3.B.ii (excluding expenditures from electioneering communications).

**136.** Moreover, the independent-expenditure definition regulates speech beyond what is unambiguously campaign related in Maine by presuming *all* speech mentioning certified “Maine Clean Elections” candidates in the 21 days before a primary or 35 days before a general election

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<sup>23</sup>See *NMYO*, order at 24-26 (holding regulation of speech unconstitutional); *Broward*, 2009 WL 1457972 at \*6 (holding disclosure requirements unconstitutional); *Broward*, 2008 WL 4791004 at \*8 (same); *National Right to Work*, 581 F. Supp.2d at 1148-52 (holding disclosure requirements unconstitutional but applying a narrowing gloss, which was incorrect); see also *VSHL II*, 263 F.3d at 388 (recognizing in effect that government may regulate spending for political speech only when it is unambiguously campaign related) (quoting *Buckley*, 424 U.S. at 79-80)); *Furgatch*, 807 F.2d at 860 (same) (quoting *Buckley*, 424 U.S. at 80)); *VRIC I*, 19 F. Supp.2d at 215 (same) (quoting *Buckley*, 424 U.S. at 80).

<sup>24</sup>Maine does not define “context,” yet Plaintiff submits that is immaterial.

(“21-35 Day Windows”) is an independent expenditure, *see* ME. REV. STAT. title 21-A, § 1019-B.1.B, which Maine then regulates. *Id.* § 1019-B.2, 3. This is unconstitutional as applied to NOM’s speech, because it is neither (1) express advocacy as defined in *Buckley vis-à-vis* state or local office in Maine nor (2) an electioneering communication as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate for state or local office in Maine. *Cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 620-23 (1996) (“*Colorado Republican P*”) (striking down a presumption that spending is coordinated with a candidate, rather than independent).

**138.** As for the attribution and disclaimer requirements, Maine does not limit them to express advocacy as defined in *Buckley vis-à-vis* state or local office in Maine or electioneering communications as defined in FECA that pass the appeal-to-vote test in Maine. *See* ME. REV. STAT. title 21-A, § 1014.1, 2, 2-A, 5. Thus, they are also unconstitutional as applied to Plaintiff’s speech.

**139.** Maine law is facially unconstitutional under the First Amendment, *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 n.6 (2008) (citing *New York v. Ferber*, 458 U.S. 747, 769-71 (1982)), because it reaches “a substantial amount of protected speech ... not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 128 S.Ct. 1830, 1838 (2008) (citing *Board of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). By not adhering to the case law, all of these sections reach substantially beyond whatever plainly legitimate sweep they may have, *i.e.*, they reach substantially beyond unambiguously-campaign-related speech. The Supreme Court has never upheld such sweeping regulation of political speech. Thus, Maine may not simply point to FECA, cite *McConnell*, and claim its law is facially constitutional. As in

*NCRL III*, 525 F.3d at 285, Maine law is full of constitutional flaws for which an as-applied holding is inadequate.

### **Count VI: Vagueness and the Level of Scrutiny**

**140.** Moving beyond the unambiguously-campaign-related principle, Maine law is also unconstitutional as applied to Plaintiff NOM’s speech and facially, both because it is vague, and therefore overbroad, and because it fails the appropriate level of scrutiny.

#### **Vagueness**

**141.** Maine uses the phrases “initiating, promoting, ... or influencing a candidate election [or] campaign” and “promoting ... or influencing in any way the nomination or election of any candidate to political office” in the PAC definition. ME. REV. STAT. title 21-A, § 1052.5.A.4-5. Meanwhile, Maine uses the phrase “for the purpose of influencing” a person’s nomination or election to political office in (1) the contribution definition, *id.* § 1012.2.A.1, and by extension in the regulation of what Maine calls “independent expenditures,” *id.* § 1019-B.3.B, (2) the expenditure definition, *id.* § 1012.3.A.1, and by extension in the regulation of what Maine calls “independent expenditures,” *id.* § 1019-B, and in the attribution and disclaimer requirements, *id.* § 1014.1, 2, 2-A, and (3) in part of the attribution and disclaimer requirements themselves. *Id.* § 1014.2-A. Maine then uses “in support of or in opposition to” in the regulation of what Maine calls “independent expenditures.” *Id.* § 1019-B.3.B.

**142.** “Influencing” an election and “for the purpose of influencing” an election are unconstitutionally vague and overbroad. *Buckley*, 424 U.S. at 77. “Promoting” and “in support of or in opposition to” are similarly vague and overbroad. While *McConnell* did say promote-support-attack-oppose (“PASO”), which includes these concepts, is not unconstitutionally vague *vis-à-vis*

party committees, 540 U.S. at 170 n.64, that was in a *facial* challenge to a part of FECA *other than* the political-committee definition or the independent-expenditure reporting requirements, and one court has held parts of PASO are vague and overbroad *vis-à-vis* other speakers. *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (“*NCRL I*”) (citing *Buckley*, 424 U.S. at 79-80), *cert. denied*, 528 U.S. 1153 (2000). Another court considered a law requiring disclosure of payments “for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office.” *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006) (“*CFIF I*”), *cert. denied*, 549 U.S. 1112 (2007). The court’s holding was based on the premise that the statute is vague and overbroad. *See id.* at 665.

**143.** Plaintiff also submits the word “initiating” fares no better than “influencing,” “promoting,” or and “in support of or in opposition to.”

**144.** Furthermore, Maine bases its express-advocacy definition on context. *WRTL II* rejects a contention that its holding is vague by noting it had all but foreclosed considering context. *See* 551 U.S. at 474 n.7. This all but holds that considering such context renders law regulating political speech vague. *See id.*

**145.** Maine also bases its express-advocacy definition on the appeal-to-vote test. *WRTL II* rejects a contention that the appeal-to-vote test is vague by noting that it applies only to electioneering communications as defined in FECA. *See id.* This all but holds that applying the test elsewhere, which Maine does, renders the test vague. *See id.* For this additional reason, Plaintiff submits Maine’s express-advocacy definition is unconstitutionally vague.

### Level of Scrutiny

146. In addition, Maine law is unconstitutional as applied to Plaintiff NOM’s speech, because it fails the appropriate level of scrutiny.

147. Strict scrutiny applies to government regulation of organizations as political committees. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (“compelling state interest”). Maine’s PAC definition is not narrowly tailored, because it lets Maine regulate organizations as political committees when they are neither under the control of, nor have the major purpose of nominating or electing, candidates for state or local office in Maine. *See NCRL III*, 525 F.3d at 290 (addressing “narrower means”); *CRLC*, 498 F.3d at 1146. In fact, an organization can be a Maine PAC by spending less – far less – than half its money on contributions to or independent expenditures for candidates for state or local office in Maine. An organization, no matter how large its budget, becomes a political committee by spending more than \$1500 or \$5000 in a calendar year on what Maine lists in its PAC definition. ME. REV. STAT. title 21-A, § 1052.5.A.4-5. This is an insubstantial amount, especially compared to NOM’s budget. *See Volle*, 69 F. Supp.2d at 174-77 (striking down a \$50 threshold as applied to the speech of an individual and his business); *CRLC*, 498 F.3d at 1154; *NMYO*, order at 24-25; *cf. Buckley*, 424 U.S. at 19 & n.18. Moreover, part of Maine’s PAC definition openly defies the major-purpose test. *See* ME. REV. STAT. title 21-A, § 1052.5.A.5 (“Any organization that does not have as its major purpose”).<sup>25</sup>

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<sup>25</sup>NOM submits there is nothing “pernicious,” Doc. 22 at 23 n.96, \_\_\_\_ F. Supp.2d at \_\_\_\_, 2009 WL 3470837 at \*9 n.96, about not allowing regulation of an organization as a political committee when it is unconstitutional. Besides, the fact that it is unconstitutional to regulate an organization as a political committee does not mean it is unconstitutional to regulate any political speech the organization does. Moreover, the Constitution does not limit such regulation to “one time reporting.” Doc. 22 at 19-20, \_\_\_\_ F. Supp.2d at \_\_\_\_, 2009 WL 3470837 at \*8. Reporting may occur during reporting periods when regulable political speech occurs, however many times that is. One difference between such reporting and full-fledged

**148.** Moreover, requiring disclosure of all donors to NOM as a PAC will deter donations to NOM from those who otherwise would donate, regardless of whether they fear harassment, retaliation, *see Buckley*, 424 U.S. at 68, or social ostracism. *Cf. ACLU of Nevada v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004) (considering attribution requirements (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995))). Also deterring their donations is the “‘reasonable probability’ of harm” to them, *McConnell*, 540 U.S. at 199; *see also FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 421 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983), including “economic or official retaliation [or] social ostracism,” which they reasonably fear will follow disclosure through the reporting requirements. *Heller*, 378 F.3d at 988 (quoting *McIntyre*, 514 U.S. at 341-42).

**149.** Strict scrutiny also applies to disclosure requirements not only for organizations a jurisdiction *may* regulate as political committees, *Daggett v. Commission on Gov’t Ethics & Election Practices*, 205 F.3d 445, 465 (1st Cir. 2000) (citing *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993)), but also for persons a jurisdiction *may not* regulate as political committees under *Buckley*, 424 U.S. at 74-77. *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (“*CPLC P*”) (collecting authorities).

**150.** *Davis* is not to the contrary, even though it uses the phrase “exacting scrutiny” – which has become strict scrutiny<sup>28</sup> – because it says that for disclosure requirements to survive,

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political-committee reporting is that the former occurs when regulable speech occurs, while the latter occurs during all reporting periods. *Compare* 2 U.S.C. § 434.c.1 (2007) (independent-expenditure reports) *and id.* § 434.f.1 (electioneering-communications reports) *with id.* § 434.a.2-4 (political-committee reports). Plaintiff submits that if anything is “pernicious,” not to mention unconstitutional, it is imposing political-committee burdens on organizations the jurisdiction may not regulate as political committees.

<sup>28</sup>*See, e.g., WRTL II*, 551 U.S. at 464 (applying strict scrutiny by citing five opinions, two of which say “exacting scrutiny” on the cited pages (citing *McConnell*, 540 U.S. at 205; *Austin*,

there must be “a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed,” *and* the governmental interest “must survive exacting scrutiny.”

128 S.Ct. at 2775 (emphasis added) (quoting *Buckley*, 424 U.S. at 64). The word “and” confirms that the inquiry is not whether there is “‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.” *Id.*

**151.** When it comes to persons Maine may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79, the *only* spending for political speech Maine has a compelling interest in regulating is:

- Express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, vis-à-vis state or local office in Maine, and
- Electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate, *WRTL II*, 551 U.S. at 457, 469-70, 474 n.7, for state or local office in Maine.

*E.g., id.* at 476. As previously noted, no such speech is at issue here.

**152.** And when it comes to persons Maine may *not* regulate as political committees, the *only* contributions received that Maine has a compelling interest in regulating are:

- Contributions intermediaries receive that are earmarked for Maine political committees. *See Buckley*, 424 U.S. at 23 n.24, 78, *quoted in Survival Educ. Fund*, 65 F.3d at 294.
- Contributions the persons receive that are earmarked, *id.* at 23 n.24, 78, for expenditures, *Survival Educ. Fund*, 65 F.3d at 295, *i.e.*, express advocacy as

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494 U.S. at 658; *MCFL*, 479 U.S. at 252; *Bellotti*, 435 U.S. at 786 (“exacting scrutiny”); *Buckley*, 424 U.S. at 44-45 (“exacting scrutiny”); *id.* at 474 n.7 (citing *Buckley*, 424 U.S. at 44 (“exacting scrutiny”)). *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 204 (1999), (“*ACLF*”) refers to “exacting scrutiny” while adhering to strict scrutiny: The “now-settled approach that state regulations imposing severe burdens on speech must be *narrowly tailored* to serve a *compelling* state interest.” *Id.* at 192 n.12 (emphasis added; brackets, ellipsis, and quotation marks omitted) (quoting *id.* at 206 (Thomas, J., concurring)).

defined in *Buckley*, 424 U.S. at 44 & n.52, 80, *vis-à-vis* state or local office in Maine, and

- Contributions received by persons doing electioneering communications as defined in FECA, *McConnell*, 540 U.S. at 195-99, whose only reasonable interpretation is as an appeal to vote for or against a clearly identified candidate, *WRTL II*, 551 U.S. at 457, 469-70, 474 n.7, for state or local office in Maine.

As previously noted, no such speech is at issue here.

**153.** Maine law reaches beyond what Maine has a compelling interest in regulating, so it fails strict scrutiny.

**154.** Moreover, Maine law fails strict scrutiny, because it is not narrowly tailored. As previously noted, Maine could use the less-restrictive means of requiring non-“onerous” disclosure of (1) independent expenditures as defined in *Buckley vis-à-vis* state or local office in Maine or (2) electioneering communications as defined in FECA that pass the appeal-to-vote test in Maine. Neither is at issue here.

**155.** Although this suffices to conclude the inquiry under strict scrutiny, Maine law is unconstitutional for an additional reason. *Attribution and disclaimer* requirements regulate the content of speech itself, so they are an even greater First Amendment violation than reporting requirements. *See McIntyre*, 514 U.S. at 355, *cited in VRLC I*, 221 F.3d at 387, and *quoted in Heller*, 378 F.3d at 992. Nothing in *McConnell* undermines, much less changes, this holding of *McIntyre*. *Heller*, 378 F.3d at 987.

**156.** Although some circuits have upheld attribution or disclaimer requirements since *McIntyre*, *see id.* at 1000-02, those actions – unlike *Heller*, *see id.* at 983-84, and unlike this action – have involved:

- Organizations that the jurisdiction in question may regulate as political committees. *See Gable v. Patton*, 142 F.3d 940, 945 (6th Cir. 1998) (candidate committee), *cert. denied*, 525 U.S. 1177 (1999).
- Contributions that the jurisdiction in question may regulate even though they are received by persons the jurisdiction may not regulate as political committees. *See Survival Educ. Fund*, 65 F.3d at 295 (contributions earmarked for express advocacy), or
- Spending for political speech that the jurisdiction in question may regulate even though it is by persons the jurisdiction may not regulate as political committees. *See Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004) (“*Majors II*”) (express advocacy as defined in *Buckley*); *FEC v. Public Citizen*, 268 F.3d 1283, 1289-90 (11th Cir. 2001) (same); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 643 & n.18, 646-48 (6th Cir.) (“KRTL”) (same), *cert. denied*, 522 U.S. 860 (1997).

No such speech is at issue here *vis-à-vis* this second preliminary-injunction motion, so it is unnecessary to consider in assessing this motion whether *McIntyre* protects such speech from this type of regulation. The parallel in this action is to *Heller*.

**157.** In the alternative, Maine law fails “exacting scrutiny” and intermediate scrutiny as well.

**158.** As to the political-committee disclosure threshold, ME. REV. STAT. title 21-A, § 1060.6, the \$50 disclosure threshold for contributions to PACs in the PAC reporting requirements, is so low that it is not narrowly tailored, *see Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009); *id.* at 1036 (Noonan, J., concurring), especially since Maine does not index its \$50 disclosure threshold for inflation. *See Randall v. Sorrell*, 548 U.S. 230, 261 (2006). Maine enacted its threshold in 1992, *see* MAINE 1992 SESSION LAWS 115TH SESSION, SECOND REGULAR SESSION CH. 839 (April 9, 1992),<sup>29</sup> and the real value of \$50 has fallen

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<sup>29</sup>*Available at* [https://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.10&fn=\\_top&sv=Split&docname=UUID\(I3EE3E9248F-0A4EAFBB172-2E0E88D8B40\)&tc=-1&pbcr=1925CFF5&ordoc=2394467&findtype=1&db=1077005&vr=2.0&rp=%2ffind%2fdefault.wl&mt=222](https://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.10&fn=_top&sv=Split&docname=UUID(I3EE3E9248F-0A4EAFBB172-2E0E88D8B40)&tc=-1&pbcr=1925CFF5&ordoc=2394467&findtype=1&db=1077005&vr=2.0&rp=%2ffind%2fdefault.wl&mt=222).

to \$32.48 in 2009.<sup>30</sup> Thus, \$50 is below the *de minimis* threshold *Canyon Ferry* struck down, *see* 556 F.3d at 1033, 1036 (Noonan, J., concurring) (implying that \$76 is too low), and incumbent legislators may not diligently police the need for changes in such thresholds. *Cf. Randall*, 548 U.S. at 261 (referring to changes in limits on contributions to candidates).

**159.** While the First Circuit has upheld one Maine \$50 threshold, *Daggett*, 205 F.3d at 466, that action concerned disclosure under former Section 1019, not Section 1060; it was before the *Randall* warning about incumbent legislators; and there has been a decade of inflation since *Daggett*.

**160.** The same level of scrutiny applies regardless of whether a challenge is as applied to Plaintiff's speech, *e.g.*, *WRTL II*, 551 U.S. at 464 (citing *McConnell*, 540 U.S. at 205; *Austin*, 494 U.S. at 658; *MCFL*, 479 U.S. at 252; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) *Buckley*, 424 U.S. at 44-45)), or facial. *E.g.*, *id.* (citing *McConnell*, 540 U.S. at 206).

**161.** All of the sections Plaintiff submits are unconstitutional as applied to its speech are also facially unconstitutional. *See NCRL III*, 525 F.3d at 289-90 (holding a political-committee definition facially unconstitutional, even apart from the unambiguously-campaign-related principle, by referring to narrow tailoring); *Florida Right to Life, Inc. v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 at \*4-5 (M.D. Fla. Dec. 15, 1999) ("*FRTL*") (holding a political-committee definition facially unconstitutional because it "expressly includes 'groups whose "incidental purpose" is to "support or oppose" candidates'"),<sup>31</sup> *aff'd*, 238 F.3d 1288 (11th Cir. 2001), *and rev'd on other grounds*, 273 F.3d 1318, 1326-28 (11th Cir. 2001) (rejecting a narrowing gloss).

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<sup>30</sup>*See* [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).

<sup>31</sup>VC Exh. 21.

### No Narrowing Glosses, Certification, or Severability

**162.** Unlike in *Buckley*, 424 U.S. at 44 & n.52, 80, no narrowing gloss saves the unconstitutional law in this action. Plaintiff (1) challenges state law (2) both as-applied to its speech and facially. Unlike in federal-court challenges to *federal* law, e.g., *Boumediene v. Bush*, 128 S.Ct. 2229, 2240, 2271 (2008), narrowing glosses (1) apply in federal-court challenges to *state* law only when they are “reasonable and readily apparent.” *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). A federal court does not “rewrite a state law to conform it to constitutional requirements.” *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988), *quoted in State Police for Automatic Retirement Ass’n v. DiFava*, 317 F.3d 6, 13 (1st Cir. 2003). As in *VRLC I*, 221 F.3d at 388-89, 390-91, there is no way to make Maine law constitutional without rewriting it. *See also NCRL I*, 168 F.3d at 712-13 (rejecting a narrowing gloss for a state’s political-committee definition); *Heller*, 378 F.3d at 986 (rejecting a narrowing gloss); *FRTL*, 273 F.3d at 1326-28 (same). Moreover, narrowing glosses (2) generally apply only to facial challenges, not as-applied challenges. *CRLC*, 498 F.3d at 1154 (quoting *American Booksellers*, 484 U.S. at 397). Therefore, no narrowing gloss applies here.

**163.** Nor is certifying a question appropriate where, as here, the state law is not “fairly susceptible” to a narrowing gloss. *Stenberg*, 530 U.S. at 945 (quoting *Houston v. Hill*, 482 U.S. 451, 468-71 (1987)).

**164.** Furthermore, severing the unconstitutional language from the remaining language – which is a question of state law, *VRLC I*, 221 F.3d at 389 (citing *Watson v. Buck*, 313 U.S. 387, 395-96 (1941)) – is not an option in this action, because the unconstitutional language is “such an integral portion of the entire statute ... that the enacting body would have only enacted the legislation as a

whole.” *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1190 (Me. 2004) (citing *Bayside Enters., Inc. v. Maine Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986)), *cert. denied*, 544 U.S. 906 (2005); *see also Randall*, 546 U.S. at 262.

WHEREFORE, Plaintiffs pray this court to:

(1) Declare 21-A M.R.S.A. § 1056-B unconstitutional facially and as applied to Plaintiffs as a violation of the First Amendment right to engage in political speech;

(2) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors from enforcing 21-A M.R.S.A. § 1056-B against NOM and APIA;

(3) Grant NOM and APIA costs and attorney’s fees under 42 U.S.C. § 1988 and any other applicable authority;

(4) Declare that the PAC and expenditure definitions, ME. REV. STAT. title 21-A, §§ 1052.5.A.4-5, 1052.4, are unconstitutional as applied to NOM’s speech and facially, and preliminarily and then later permanently enjoin their enforcement;

(5) Declare that the independent-expenditure definition, contribution definition, expenditure definition, express-advocacy definition, and reporting requirements, ME. REV. STAT. title 21-A, §§ 1019-B.1.A, 1012.2.A.1, 1012.3.A.1; ME. CODE R. § 10.2.B; ME. REV. STAT. title 21-A, § 1019-B, are unconstitutional as applied to NOM’s speech and facially, and preliminarily and then later permanently enjoin their enforcement;

(6) Declare that the expenditure definition, the express-advocacy definition, plus the attribution and disclaimer requirements, ME. REV. STAT. title 21-A, § 1012.3.A.1; ME. CODE R. § 10.2.B; ME. REV. STAT. title 21-A, § 1014, are unconstitutional as applied to NOM’s speech and facially, and preliminarily and then later permanently enjoin their enforcement;

(7) Declare that the political-committee disclosure threshold, ME. REV. STAT. title 21-A, § 1060.6, is unconstitutional as applied to NOM’s speech and facially, and preliminarily and then later permanently enjoin its enforcement; and

(8) Expunge the records, *i.e.*, NOM’s reports it will file before the conclusion of this action, of the information regarding those contributing more than \$50.

With respect to Prayers 4 to 7, if the Court nevertheless held a narrowing gloss were possible, Plaintiff NOM prays for:

(9) A declaratory judgment limiting Maine’s PAC definition, and by extension the burdens Maine imposes on political committees, to organizations that are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Maine.<sup>32</sup>

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<sup>32</sup>In the alternative, Plaintiff NOM prays that the Court limit the definition and burdens to organizations that are under the control of, or have the major purpose of nominating or electing, *any* candidate or candidates.

Plaintiff submits this alternative would also be incorrect, because, for example, it would allow Maine to regulate as Maine PACs those organizations that are under the control of, or have the major purpose of nominating or electing, candidates for *federal* office or candidates for *state or local office in another state*. This can easily turn against Maine and allow these non-Maine jurisdictions to regulate organizations that really do pass the “under the control of a candidate” or major-purpose test in Maine.

Moreover, under this approach, a jurisdiction could impose political-committee burdens on organizations whose activity is minimal – or even zero – in the jurisdiction.

(10) A declaratory judgment limiting Maine’s independent-expenditure and express-advocacy definitions and corresponding reporting requirements to express advocacy as defined in *Buckley vis-à-vis* state or local office in Maine,<sup>33</sup> and

(11) A declaratory judgment limiting Maine’s attribution and disclaimer requirements to express advocacy as defined in *Buckley vis-à-vis* state or local office in Maine and electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against a clearly candidate for state or local office in Maine.<sup>34</sup>

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<sup>33</sup>In the alternative, Plaintiff prays that the Court limit the definition and corresponding requirements to express advocacy as defined in *Buckley vis-à-vis any* office.

<sup>34</sup>In the alternative, Plaintiff prays that the Court limit the requirements to express advocacy as defined in *Buckley vis-à-vis any* office and electioneering communications as defined in FECA whose only reasonable interpretation is as an appeal to vote for or against *any* clearly identified candidate.

### Certificate of Service

I certify that on December 3, 2009, I electronically filed the foregoing First Amended Verified Complaint with the clerk of court using the CM/ECF system, which will notify the following CM/ECF participants:

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The document is available for viewing and downloading from the ECF system and service was accomplished via transmission of the Notice of Electronic Filing.

/s/Jeffrey Gallant  
Jeffrey Gallant

**VERIFICATION**

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING THE NATIONAL ORGANIZATION FOR MARRIAGE FOUND IN THIS FIRST AMENDED COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: this 3 day of December, 2009.



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Brian S. Brown  
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National Organization for Marriage  
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609/688/0450 telephone  
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**VERIFICATION**

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING AMERICAN PRINCIPLES IN ACTION FOUND IN THIS COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: this 20<sup>th</sup> day of October, 2009.



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