UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NATIONAL ORGANIZATION FOR MARRIAGE, INC., *Plaintiff* v. JAMES WALSH, in his official capacity as co-chair of the New York State Board of Elections; DOUGLAS KELLNER, in his official capacity as co-chair of the New York State Board of Elections; EVELYN AQUILA, in her official capacity as commissioner of the New York State Board of Elections, and GREGORY PETERSON, in his official capacity as commissioner of the New York State Board of Elections, *Defendants*	Case No. 10-cv-751

AMICUS CURIAE BRIEF OF COMMON CAUSE/NY AND CITIZENS UNION

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PRELIMINARY STATEMENT

This case is one of a series of challenges that plaintiff, National Organization for Marriage, Inc., has brought recently against state laws regulating elections. Plaintiff has filed nearly identical complaints in three other states.[1] Here, plaintiff seeks a preliminary injunction that would neuter Article 14 of New York's Election Law. Plaintiff claims that Article 14's definition of "political committee" is unconstitutional and that the Court should therefore enjoin enforcement of any part of Article 14 that imposes any requirement of any kind on any political committee anywhere in the State of New York.

Plaintiff identifies the requirements to which it objects as: filling out a registration form and filing it with the Board of Elections, designating a treasurer to keep track of its money, keeping records, disclosing the identities of its donors and the persons to whom it has paid money in connection with an election, and declining contributions from certain interests such as foreign nationals. Complaint ¶ 19. These are requirements familiar to every participant in the New York election process, including (of course) candidates for all public offices filled by election. By operation of Article 14, New Yorkers can see who is giving money to, and getting money from, candidates for elected office. For more than thirty-five years, political committees supporting candidates or ballot questions have routinely complied with Article 14, when seeking to influence elections for offices as diverse as Village Trustee, Sheriff, Receiver of Taxes, County Legislator, Family Court Judge, and Highway Superintendent, just to name a small handful.

Granting plaintiff the relief it seeks would do away with all such disclosures, as well as the very modest additional requirements of Article 14, and thereby do an enormous disservice to

[1] Copies of each of those complaints are annexed hereto as Exhibits A, B and C, respectively.

the people of the State of New York. For its own part, plaintiff has made no factual showing that it would benefit from *any* injunction, let alone the sweeping, drastic, and disruptive injunction it demands. Plaintiff's legal arguments are meritless: the Legislature's carefully crafted definition of "political committee" is neither vague nor overbroad. It is substantially related to important government interests—interests that the Supreme Court of the United States reaffirmed only months ago:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. ***This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.***

Citizens United v. FEC, 130 S. Ct. 876, 915-16 (2010) (emphasis supplied). The relief plaintiff seeks would destroy the transparency created by Article 14 and permit special interests to funnel money to elected officials in secret. The Court should deny the motion and dismiss the Complaint.

FACTS

The Complaint and other facts of record before the Court are bare bones. They indicate that plaintiff is an organized advocacy group focused on opposing state recognition of same-sex marriage. Complaint Ex. 7.[2] Plaintiff's IRS Form 990 (Return of Organization Exempt from

[2] In New York, state-sanctioned same-sex marriage has been an issue before the Legislature for several years. *See, e.g.*, A. 40003, 232nd Leg. Sess., 20th Extraordinary Sess. (N.Y. 2009) (bill that would legalize same-sex marriage passed Assembly, but not Senate); A. 3000, 231st Leg. Sess. (N.Y. 2009) (bill introduced that would declare same-sex marriages void, enacting clause stricken); A. 4978, 230th Leg. Sess. (N.Y. 2007) (bill introduced that would declare same-sex

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Tax) provides little additional information. Complaint Ex. 8. Plaintiff is organized under the laws of Virginia, has its principal office in New Jersey, and raised and spent $3 million in 2008. *Id.*

Plaintiff alleges that it intends to participate in electioneering for or against the major-party candidates for governor, as well as certain targeted but unidentified New York legislators running for reelection in 2010, by raising or spending more than $1,000 on radio and television advertisements, direct mail, and internet postings. Complaint ¶¶ 8, 10, Exs. 2-6. Plaintiff has not offered any evidence that it actually plans to go forward with any particular advertisement, and it has not identified any actual election races in this District that it intends to attempt to influence, claiming that to do so would "divulge its strategy." Complaint ¶ 8. Plaintiff also discloses that its charter states: "No substantial part of the activities of the Corporation [*i.e.* plaintiff] shall participate in, or intervene in (including the publishing or distribution of Statements) any political campaign on behalf of or in opposition to any candidate for public office." Complaint Ex. 7 ¶ 9. Plaintiff does not explain how its alleged plans can be reconciled with this limitation in its Charter.

Plaintiff's complaint and its motion papers are silent on whether plaintiff has any other connection to New York, or even any members or donors anywhere in the State of New York, let alone in this District. Plaintiff has not alleged any harm that would actually befall it or any of its members or donors should it comply with the modest requirements of Article 14. Rather, the gravamen of its complaint seems to be that even the fact of being categorized as a "political committee" within the meaning of Article 14 would somehow "chill" its participation in the

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marriages void, but never passed); A. 7463, 228th Leg. Sess. (N.Y. 2005) (bill introduced that would recognize same-sex marriages as valid, but never passed).

electoral process. Complaint ¶¶ 15-17. Plaintiff does not explain how this would happen. It makes no showing that it does not have the resources to fill out the forms required by Article 14. It makes no showing that any of its donors or members would be stigmatized or shunned should their participation in New York elections be revealed to the public. It makes no showing that it would be dissuaded or discouraged from speaking for any other reason. It states only that complying with Article 14 "would simply not be worth it" because plaintiff "does not want to bear the burdens of being a political committee." Complaint ¶ 20. In other words, for its own reasons, plaintiff wants to spend its out-of-state funds in connection with New York's elections, but wants to do so from under a shroud of secrecy, rather than in the transparent environment created by Article 14.

ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED

A. Plaintiff Has Failed to Plead Facts Sufficient to Support its Claims

Plaintiff's complaint fails to meet the modest pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Rule 8 provides that a "pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). The short and plain statement must present a plausible claim for relief, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), "in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007).

The Complaint utterly fails to meet the requirements of Rule 8. In fact, it does not read like a complaint at all—it is more like a white paper discussing First Amendment theory. The complaint is replete with legal argument, conclusory statements, a thicket of citations to cases,

and more than one footnote per page. *See, e.g.*, Complaint ¶¶ 9, 16, 18, 27, 28, 29, 31, 35-40, 42-48, 50-61 and 63-66. For example, in paragraph 31, Plaintiff alleges:

> The "loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). So unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See id.*

Complaint ¶ 31. Yet, Plaintiff fails to plead any actual *facts* in support of these legal conclusions. The few facts that Plaintiff does plead are buried in lengthy argumentative passages containing legal conclusions regarding ultimate issues in the case. In that way, the complaint "places an unjustified burden on the [Court] and the part[ies] who must respond to it because they are forced to ferret out the relevant material from a mass of verbiage." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1281 at 709 (3d ed. 2004).

The United States District Court for the District of Rhode Island recently reached an identical conclusion with respect to a nearly identical complaint in *National Organization of Marriage, Inc. v. Daluz*, Civil Action No. 10-392-ML (D.R.I.). Noting that federal trial courts have the discretion to enforce Rule 8 and dispose of claims *sua sponte*, the Court held that the pertinent factual allegations were "buried in . . . conclusory and argumentative passages," dismissed the plaintiff's complaint without prejudice, and ordered plaintiff to file an amended complaint, if it chose, within seven days. The Complaint in this case suffers from the same infirmities.

B. Plaintiff Has Failed To Show That It Has Standing

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (*citing Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009)). "'Standing . . . is not an ingenious

academic exercise in the conceivable . . . [but] requires . . . a factual showing of perceptible harm.'" *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992)). "Except when necessary [to prevent actual harm], courts have no charter to review and revise legislative and executive action. . . . This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 129 S. Ct. at 1148 (citations omitted). Plaintiff, as the party seeking to invoke the Court's jurisdiction here, bears the burden of establishing the existence of an individualized injury sufficient to give rise to Article III standing. *Id.* at 1149.

However, instead of coming forth with facts and evidence establishing that it will suffer an actual injury absent an injunction, plaintiff merely alleges that it deems itself "chilled" by the prospect of being a "political committee." Plaintiff provides no facts explaining why it will be hurt if it complies with Article 14. There is no reason to believe (and plaintiff does not contend) that simply meeting the definition of a "political committee" would stigmatize plaintiff or otherwise would, by itself, cause it injury.[3] Plaintiff identifies three requirements of "political committee" status under Article 14 that it considers "burdensome and onerous": (1) designating a treasurer and filing a form registering with the Board of Elections, (2) keeping records, and (3) disclosing its contributions and expenditures in connection with particular elections. Pl. Br. 11.

Designating a treasurer and filling out a form cannot be deemed onerous for plaintiff, because it already has a treasurer who signs and files its federal tax returns and the annual reports required by the State of Virginia, where plaintiff is organized. Complaint Ex. 8.

[3] Plaintiff suggests that political committee status, itself, is burdensome and onerous because the First Amendment allows the state to impose greater restrictions and obligations on such entities than it would be permitted to impose on entities that are not political committees. Pl. Br. 10-11. However, such an abstract point about the restrictions that the state *might* impose on a "political committee" is patently irrelevant to the question whether the *actual* statute *as it exists in the real world* causes identifiable harm to the actual plaintiff before the Court.

Keeping records cannot be deemed onerous for plaintiff because it already must comply with such requirements under state and federal law. *See* Virginia Nonstock Corporation Act. § 13.1-932 (state law imposing recordkeeping requirements on plaintiff); 26 U.S.C. § 1.6001-1(c) (federal law).

Thus, plaintiff's alleged "injury in fact" boils down to the requirement that it comply with Article 14's reporting requirements which are, in fact, quite modest. To be sure, the courts have "long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show 'a reasonable probability that the compelled disclosure of [personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). However, plaintiff does not allege in its complaint or elsewhere that disclosing its contributors or expenditures in connection with an election will subject it or its members to any "threats, harassment or reprisals." Nor has plaintiff presented any evidence that it or its contributors will be subject to such harm if an injunction is not granted. Indeed, plaintiff's charter suggests that the activities it asks the Court to protect would be *ultra vires*. Plaintiff has not explained to the Court why, if at all, its election activities would comport with its Charter limitations. At bottom, a mere desire to avoid non-onerous legal obligations is not adequate to show "concrete, particularized, and actual or imminent" injury "fairly traceable" to complying with those obligations giving rise to Article III jurisdiction. *Monsanto Co.*, 130 S. Ct. at 2752 (citation omitted).

II. PLAINTIFF DOES NOT MERIT A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy. *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010). To qualify for one, "a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) 'either a likelihood of success on the merits, or a serious question going to

the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor,' *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (per curiam); and 3) that the public's interest weighs in favor of granting an injunction." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). Further, "'[w]hen, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" *Id.* (quoting *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir.2008)).

Plaintiff bears the burden to come forward with *evidence* sufficient to demonstrate that each of the requirements for a preliminary injunction are met. *See Almontaser*, 519 F.3d at 508; *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007). Plaintiff's bald factual allegations and legal conclusions are not sufficient to meet this burden. *See Benitez v. Duquette*, 293 Fed. App'x 791, 792 (2d Cir. 2008) (affirming denial of preliminary injunction where movant offered conclusory statements in support of alleged irreparable harm).

A. Plaintiff Cannot Demonstrate Irreparable Harm

Plaintiff contends, with virtually no discussion of the pertinent facts, that it is entitled to the extreme remedy of a preliminary injunction prohibiting the enforcement of an important state law not only as applied to itself, but as applied to every person wishing to support or oppose any candidate for any elected office anywhere in the entire state of New York. Plaintiff's motion papers include a lengthy and abstract discussion of First Amendment theory, but that discussion is untethered to actual facts. Plaintiff offers no evidence of irreparable harm.

Little more than a week ago, the First Circuit affirmed the denial of a motion to preliminarily enjoin the enforcement of Maine's campaign finance reporting statute because the appellants had failed to provide evidence of an irreparable injury. *Respect Maine v. McKee*, ---

F.3d ---, 2010 WL 3861051, *1-2 (1st Cir., Oct. 5, 2010). The court held that "[i]t was appellants' burden to produce such evidence," and that conclusory allegations of an injury to appellants' First Amendment rights, absent evidentiary support, were not sufficient to justify a preliminary injunction. *Id.* The court noted:

> The only irreparable injury claimed by appellants is that to their First Amendment rights. "The fact that [appellants are] asserting First Amendment rights does not automatically require a finding of irreparable injury." . . . Whether there is any such harm is the issue that will ultimately be addressed on the merits of the case. We recognize the importance of rights asserted under the First Amendment, but every case depends on its own facts. We acknowledge that the issues raised by the challenge to Maine's laws are difficult and will require careful analysis, on a fully developed record.

Id. (citations omitted). Here, plaintiff has similarly failed to come forward with any evidence to support its claimed loss of First Amendment rights, and thus, has failed to demonstrate the requisite irreparable injury.

Moreover, any suggestion of irreparable harm rings hollow in light of plaintiff's delay in filing this action and the pending motion. Plaintiff claims that it must have the Court's immediate attention because of the impending election. But Article 14 has been on the books for more than thirty-five years. It is common knowledge, and certainly known to an entity as sophisticated as plaintiff, that New York's elections are held on the first Tuesday next succeeding the first Monday in November. Elec. L. § 8-100[1](c). The issue of concern to plaintiff—state sanctioned same-sex marriage—has been a matter of public record before the Legislature since 2005 or earlier, with the most recent vote having taken place on December 2, 2009. *See* A. 40003, 232nd Leg. Sess., 20th Extraordinary Sess. (N.Y. 2009); A. 7463, 228th Leg. Sess. (N.Y. 2005). These votes were reported in the press. *See, e.g.*, Jeremy W. Peters, *New York State Senate Turns Back on Gay Marriage*, N.Y. Times, Dec. 2, 2009, at A1; Jeremy

W. Peters et al., *Marriage Bill Poses a Test Of Loyalties: Church vs. State*, Apr. 27, 2009, at A16; Erin Duggan, *Marriages Divide Legislature*, Albany Times Union, Feb. 28, 2004, at A1.

Plaintiff does not explain why—having waited for years to challenge this long-standing statute—it now urgently needs the Court's intervention. "[D]elay alone may justify denial of a preliminary injunction" because the "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see Respect Maine*, 2010 WL 3861051 at *2-3 (affirming denial of motion to enjoin enforcement of campaign finance statute and noting that, because appellant declined to challenge statute until two months before election, "this 'emergency' is largely one of [appellants'] own making.").

B. Plaintiff Is Unlikely To Succeed On the Merits

Plaintiff contends that the definition of "political committee" under Article 14 is unconstitutionally vague and overly broad. None of these arguments has merit. "New York's election statutes, as with other state legislative enactments, have been afforded a strong presumption of constitutionality." *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 292 (S.D.N.Y. 1994); *see Kermani v. New York State Bd. of Elections*, 487 F. Supp. 2d 101, 107 (N.D.N.Y. 2006) (same); *Soleil v. New York*, 2005 WL 662682, at *5 (E.D.N.Y. Mar. 22, 2005) (same).

Initially enacted in 1974, Article 14 does not ban speech, and it is entirely viewpoint-neutral. In the interest of maintaining an open and transparent election process, Article 14 imposes disclosure and other modest requirements on "political committees" and others involved

in the election process.[4] The Legislature's definition of "political committee" is carefully constructed to capture those organizations in whatever form, to the extent that they involve themselves in an election. Contrary to plaintiff's suggestion, the definition does not apply to *any* issue advocacy group—only advocacy groups that act in connection with a vote in an election. The definition reads:

> "[P]olitical committee means any corporation aiding or promoting and any committee, political club or combination of one or more persons operating or co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office; ***but nothing in this article shall apply to any committee or organization for the discussion or advancement of political questions or principles without connection with any vote*** or to a national committee organized for the election of presidential or vice-presidential candidates; provided, however, that a person or corporation making a contribution or contributions to a candidate or a political committee which has filed pursuant to section 14-118 shall not, by that fact alone, be deemed to be a political committee as herein defined.

New York Election Law § 14-100[1] (emphasis supplied). In addition, the statute contains a further limitation for groups devoted to some party or principal other than a single candidate:

> Notwithstanding the provisions of subdivision one hereof, if the expenditures made and liabilities incurred in any calendar year by

[4] To aid the political committees and other entities that must make disclosures under Article 14, the New York Board of Elections publishes a wealth of information on its website, including descriptions of the various types of entities covered by the statute, step-by-step instructions for registration, the types of reports that must be filed and how to do so. *See http://www.elections.state.ny.us/CFU.html.* The Board of Elections also publishes a written Campaign Finance Handbook, which details filing requirements, explains electronic filing procedures, provides samples of filing forms and defines various frequently used terms. *See http://www.elections.state.ny.us/NYSBOE/download/finance/hndbk2010.pdf.*

> any political committee for the purpose of aiding or promoting the success or defeat of one or more ballot proposals are less than five thousand dollars and ***less than fifty percent of all the expenditures made and liabilities incurred by such committee in such year, then such committee shall be required to report only those contributions which are made to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals***, but such committee shall be required to report all expenditures made and liabilities incurred for such purposes. Nothing contained in this subdivision shall be construed to relieve any political committee aiding or promoting the success or defeat of a candidate from any of the reporting requirements imposed by this article.

New York Election Law § 14-102[2] (emphasis supplied). Taken as a whole, the Legislature has provided a three-part test that is easy for an entity in plaintiff's circumstances to follow.

First, the statute applies to an entity, like plaintiff, that is "co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal" or "to aid or take part in the election or defeat of a candidate for public office." § 14-100[1]. Plaintiff obviously meets the first part of this test because, at a minimum, it is promoting the success of a "political principle," and it expresses an intent to meet this prong as well by "aid[ing] or tak[ing] part in the election or defeat of a candidate for public office."

Second, the statute exempts "any committee or organization for the discussion or advancement of political questions or principles without connection with any vote." § 14-100[1]. If plaintiff wishes to promote the advancement of its political principles without connection with any vote, plaintiff would qualify for the exemption; but plaintiff has announced its intention to promote the advancement of its goals in connection with the upcoming election of particular candidates and, if it follows through on that intention, it would not qualify for the exemption. That is not difficult for a reasonably intelligent person to understand.

Third, the statute contains an additional limitation for political committees spending less than $5,000 per year and less than 50% of their expenditures and liabilities in connection with a

particular ballot proposal. Such committees need only report "*those contributions which are made to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals*" as well as "all expenditures made and liabilities incurred for such purposes." § 14-102[2]. This limitation does not "relieve any political committee aiding or promoting the success or defeat of a candidate from any of the reporting requirements." *Id.* Plaintiff has announced its intention to go beyond mere issue advocacy and to aid or promote the success and defeat of particular candidates, and therefore, it would not qualify for this exemption.

1. Article 14 Is Not Vague

Plaintiff's principal contention is that the Statute's definition of "political committee" allegedly is unconstitutionally vague, because it covers entities that "aid or promote the success or defeat of a political . . . principal." *See* Pl. Br. 5-8. Plaintiff's argument is without merit.

In addressing whether a statute is vague, courts must examine the statute as a whole. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *United States v. Ali*, 2008 WL 4773422, at *6 (E.D.N.Y. Oct. 27, 2008) (citing *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 327 (2d Cir. 2007)). A statute is not unconstitutionally vague unless it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or does not "provide explicit standards" for those who are tasked with enforcing it. *Grayned*, 408 U.S. at 108.

A statute is expected to have some manner of flexibility and reasonable breadth and need not possess "meticulous specificity" in order to be constitutional. *Id.* At 110. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008). The mere fact that a statute may give rise to close factual situations, or is subject to differing interpretations, does not render it

unconstitutional. *See id.* at 305-06; *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 179 (2d Cir. 2006). As the Supreme Court has stated: "Close cases can be imagined under virtually any statute," but that issue is addressed by the burden-of-proof requirement, rather than by striking down the statute as unconstitutional. *Williams*, 553 U.S. at 305-06.

A statute is not *facially* vague unless it is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). In other words, it must be shown that "the statute is vague in the sense that no standard of conduct is specified at all." *United States v. Nadi*, 996 F. 2d 548, 550 (2d Cir. 1993). That obviously is not the case here. Hundreds of political committees each year have no trouble identifying themselves as such and complying with Article 14. There is no colorable claim that Article 14 is vague on its face.

Article 14, on its face, gives notice that an entity will be considered a "political committee" if it involves itself in an election or other vote, regardless of whether that entity is promoting (or opposing) a specific candidate or a broader political principle. However, if the entity is engaged in pure issue advocacy, without tying its activities to any particular vote, Article 14 exempts the entity from its requirements. Such language unquestionably gives a person of ordinary intelligence a reasonable opportunity to understand the types of entities that are designated as "political committees" under Article 14, and therefore, cannot legitimately be said to be facially vague.

The Third Department addressed this very issue in *Klepper v. Christian Coalition of New York, Inc.*, 259 A.D.2d 926 (3d Dept. 1999). In that case, the Christian Coalition (a 501(c)(4) not-for-profit corporation just like plaintiff) argued that Article 14's definition of "political committee" was unconstitutional on its face. *Id.* at 927. The court rejected that argument and,

pointing to the limiting phrase of Section 14-100[1] quoted above, held: "Inasmuch as this savings provision preserves the unencumbered right of an organization to engage in issue advocacy, we find no merit to [Christian Coalition]'s facial challenge to the constitutionality of the provisions at issue." *Id.* Thus, the long-standing provision that plaintiff claims is unconstitutional has already been analyzed and upheld as facially valid by the New York courts.

Article 14 also is not vague as applied to plaintiff. It is apparent from both the timing and text of plaintiff's proposed advertisements that it falls within Article 14's definition of "political committee." In its complaint, plaintiff reveals its intent to spend money advertising in order to support the candidacy of Carl Paladino and to defeat the candidacy of Andrew Cuomo during the weeks leading up to the elections this November. Complaint ¶ 8 & Exs. 2, 4, 5. Plaintiff's advertisements specifically encourage citizens to take action "[a]s the election approaches." *Id.*, Exs. 1-6. It is clear that the promotion of a chosen political principal in connection with the election of specified candidates for public office would render plaintiff a political committee as that term is defined in New York law.

The decision in *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75, 77-78 (S.D.N.Y. 1978), is not persuasive authority to the contrary. That case involved a challenge by the New York Civil Liberties Union to the statue shortly after its enactment. The court held that Article 14 was unconstitutional to the extent that it reached entities engaged in pure issue advocacy, in the context of a case in which the plaintiff made a particularized showing that its members feared the consequences of disclosure. The court in *Acito* did not discuss the definitional exclusion of organizations "without connection with any vote or to a national committee organized for the election of presidential or vice-presidential candidates." § 14-100[1].

Moreover, in 1983, the Legislature amended the Election Law specifically in response to the decision in *Acito*, passing the exception in § 14-100[2]. As the sponsor of the law in the Assembly explained, the legislation was designed to

> accomplish a full restoration of financial reporting by major political action committees and organizations who work to pass or defeat political questions submitted to the voters on Election Day.... [T]hese requirements are very much in effect and law when it comes to political candidates, and I feel that the people of this State have a right to know, as well, how their votes are manipulated, pro or con on an issue, as well as on a candidate.... We believe this particular bill answers the court's recommendation.

Assembly Debate Transcript 73-75 (1983).[5] The sponsor in the Senate explained,

> if an organization spends 5,000 or more or half of their annual budget in a fight for or against something that's on the ballot, I think that's substantial. I think the voters have a right to know where those moneys are coming from; and I think they have the same obligation to report those sums of moneys that they receive as we do as legislators in our campaign committees.... [T]he court's narrow interpretation of the previous section [it] struck down indicated that this would be a proper way to go....

Senate Debate Transcript p. 748-49 (1983).[6]

Finally, since 1978, New York has had thirty years of experience with the statute, which is now routinely obeyed without incident or complaint; persons who make political contributions and who receive expenditures are easily identified though the Board of Election's website, and such disclosure is widely recognized as a strong benefit to the public. To the extent that privacy concerns are implicated by disclosure, the Legislature took account of those concerns, limiting the reach of the disclosure requirement for contributions to "those contributions which are made

[5] A copy of the Assembly Debate Transcript is annexed hereto as Exhibit D.

[6] A copy of the Senate Debate Transcript is annexed hereto as Exhibit E.

to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals." § 14-100[2].

Plaintiff argues that Article 14's definition of "political committee" must be unconstitutionally vague on the theory that it is less precise than the phrase "advocating the election or defeat of a candidate," which the Supreme Court purportedly held was vague in *Buckley*. Pl. Br. 7. However, plaintiff's reliance on *Buckley* to support its argument is unpersuasive. *First*, the portion of *Buckley* to which Plaintiff cites has nothing to do with defining "political committees." Rather, that discussion concerned a criminal prohibition limiting independent expenditures "relative to" a candidate to $1,000. *See Buckley*, 424 U.S. at 39-44. *Second*, Plaintiff's contention that the *Buckley* court held that the phrase "advocating the election or defeat of a candidate" was unconstitutionally vague in all applications is incorrect. Rather, the Court found a different phrase—"relative to a clearly identified candidate"—to be unconstitutional. *See id.* at 39-44. Contrary to plaintiff's assertion, the Court expressed concern that the potentially severe penalties would cause individuals to self-censor because of the breadth of the prohibition. To alleviate that concern, the Court narrowed the statutory phrase to encompass only those expenditures made for the express purpose of "advocat[ing] the election or defeat" of a candidate. *See id.* That holding teaches nothing about the vagueness or clarity of the New York statutory scheme, which is carefully reticulated to capture a broad spectrum of organizations—but only when they are spending substantial funds in connection with a particular vote or advocating the election or defeat of a candidate.[7]

[7] The limiting language distinguishes Article 14 from the other cases on which plaintiff relies. For example, in both *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) and *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006), the courts were concerned with statutory language that arguably imposed disclosure requirements on entities that merely engaged in issue advocacy, without becoming involved in any particular election or vote.

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2. Article 14 is Not Overbroad

Under the First Amendment, a law may be overturned as impermissibly overbroad only if a "substantial number" of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'" *New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The courts do not apply the "'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *See New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988). Plaintiff has failed to identify even one unconstitutional application of Article 14, let alone a "substantial number" in "relation to the statute's plainly legitimate sweep."

The courts evaluate election laws imposing disclosure requirements under the "exacting scrutiny" standard. Such laws are upheld as long as there is a "substantial relation" between the statute's requirements and a "sufficiently important" government interest. *Citizens United*, 130 S. Ct. at 914 (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976), and *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003)); *see Speechnow.org v. FEC*, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (following *Citizens United* and applying exacting scrutiny in upholding registration and reporting requirements); *Nat'l Org. For Marriage v. McKee*, 2010 WL 3270092, at *9 (D. Me. Aug. 19, 2010) (same).[8] There is no question that Article 14 meets those requirements.

Footnote continued from previous page
See North Carolina Right to Life., 168 F.3d at 712-13; *Center for Individual Freedom*, 449 F.3d at 663-64. That is not an issue here because the limiting language in Section 14-100[1] specifically excludes such entities from the definition of "political committee" under Article 14.

[8] Plaintiff contends for strict scrutiny by arguing that all regulation of political committees is subject to strict scrutiny. Pl. Br. 9. Plaintiff confuses the case at hand with cases reviewing actual *bans* on speech. *See, e.g., FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 (1986). Nothing in those decisions suggests that strict scrutiny should be applied to *all* regulation of entities called "political committees," nor would such a rule make sense. The issue is what does the statute *do*, not what *name* does it use to identify the entities subject to its terms. Indeed, this precise argument by this precise plaintiff was soundly rejected by the District Court in Maine. *McKee*, 2010 WL 3270092, at *9 & n.122, n.126. Plaintiff's other cases do not

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New York undoubtedly has a substantial (indeed compelling) interest in fostering a fair and transparent electoral system by requiring disclosure of certain information by entities that raise and expend money in connection with elections and other votes. Transparency "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 915-16. "Public disclosure... promotes transparency and accountability in the electoral process to an extent other measures cannot." *John Doe No. 1 v. Reed*, 130 S. Ct. at 2820. Indeed, as long ago as 1976, the Supreme Court enumerated a number of specific governmental interests that are served by statutory recordkeeping and disclosure requirements:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Footnote continued from previous page
support its position. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (considering constitutionality of segregated fund requirement); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (analyzing definitional provision without discussing level of scrutiny required); *Colorado Right to Life Comm'n., Inc. v. Coffman*, 498 F.3d 1137, 1146-1155 (10th Cir. 2007) (considering constitutionality of direct bans on express advocacy and electioneering by corporations).

Buckley, 424 U.S. 1, 66-68 (1976); *see also Speechnow.org*, 599 F.3d at 696 (recognizing strong "government interest in 'provid[ing] the electorate with information' about the sources of political campaign funds") (citation omitted).

There also is no question that Article 14 is "substantially related" to the strong government interests described above. Article 14 requires "political committees" to disclose information concerning the contributions received and expenditures made for the purpose of supporting or opposing a candidate or political principle in connection with an election or other vote. Such requirements are not arbitrary or unduly burdensome. They have existed on the books in New York for more than three decades, and thousands of political committees have deemed disclosure "worth it" as the price of admission to advocating for or against a candidate for election.

As the Supreme Court explained earlier this year in an analogous case challenging disclosure:

> Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the [disclosure statute at issue]. In doing so, we note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.

John Doe No. 1 v. Reed, 130 S. Ct. at 2822.

Similarly, in *Citizens United*, the Supreme Court rejected a facial challenge to federal election disclaimer and disclosure requirements, holding that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S. Ct. at 914 (citations omitted). The *Citizens United* court also held that "disclosure is a less restrictive

alternative to more comprehensive regulations of speech." *Id.* at 915. There can be little doubt that Article 14 is facially valid.

Ignoring the holdings in *Citizens United* and *Reed*, plaintiff relies on an erroneous interpretation of *Buckley*. Plaintiff claims that a state may only designate an entity as a "political committee" if the entity (a) is "under the control of a candidate" or (b) "the major purpose" of the entity is the nomination or election of a candidate in the jurisdiction, and that any other definition of "political committee" is unconstitutional. Pl. Br. 12. That is not the law. The Supreme Court has never held that states are limited to imposing disclosure or other requirements on organizations that meet a "control" or "major purpose" test.

To be sure, the Court in *Buckley* performed a narrowing construction of *federal* election law in order to sidestep concerns regarding the overbreadth of the *specific statute at issue in that case*, but the Court never suggested that its particular narrowing construction was constitutionally required in all cases. *See Buckley*, 424 U.S. at 79. The Supreme Court has specifically explained that the part of *Buckley* on which plaintiff relies involved an "intermediate step of statutory construction on the way to its constitutional holding," not "a constitutional test." *FEC v. Wisconsin Right to Life, Inc.*, 550 U.S. 449, 474 n. 7. (2007); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 662 (1990), *overruled on other grounds by Citizens United*, 130 S. Ct. 876 (upholding provision imposing political committee-style requirements on *any* corporation making expenditures in connection with federal election, regardless of corporation's "major purpose"); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (same); *see also Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 at *19-20 (W.D. Wash. Jan. 8, 2009) ("Subsequent Supreme Court opinions make clear that there is no 'bright-line' requirement that

[political committee]-style requirements only be imposed on organizations whose single 'major purpose' is campaign advocacy.").

The United States District Court for the District of Maine recently pointed out the absurdity of plaintiff's argument in rejecting an attack by plaintiff on a similar statute:

> NOM's desire to limit campaign finance disclosures to "major purpose" groups would yield perverse results, totally at odds with the interest in "transparency" recognized in *Citizens United*. Under Plaintiff's interpretation, a small group with the major purpose of re-electing a Maine state representative that spends $1,500 for ads could be required to register as a [political committee]. But a mega-group that spends $1,500,000 to defeat the same candidate would not have to register because the defeat of that candidate could not be considered the corporation's major purpose. I see nothing in the Supreme Court's recent case law suggesting that the First Amendment's protections should apply so unequally.

McKee, 2010 WL 3270092, at *10. Other courts have also rejected the "major purpose" and "control" tests in the context of a state disclosure statute. *See id.*; *Human Life of Washington*, 2009 WL 62144 at *61-63; *California Pro-Life Council, Inc. v. Randolph*, 507 F. 2d 1172, 1180 (9th Cir. 2007).

C. A Preliminary Injunction Will Substantially Injure the Public

Plaintiff states in a conclusory fashion that the equities must tip in its favor and that a preliminary injunction must be in the public interest solely because, without such an injunction, plaintiff's First Amendment rights will be injured. *See* Pl. Br. 4. However, as discussed above, plaintiff has not provided any evidence to support its alleged First Amendment injury and any supposed urgency in preventing that injury is, at best, due to plaintiff's own delay in bringing its motion. Conversely, the preliminary injunction that plaintiff seeks, if granted, will inflict a very real and serious injury on the citizens of the State of New York and will dramatically interfere with the State's ability to regulate its elections.

As discussed above, the state has a strong interest in ensuring that state elections are fair, open and honest, and Article 14 is an essential, time-tested tool for shedding the disinfectant of sunshine on the manner in which campaigns are financed. If, as plaintiff demands, the Court enjoins the State from enforcing Article 14 during the upcoming elections, individuals and entities will be able to engage in all manner of electioneering and other political activity with anonymity. Voters will be left completely in the dark in knowing where political campaign money has come from and how it is being spent.

The recent decision by the First Circuit in *Respect Maine* is once again instructive. There the court affirmed the denial of a motion to enjoin the enforcement of Maine's campaign finance reporting statute that was filed approximately three months before Maine's state elections, pointing to the "considerable harm" that such an injunction would cause to the state's citizens. *Respect Maine*, 2010 WL 3861051 at *2-3.

> We also note the harm to the public interest from the chaos that will ensue if the Maine election laws, which have been in place since 1996, are invalidated by a court order in the crucial final weeks before an election. . . Given the potential harm to Maine and to all candidates if the emergency injunction were granted, and the public interest in maintaining the status quo during the period of the Court's deliberations, we deny the emergency motion.

Id. at *2-3.

Here, plaintiff's interest in advocating for or against particular candidates from under a shroud of darkness—an interest unsupported by any concrete allegations of threats, harassment, or reprisals—pales in comparison to the important public interest in disclosure.

CONCLUSION

The Court should dismiss the Complaint and deny the motion for a preliminary injunction.

Dated: October 15, 2010
New York, New York

ARNOLD & PORTER LLP

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[9] Motions for admission *pro hac vice* is pending.

EXHIBIT A

In the United States District Court
for the Northern District of Florida
Gainesville Division

National Organization for Marriage, Inc., ***Plaintiff*** *v.* **Dawn Roberts,** in her official capacity as Florida secretary of state; Jorge Cruz-Bustillo, in his official capacity as chair of the Florida Elections Commission, and William Hollimon, Alia Faraj-Johnson, Leon Jacobs, Jr., Julie Kane, Gregory King, Jose Luis Rodriguez, Thomas Rossin, and Brian Seymour, in their official capacities as members of the Florida Elections Commission, ***Defendants***	Civil Action No. ____

Verified Complaint

Table of Contents

1. Plaintiff National Organization for Marriage, Inc. ("NOM") files this verified complaint.

2. This action begins with the principle of freedom of speech. Government may limit or otherwise regulate speech only when it has the enumerated power to do so and only when the exercise of that power is constitutional.

3. This Court has jurisdiction, because this action arises under the First and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331 (1980).

4. This Court also has jurisdiction, because this action arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1996). *See* 28 U.S.C. § 1343.a (1979).

5. This Court also has jurisdiction under the Declaratory Judgment Act. *See id.* §§ 2201 (1993), 2202 (1948).

6. Venue is also proper in this Court, because "a substantial part of the events or omissions giving rise to the claim[s]" occurs in the Northern District of Florida. *See id.* § 1391.b.2 (1992).

7. Plaintiff submits this action is related to *Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning*, No. 08-445 (N.D. Fla.), although it is no longer pending.

I. Background

A. Plaintiff

1. NOM

8. 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. *Cf.* 2 U.S.C. § 431.7 (2002) (defining "connected organization" under federal law).

2. NOM's Speech

9. Consistent with its mission,[1] NOM seeks in September and October 2010 to engage in multiple forms of speech in Florida, including radio ads,[2] television ads,[3] direct mail,[4] and publicly accessible Internet postings of its radio ads and direct mail. NOM will run the radio and television ads on stations reaching, and send the direct mail to, persons in Florida. The direct-mail exhibit refers to "Candidate X." This refers to candidates for the Florida legislature in the 2010 general election. This includes candidates from the Northern District of

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[1] VERIFIED COMPL. ("VC") Exh. 1, *available at* http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm (all Internet sites visited Sept. 13, 2010).

[2] VC Exhs. 2-3.

[3] VC Exhs. 4-5.

[4] VC Exh. 6.

Florida. When NOM sends the direct-mail piece, it will substitute state candidates' names for "Candidate X." NOM does not wish to reveal the candidates' names in this complaint, because it does not wish to divulge its strategy at this early date. Further, NOM will target each example of its speech to the geographic area that the clearly identified candidate would represent if elected. *Cf.* FLA. STAT. § 106.011.18.a (2010). This is NOM's only election-related activity in Florida. *Cf. id.* §§ 106.011.19 (defining "electioneering communications organization"), 106.03.1.b (2010) (in effect limiting the definition to electioneering-communications organizations that "receive[] contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000").

10. None of this speech is 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 Florida.[5]

3. What NOM Does and Does Not Do

11. To pay for its speech in Florida, NOM will raise or spend more than $5000 in 2010. *Cf.* FLA. STAT. §§ 106.011.19, 106.03.1.b (2010).

12. NOM does not coordinate any of its speech with any candidate for state or local office in Florida, the candidate's agents, or the candidate's committee, *cf. Buckley*, 424 U.S. at 78, *quoted in FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 294 (2d Cir. 1995), or a state or local political party in Florida. *Cf. McConnell v.*

[5] Although it is not material, none of this speech is express advocacy as defined in *Buckley vis-à-vis any* office.

FEC, 540 U.S. 93, 219-23 (2003), *overruled on other grounds, Citizens United v. FEC*, 558 U.S. ____, ____, 130 S.Ct. 876, 896-914 (2010).[6]

13. Nor is there at issue here a contribution NOM receives that (1) is earmarked for a Florida political committee, *i.e.*, an indirect contribution to a Florida political committee, *cf. Buckley*, 424 U.S. at 24 n.23, 78, or (2) "will be converted to an expenditure[,]" *Survival Educ. Fund*, 65 F.3d at 295, *i.e.*, will be earmarked for express advocacy as defined in *Buckley*, 424 U.S. at 44 n.52, 80, *vis-à-vis* state or local office in Florida.[7]

B. Defendants

14. Defendant Dawn Roberts is the Florida secretary of state. Defendant Jorge Cruz-Bustillo chairs the Florida Elections Commission. Defendants William Hollimon, Alia Faraj-Johnson, Leon Jacobs, Jr., Julie Kane, Gregory King, Jose Luis Rodriguez, Thomas Rossin, and Brian Seymour are members of the Florida Elections Commission. Florida law vests Defendants, all of whom are sued in their official capacities, with authority *vis-à-vis* the law at issue in this action. They act under color of law. *See, e.g.*, FLA. STAT. §§ 106.22 (2006), 106.23 (2001), 106.24 (2010), 106.25 (2010), 106.26 (1998), 106.265 (2004), 106.27 (1998).

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[6] Although it is not material, NOM does not make direct contributions to *any* candidate committee or coordinate its speech with *any* candidate, the candidate's agents, or the candidate's committee, or with *any* political party.

[7] Although it is not material, there is not at issue here a contribution NOM receives that (1) is earmarked for *any* political committee, *i.e.*, an indirect contribution to any political committee or (2) "will be converted to an expenditure[,]" *i.e.*, will be earmarked for express advocacy as defined in *Buckley, vis-à-vis any* office.

C. Florida Law

15. NOM reasonably believes that if it does not follow Florida law, Defendants will subject NOM to enforcement and prosecution leading to civil liabilities and criminal penalties. *See id.* Even if government ultimately imposes no civil liabilities or criminal penalties, being cleared provides little comfort to those whom government has wrung through a process that becomes the punishment. *See, e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007) ("*WRTL II*"). "The right of free speech can be trampled or chilled even if convictions are never obtained" and civil liabilities are never imposed. *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 422 n.15 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983).

16. Florida law chills[8] NOM from proceeding with its speech. NOM will engage in its speech only if the Court grants the requested relief.

17. Florida defines "electioneering-communications organization" as

> any group, other than a political party, political committee, or committee of continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party, political committee, or committee of continuous existence under this chapter.

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[8] The term "pre-enforcement" applies before civil enforcement or criminal prosecution. The term "chill" is a proper 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" and "chill" apply to all of Plaintiff's speech.

FLA. STAT. § 106.011.19. With exceptions that do not apply here, "electioneering communication" means

> any communication that is publicly distributed by a television station, radio station, cable television system, satellite system, *newspaper, magazine, direct mail, or telephone* and that:
>
> > 1. Refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is *susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate*;
> >
> > 2. Is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate; and
> >
> > 3. Is targeted to the relevant electorate in the geographic area the candidate would represent if elected.

Id. § 106.011.18.a (emphasis added).

18. NOM – which is neither a political party, a political committee, *see id.* § 106.011.1.a, nor a committee of continuing existence, *see, e.g., id.* §§ 106.011.1.b.1 ("certified ... pursuant to provisions of s. 106.04"), 106.04.1.b (2010) ("At least 25 percent of the income of such organization, excluding interest, must be derived from dues or assessments payable on a regular basis by its membership pursuant to ... the charter or bylaws") – is not under the control of a candidate or candidates for state or local office in Florida.[9] In addition, NOM's organizational documents – *i.e.*,

[9] Although it is not material, NOM is not under the control of *any* candidate or candidates.

its articles of incorporation[10] and by-laws[11] – and public statements[12] do not indicate it has the major purpose of nominating or electing a candidate or candidates for state or local office in Florida, 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 Florida.[13] "Independent expenditure" means express advocacy as defined in *Buckley* and not coordinated with a candidate, a candidate's committee, a candidate's agent, or a party, which is the standard under the Constitution. 424 U.S. at 39-51; *McConnell*, 540 U.S. at 219-23; *cf.* 2 U.S.C. § 431.17 (2002) (following *Buckley* by limiting the statutory independent-expenditure definition to express advocacy).[14]

19. Nevertheless, NOM reasonably fears that, based on its speech, it is an electioneering-communications organization, because it receives "contributions," or makes "expenditures," exceeding $5000 in a calendar year for speech listed in the electioneering-communications-organization definition. *See* FLA. STAT. §§ 106.011.19, 106.03.1.b.

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[10] VC Exh. 7.

[11] VC Exh. 8.

[12] *E.g.*, VC Exh. 1.

[13] *See* VC Exh. 9 (IRS Form 990).

[14] 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.

20. As a result, NOM will have to comply with a panoply of burdens that Florida *via* its electioneering-communications-organization definition imposes on organizations such as NOM, including:

- Registration (including treasurer-designation and bank-account) and termination requirements. *E.g., id.* §§ 106.03.1.b (registration), 106.022 (2010) (same), 106.0703.4 (2010) (treasurer), 106.0703.7.c (same), 106.0703.5 (bank account), 106.03.2.j (termination).
- Recordkeeping requirements. *E.g., id.* § 106.0703.5 (citing *id.* § 106.06)), and
- Extensive reporting requirements. *E.g., id.* § 106.0703.

21. The weight of these burdens[15] is such that the speech would simply not be worth it for NOM. NOM does not want to bear these political-committee burdens that Florida imposes under the electioneering-communications-organization label.

22. Therefore, Plaintiff NOM seeks a declaratory judgment that (1) the electioneering-communications-organization definition, FLA. STAT. §§ 106.011.19 (defining "electioneering communications organization"), 106.03.1.b (in effect limiting the definition to electioneering-communications organizations that "receive[] contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000"), and (2) the electioneering-communication definition, *id.* § 106.011.18.a, are unconstitutional as applied to NOM's speech and

[15] As opposed to, for example, limited independent-expenditure reports, *see, e.g., Buckley,* 424 U.S. at 80-81; 2 U.S.C. § 434.c (2002), or limited reports for electioneering-communications as defined in the Federal Election Campaign Act ("FECA"), *see, e.g., Citizens United,* 130 S.Ct. at 914-16, 2 U.S.C. § 434.f (2002), which Florida does not have.

facially. NOM further asks that the Court preliminarily and then later permanently enjoin their enforcement.

23. This will allow NOM to engage in its speech, and materially similar speech in the future, without fear of becoming an electioneering-communications organization, and without fear of enforcement or prosecution.

D. Future Speech

24. In materially similar situations in the future, NOM intends to engage in speech materially similar to all of its planned speech such that Florida law will apply to NOM as it does now.

25. Plaintiff will plan its future speech as the need arises, keeping in mind that it often cannot know well in advance of when it wants to speak, *see WRTL II,* 551 U.S. at 462-63, and that "timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

26. Despite *Citizens United,* Plaintiff finds itself in the position of having to consult campaign-finance lawyers or seek declaratory rulings "before discussing the most salient political issues of our day." 130 S.Ct. at 889.

II. Discussion

27. Count 1[16] asserts Florida's electioneering-communication definition, and by extension its electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad. Count 2[17] asserts the electioneering-communications-organization definition fails the appropriate level of scrutiny. Count 3[18] then asserts the definitions are facially unconstitutional.

A. Justiciability

1. Standing

a. Constitutional Standing

28. NOM's injury is the chill to speech caused by Defendants' prospective enforcement of Florida law or prosecution of NOM. The relief it seeks will redress this chill, thereby allowing NOM to engage in its speech without fear of enforcement or prosecution. Therefore, NOM has standing to seek relief from the chill. *See Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1322-23 (11th Cir. 2001); *Pittman v. Cole*, 267 F.3d 1269, 1283-85 (11th Cir. 2001).

b. Prudential Standing

29. Plaintiff has prudential standing, because its injuries are in the "zone of interests" the challenged law regulates. *FEC v. Akins*, 524 U.S. 11, 20 (1998)

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[16] *Infra* Part II.D.

[17] *Infra* Parts II.E-G.

[18] *Infra* Part II.H.

("protected or regulated" (quoting *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998))).

2. Ripeness

30. Pre-enforcement challenges are ripe when they address laws chilling political speech. *See Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323-25 (11th Cir. 2001) ("*FRTL*"); *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir.) (citing *Abbott Labs.*, 387 U.S. at 152-53), *cert. denied*, 519 U.S. 1010 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) (citing *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 762 (11th Cir. 1991)).

31. Therefore, Plaintiff's claims are ripe.

B. Irreparable Harm

32. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). So unless Plaintiff receives the relief it requests, it will suffer irreparable harm. There is no adequate remedy at law. *See id.*

C. First Principles

1. The Limited Power of Government

33. Freedom of speech is the norm, not the exception. *See, e.g., Citizens United v. FEC*, 558 U.S. ____, ____, 130 S.Ct. 876, 911 (2010) ("more speech, not less, is the governing rule"); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

34. The framers established government with the consent of the governed, *see, e.g.*, U.S. CONST. preamble (1787) ("We the people of the United States"); FLA. CONST. preamble ("We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty"), and government has only those powers that the governed surrendered to it in the first place.

2. The First and Fourteenth Amendments as Restrictions on the Already Limited Power of Government

35. This power – including the "constitutional power of Congress to regulate federal elections[,]" *Buckley*, 424 U.S. at 13 & n.16, and each state's parallel power over its own, though not other states', elections, *see, e.g., North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*") (citing *Buckley*, 424 U.S. at 13); FLA. CONST. art. VI – is further constrained by other law, including the First and Fourteenth Amendments.

a. Vagueness

36. Under the Fourteenth Amendment, U.S. CONST. amend. XIV (1868), state law regulating political speech must not be vague. *See Citizens United*, 130 S.Ct. at 889 (quoting *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926)).

37. To avoid the problems vagueness causes, law regulating political speech must also be simple and concise. *See id.*

b. Overbreadth

38. The absence of vagueness, however, does not make law regulating political speech constitutional. *See Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479

(2007) ("*WRTL II*") (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) ("*MCFL*")).

39. Even non-vague law regulating political speech must comply with the First Amendment, which provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791). The First Amendment guards against overbreadth, *Buckley*, 424 U.S. at 80 ("impermissibly broad"),[19] and applies to the states through the Fourteenth Amendment, regardless of whether it is through the Due Process Clause, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech and freedom of the press), or the Privileges and Immunities Clause. *Cf. McDonald v. City of Chicago*, 561 U.S. ____, ____, 130 S.Ct. 3020, 3059, 3062-63 (2010) (Thomas, J., concurring in part and concurring in the judgment).

40. The government's power to regulate *elections* is an exception to the norm of freedom of speech. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). The power to regulate *elections* is also self-limiting. To ensure law is not "impermissibly broad," *Buckley* establishes that government may, subject to further inquiry,[20] have the power to regulate donations received and

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[19] One should not confuse this overbreadth with the substantial overbreadth courts address in assessing facial unconstitutionality. *Infra* Part II.H.

[20] *E.g.*, *infra* Parts II.F, G.

spending for political speech only when they are "unambiguously related to the campaign of a particular ... candidate" in the jurisdiction in question, 424 U.S. at 80, or "unambiguously campaign related" for short. *Id.* at 81; *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *7 (N.D. Fla. May 22, 2009) (summary-judgment order (quoting *Buckley*, 424 U.S. at 80));[21] *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).[22] This principle helps ensure government regulates only speech that government has the "power to regulate," *NCRL III*, 525 F.3d at 282, *i.e.*, speech that government has a constitutional interest in regulating. *See id.* at 281 (citing *Buckley*, 424 U.S. at 80). This principle is part of the larger principle that law regulating political speech must not be overbroad, *see Buckley*, 424 U.S. at 80 ("impermissibly broad"), and thus overlaps with constitutional scrutiny.

3. Determining the Meaning of Political Speech and whether Government may Regulate it

41. *WRTL II* also reaffirms that in determining the meaning of political speech and whether government may regulate it, one looks to the *substance* of the speech itself. 551 U.S. at 469 (citing *Buckley*, 424 U.S. at 43-44). *WRTL II* all but

[21] VC Exh. 10.

[22] VC Exh. 11.

forecloses considering *context* to determine the meaning of political speech and whether government may regulate it. *See id.* at 467-73.

Count 1: Vagueness

D. Vagueness

1. The Order of Questions for Political Committee Status

42. Plaintiff re-alleges the preceding paragraphs.

43. In addressing whether a jurisdiction may regulate an organization as a political committee – or impose political-committee-like burdens under another label – the law requires considering these questions in this order: Does the organization (1) fall under a political-committee or similar definition that is not unconstitutionally vague and therefore overbroad? If so, does the organization (2) pass the proper "under the control of a candidate" or major-purpose test? *See Buckley v. Valeo,* 424 U.S. 1, 74-79 (1976).

2. Florida Law is Vague, and therefore Overbroad

44. Florida's electioneering-communication definition, and by extension its electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad, and the definition is unconstitutional as applied to NOM's speech and facially.

45. Florida's vague law does not "provide the kind of notice that will enable ordinary people to understand what conduct it" regulates; furthermore, "it may authorize and even encourage arbitrary and discriminatory enforcement." *City*

of Chicago v. Morales, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

3. Why Florida Law is Vague, and therefore Overbroad

46. Florida bases its electioneering-communication definition, and by extension its electioneering-communications-organization definition, on the appeal-to-vote test. *Compare* FLA. STAT. § 106.011.18.a.1 ("is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate") *with FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL II*").

47. The electioneering-communication definition, and by extension the electioneering-communications-organization definition, are unconstitutionally vague, and therefore overbroad, and are unconstitutional as applied to NOM's speech and facially.[23]

E. Overbreadth: In General

48. In addition, Florida law is unconstitutional as applied to NOM's speech and facially, because it is overbroad.[24]

49. Florida law fails the appropriate level of scrutiny.

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[23] Part II.H addresses facial unconstitutionality, including vagueness.

[24] Parts II.E-G address as-applied challenges, and Part II.H addresses facial unconstitutionality, including overbreadth.

Count 2: Electioneering Communications Organization Definition

F. Overbreadth: The Political Committee and Electioneering Communications Organization Definitions

1. Strict Scrutiny

50. Plaintiff re-alleges the preceding paragraphs.

51. Strict scrutiny applies to government regulation of organizations as political committees and to law imposing political-committee-like burdens. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (holding that a state requirement that an organization form a segregated fund "must be justified by a compelling state interest"), *overruled on other grounds, Citizens United v. FEC*, 558 U.S. ____, ____, 130 S.Ct. 876, 896-914 (2010); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007) ("*CRLC*") (applying strict scrutiny to a state requirement that organizations themselves be political committees); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) ("*NCRL III*") (addressing "narrower means" than a state requirement that organizations themselves be political committees); *cf. Citizens United*, 130 S.Ct. at 897-98 (holding that strict scrutiny applies to a ban on speech and noting the burdens of forming a political committee to do the same speech); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) ("*MCFL*") (considering whether a ban on independent expenditures "is justified by a compelling state interest" and noting the burdens of forming a separate segregated fund to do the same speech).

52. *Buckley v. Valeo* establishes that government may regulate an organization as a political committee or otherwise impose political-committee-like burdens only if (1) it is "under the control of a candidate" or candidates or (2) "the major purpose" of the organization is "the nomination or election of a candidate" or candidates in the jurisdiction. *See* 424 U.S. 1, 79 (1976); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982) (quoting *Buckley*, 424 U.S. at 79); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 08-445, 2009 WL 1457972 at *12-13 (N.D. Fla. May 22, 2009) (summary-judgment order (quoting *Buckley*, 424 U.S. at 80));[25] *Broward*, 2008 WL 4791004 at *12-13 (N.D. Fla. Oct. 29, 2008) (preliminary-injunction order), *clarified on other grounds*, 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008).[26]

53. These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)); *NCRL III*, 525 F.3d at 288-89; *CRLC*, 498 F.3d at 1139, 1154-55; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n.5 (7th Cir. 1998).

[25] VC Exh. 10.

[26] VC Exh. 11.

54. Determining whether an organization is "under the control of a candidate" or candidates for state or local office in Florida is straightforward, and NOM is under no such control.[27]

55. Determining whether an organization passes the major-purpose test is also straightforward.

56. NOM does not have the major purpose of nominating or electing a candidate or candidates for state or local office in Florida: (1) It has not indicated this in its organizational documents or in its public statements, and (2) it does not spend the majority of its money on contributions to, or independent expenditures for, such candidates.[28]

2. Applying Strict Scrutiny

57. Florida lacks a compelling interest in regulating organizations such as NOM as political committees – meaning, here, by imposing full-fledged political-committee burdens on electioneering-communications organizations -- because they are neither under the control of, nor do they have the major purpose of nominating or electing, candidates for state or local office in Florida. In the alternative, Florida's electioneering-communications-organization definition is not narrowly

[27] Although it is not material, NOM is not under the control of *any* candidate or candidates.

[28] Although it is not material, NOM does not have the major purpose of nominating or electing *any* candidate or candidates. It has not indicated this in its organizational documents or in its public statements. Nor does it spend the majority of its money on contributions to, or independent expenditures for, *any* candidate or candidates.

tailored, because it lets Florida regulate organizations such as NOM with political-committee-like burdens when they are neither under the control of, nor have the major purpose of nominating or electing, candidates for state or local office in Florida. *See Florida for Kennedy Comm.*, 681 F.2d at 1287; *Broward*, 2009 WL 1457972 at *12-13; *Broward*, 2008 WL 4791004 at *12-13; *NCRL III*, 525 F.3d at 290; *CRLC*, 498 F.3d at 1146.

58. Therefore, Florida's electioneering-communications-organization definition is unconstitutional as applied to NOM's speech.

59. If Florida wanted to regulate, for example, spending for political speech by persons it may *not* regulate as political committees under *Buckley*, 424 U.S. at 74-79, then it could use less-restrictive means.

G. Exacting Scrutiny

60. Exacting scrutiny applies to disclosure requirements, including attribution, disclaimer, and reporting requirements, both for organizations government *may* regulate as political committees under *Buckley*, 424 U.S. at 74-79, *see Davis v. FEC*, 554 U.S. ____, ____, 128 S.Ct. 2759, 2775 (2008) (quoting *Buckley*, 424 U.S. at 64), and for those it may *not*. *See Citizens United*, 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

61. Full-fledged political-committee *disclosure requirements* apply only if the jurisdiction's regulation of organizations as political committees – *i.e.*, only if the