IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Massachusetts Fiscal Alliance, *Plaintiff*, v. Michael J. Sullivan, Director of Campaign and Political Finance, *et al*. *Defendants*.	No: 1:18-cv-12119-RWZ

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Under Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Massachusetts Fiscal Alliance ("Alliance") moves for a temporary restraining order and a preliminary injunction pending adjudication of the merits of this case.[1] The Alliance asks the Court to enjoin Defendants from enforcing Massachusetts General Laws, Chapter 55, Section 18G, as applied to the Alliance's proposed communications.

As set forth in the accompanying Memorandum of Law, Section 18G imposes substantial burdens on organizations like the Alliance wishing to name candidates for office—including, as in this case, unopposed candidates—while discussing issues of public concern. The law requires

[1] While all Defendants have been served by process server, no attorney has yet entered an appearance for any Defendant. Nevertheless, Plaintiff has sought to comply in good faith with Rule 7.1(a)(2). Undersigned counsel conferred on October 10, 2018 with Robert Toone, Chief of the Attorney General's Government Bureau to advise that office that this motion would be filed. A message left with the Suffolk County District Attorney's office on October 11, 2018 was not returned at the time of filing. Nevertheless, given the claims involved, Plaintiff expects the Parties will be unable to resolve or narrow the issue, and anticipates that all Defendants will oppose this motion.

organizations to place their principal officers on screen to read a government-mandated script—imposing substantial financial costs while needlessly revealing those officers' membership in protected classes and exposing them and their organizations' messages to prejudices unrelated to the communication's content. Section 18G further forces organizations to reveal their top contributors on the face of the communication, regardless of their connection to, or even knowledge of, the communication. And Section 18G compels organizations like the Alliance to advertise the State's website as part of their message. It is illegal to publish a regulated communication without abiding by these requirements.

These burdens violate the Alliance's First Amendment rights to freedom of speech and association. Reasonably fearing that the Defendants will enforce Section 18G, the Alliance will not speak absent an injunction from this Court.

Accordingly, the Alliance asks the Court to enjoin enforcement of Section 18G. It also asks the Court to award such other and further relief as is just and proper.

Respectfully submitted,

/s/ Allen Dickerson

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Dated: October 11, 2018

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, RULES, AND REGULATIONS

REQUEST FOR ORAL ARGUMENT

Given the substantial First Amendment questions at issue, Plaintiff respectfully requests a hearing before this Court pursuant to D. Mass. L.R. 7.1(d).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents a substantial question of first impression in this Circuit. The Commonwealth of Massachusetts, represented by Defendants here, demands that communications which mention an officeholder before an election carry substantial additional government-directed speech. One of these scripts must be read by the principal officer of a group, revealing his or her sex, gender, race, speech pattern, and other irrelevant personal characteristics. Another script will publicize the names of five of Plaintiff's donors, violating those individuals' privacy and forcing them to "sign" communications that they do not know about and may not support. The third requires groups to advertise the Commonwealth's elections enforcement agency.

The Commonwealth's compelled speech regime is subject to strict scrutiny, but it cannot survive even a lesser standard of review, as its requirements are not properly tailored to a sufficiently important governmental interest. Accordingly, the Commonwealth's speech mandates are unconstitutional.

STATEMENT OF FACTS

a. The Massachusetts Fiscal Alliance

The Massachusetts Fiscal Alliance is "a nonpartisan, nonprofit corporation organized under 26 U.S.C. § 501(c)(4)." Verified Complaint ("VC") at 3, ¶ 12. Because of its § 501(c)(4) status, federal law shields the Alliance's donors from disclosure. 26 U.S.C. § 6104(d)(3)(A). The Alliance "advocates for fiscal responsibility on the part of the Massachusetts state government, for

transparency and accountability, and for increased economic opportunity for all people of the Commonwealth." VC at 3, ¶ 12. Its chairman is Mark Cohen. *Id*. at 4, ¶ 22.

The Alliance's mission is ideological, not partisan. *Id*. at ¶ 21. "Part of" its "mission involves educating the people of the Commonwealth about the activities of their state government." *Id*. at 5, ¶ 23. Accordingly, the Alliance wishes to run radio, internet, and television ads about two recent legislative issues: a tax increase and a legislative pay raise. *See id*. at 5-8. The ads will also encourage viewers or listeners to visit MassFiscalScorecard.org, an Alliance project that reports the position of state legislators on the pay raise and other issues. *See* Ex. B. Because these advertisements will be run on television stations, a radio station, and websites targeting the First Plymouth and Bristol district, they will refer to that region's state senator: Marc Pacheco, an unopposed candidate for re-election. *See* VC at 6-8. In addition, the Alliance wishes to send out a static, paper version of its legislative scorecard to over 100 households throughout the Commonwealth. These activities will, individually and in combination, cost more than $250. *Id*. at 10, ¶ 46.

The Alliance's speech merely "take[s] a position on" some "legislative issue[s]," and "exhort[s] the public to adopt [those] position[s] and urge the public to contact public officials with respect to the matter." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (Roberts, C.J., controlling op.) ("*WRTL II*").[1] "The [communications] do not mention" officeholders in their capacity as candidates, but rather in their capacity as sitting legislators. *Id*. Nor do the communications evaluate officeholders' "character, qualifications, or fitness for

[1] The first iteration of the case asked whether an as-applied remedy was foreclosed by *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which upheld the federal statute at issue facially. *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 411-412 (2006).

office." *Id*. They are merely ideological policy statements, principally about the revenue generation and state spending preferences of members of the Massachusetts General Court.

The Alliance would like to make these communications now, during the period directly before the November 6, 2018 election, so it can "inform citizens of the Commonwealth about policies being enacted by the General Court at a time when the people's attention is focused on that legislative body." VC at 5, ¶ 28. If it does so, however, it will run into the burdens of Massachusetts General Laws, chapter 55, section 18G.

b. Massachusetts's compelled speech regime

If distributed, the Alliance's proposed issue speech will be regulated as an "electioneering communication," Mass. Gen. Laws, ch. 55, § 1, even though the "four corners of the ads" do not electioneer, *WRTL II*, 551 U.S. at 461 (internal quotation marks omitted). In Massachusetts, electioneering communications are simply "internet communications which are…paid advertisements," and "any broadcast, cable, mail, satellite[,] or print communication that…refers to a clearly identified candidate; and…is publicly distributed within 90 days" of a general election. Mass. Gen. Laws ch. 55, § 1. Although there are a few exceptions from the electioneering communication definition, none of the Alliance's proposed communications qualify for any dispensation. *See, e.g.*, VC at 9, ¶ 44.

Persons that make electioneering communications "in an aggregate amount exceeding $250 in a calendar year" must provide after-the-fact reporting to the Commonwealth. Mass. Gen. Laws ch. 55, § 18F. This reporting, which includes providing the name and addresses of persons that gave funds specifically to fund electioneering communications, *id*., is not challenged here. *See* 11 C.F.R. 104.20(c)(9) (describing similar contribution reporting regime upheld by *Citizens*

United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) and *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501-502 (D.C. Cir. 2016)).

Rather, the Alliance objects only to the on-communication compelled speech regime that Massachusetts has *in addition to* any after-the-fact reports. Massachusetts's Code of Regulations calls this government-directed speech a mere "disclaimer," 970 Code of Mass. Regs. 2.20, but "the state uses this word to mean the opposite of its normal connotation." *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*). "In everyday language, a disclaimer is a repudiation or denial of responsibility." *Id*. More properly stated, Massachusetts's compelled speech regime involves "*pro*claimer[s] (or just…'disclosure[s]') rather than a *dis*claimer." *Id*. (emphasis in original).

Section 18G provides for three forms of proclaimers. A "statement of responsibility" on radio, television, and internet communications, a "top contributors" disclosure on television, internet, and print communications, and a "government advertisement" on television, internet, and print communications "that directs viewers to the official web address" of Defendant Office of Campaign and Political Finance. Mass. Gen. Laws, ch. 55, § 18G.

1. <u>"Statement of Responsibility"</u>

While the statement of responsibility is required for radio, television, and internet electioneering communications, the law's impositions vary for each form.

For the Alliance's proposed television ad, the Alliance must place its "principal officer" on screen, in "an unobscured, full-screen view." *Id*. Simply showing Mr. Cohen is not enough. He also must "mak[e] the statement" that the Commonwealth has drafted for him: "I am Mark Cohen, the chairman of the Massachusetts Fiscal Alliance and the Massachusetts Fiscal Alliance approves and paid for this message." Mass. Gen. Laws ch. 55, § 18G. Thus, in exchange for the privilege of

talking about policy, the Alliance—and all other groups making electioneering communications—is compelled to show the physical appearance, sex, gender, race, speech pattern, and other irrelevant personal characteristics of its principal officer.

Owing to the medium of communication itself, the radio statement of responsibility does not require an image of Mr. Cohen. The government-compelled script, however, is the same. Mass. Gen. Laws ch. 55, § 18G. For both the radio and television communications, then, the compelled speech will add eight seconds of time to the ads themselves. VC at 12, ¶ 57. Each time the radio ad runs, this additional eight seconds will cost approximately $56. VC at 16, ¶ 75. Each time the television ad runs, this additional eight seconds will cost approximately $667. *Id*.

For internet communications, the visual depiction of Mr. Cohen does not appear to be necessary. *See* Mass. Gen. Laws ch. 55, § 18G. Nonetheless, for "internet advertising," the same statement, "'I am [Mark Cohen,] the [chairman] of the [Massachusetts Fiscal Alliance] and the [Massachusetts Fiscal Alliance] approves and paid for this message'…shall appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement." *Id*. This proclaimer will apply to the Alliance's video ad on the *Taunton Daily Gazette*, but not its Facebook posts. VC at 7, ¶¶ 32-33; 970 Code of Mass. Regs. 2.20(4)(e)-(f) (excluding internet communications "of limited size" and "[s]ocial media posts").

2. <u>"Top Contributors"</u>

The proclaimer regime goes further, providing another script for television, internet, and print advertising. Those communications must "include a written statement at the bottom of the advertisement or mailing that contains the words 'Top Contributors' and a written statement that lists the 5 persons or entities or if fewer than 5 persons or entities, all persons and entities that made the largest contributions to that entity." Mass. Gen. Laws ch. 55, § 18G. Any organization

that "has raised more than $5,000 in the aggregate from any contributor during the 12-month period before the date" the ad runs must provide this disclosure. 970 Code of Mass. Regs. 2.20(3). Unlike the after-the-fact reporting requirement discussed *supra*, however, the "top contributors" proclaimer must include donors "regardless of the purpose for which the funds were given." Mass. Gen. Laws, ch. 55, § 18G. Neither the statute nor its attending regulations limit how long the top contributors proclaimer must go on, suggesting that this message must be on-screen for the entirety of the Alliance's relevant television or internet communications.

3. "Government Advertising"

The third proclaimer does not provide information about authorship or donors. Rather, on the Alliance's television, internet, and print communications, it must also include a message "that directs viewers to the official web address of the office of campaign and political finance." *Id*. By regulation, that message is a specific script: "for more information regarding contributors, go to www.ocpf.us." 970 Code of Mass. Regs. 2.20(7). Once again, neither the statute nor its attending regulations place a time limit on this proclaimer, suggesting that this message should be displayed on-screen continuously.

These three proclaimer provisions are compounded by the statute's vague instruction that the compelled text of the communication "shall appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement." Mass. Gen. Laws, ch. 55, §18G. Although the Director has issued regulations that purport to clarify what "clearly readable" means, the regulation merely states that the "size and contrasting color" must be "legible to the average viewer." 970 Code of Mass. Regs. 2.20(6).[2]

[2] The Office of Campaign and Political Finance has issued guidance with respect to the statement of approval for internet ads that "the color contrast requirement is met if the disclaimer is printed in black on a white background, or if the degree of contrast between the background color and the

c. Defendants' role in enforcing Massachusetts's compelled speech regime

The Alliance wishes to make its communications without the burden of also carrying the Commonwealth's messages. In fact, in the past, to prevent being forced to present the government's speech as its own and expose the privacy of its donors, the Alliance has extensively communicated with lawyers with the Office of Campaign and Political Finance in an informal pre-clearance regime. *See, e.g.*, Ex. A; *Citizens United*, 558 U.S. at 335 ("This regulatory scheme may not be a prior restraint on speech in the strict sense of that term…As a practical matter, however…a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against [the Office's] enforcement must ask a governmental agency for prior permission to speak") (citations omitted).

Any violation of the proclaimer regime is treated seriously. "Whoever violates" the law, by failing to comply with any of the government-directed scripts, "shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than $10,000, or both." Mass. Gen. Laws, ch. 55, § 18G. Defendants are tasked with the civil and criminal enforcement of this statute. VC at 2-3, ¶¶ 9-11; *id*. at 3-4, ¶¶ 13-17. Accordingly, the Alliance will not engage in its proposed communications—nor substantially and materially similar communications it would like to make within 90 days of future Massachusetts elections—unless

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disclaimer text is at least as great as the degree of contrast between the background color and the color of the largest text in the communication." OCPF-IB-10-01 (Sep. 2010) (rev. June 22, 2018). This guidance does not apply to television advertisements, however, and it does not provide any guidance for the top contributor proclaimer. Furthermore, the OCPF's guidance is nonbinding. *See 1A Auto, Inc. v. Dir. of the Office of Campaign & Political Fin.*, 480 Mass. 423, 442 n.10 (2018) (noting that an OCPF interpretive bulletin was "not a promulgated regulation that carries the force of law"); *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 231 (2011) (noting that agencies like the OCPF do "not consider bulletins to be binding regulations"). Thus, the bulletin is not a safe harbor, and neither the Director nor electors are required to heed even the guidance it does give before filing complaints. *See* Mass. Gen. Laws ch. 55, § 3 (noting that "five registered voters" may file a written complaint).

this Court intervenes. *Va. v. Am. Booksellers*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of the suit…self-censorship[is] a harm that can be realized even without an actual prosecution.") (punctuation altered, brackets supplied).

JURISDICTION, VENUE, AND STANDARD OF REVIEW

This Court has jurisdiction because this case presents a federal question involving the First and Fourteenth Amendments. 28 U.S.C. § 1331, 28 U.S.C. § 1343(a); 42 U.S.C. §§ 1983, 1988. Venue is appropriate because "a substantial part of the events or omissions giving rise to the claim" will occur in Boston, Massachusetts. VC at 2, ¶ 8 (quoting 28 U.S.C. § 1391(b)).

The standard for a temporary restraining order or preliminary injunction is the same. *Cavalier Coach Corp. v. Foxx*, No. 14-cv-12499-IT, 2014 U.S. Dist. LEXIS 81705, at *1-2 (D. Mass. June 13, 2014) (unpublished) (applying same standard to both). "A plaintiff…must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Glossip v. Gross*, 576 U.S. __; 135 S. Ct. 2726, 2736 (2015) (internal quotation marks omitted); *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) ("*Sindicato*") (stating similar).

ARGUMENT

I. The Alliance Is Likely To Succeed On The Merits.

While "each factor" of the relevant standard "is important…'[t]he sine qua non of th[e] four-part inquiry is likelihood of success on the merits.'" *Sindicato*, 699 F.3d at 10 (1st Cir. 2012) (brackets in original) (quoting *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)). This factor is especially important "in the First Amendment context" as "success on the merits" in such cases renders "a discussion of the other factors" virtually irrelevant. *Am.*

Freedom Def. Initiative v. Mass. Bay Transp. Auth., 989 F. Supp. 2d 182, 192 (D. Mass. 2013). Thus, this factor "is the linchpin of the preliminary injunction analysis" here. *Sindicato*, 699 F.3d at 10. The Alliance is likely to succeed on the merits.

A. When the Government compels private actors to read a state-directed script, the demand is subject to strict scrutiny.

The Alliance's speech is merely "nonpartisan public discussion of issues of public importance." *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975) (*en banc*). Unlike speech that speaks "pejorative[ly]" about a candidate and her campaign, *Citizens United*, 558 U.S. at 320, or speech that expressly advocates an outcome in a candidate election, *Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (*per curiam*), the Alliance seeks merely to "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *WRTL II*, 551 U.S. at 470. This sort of "genuine issue" speech is highly protected. *Id*.

Here, the State seeks nothing less than to "proscrib[e] the content of" genuine issue speech, "a form of regulation of campaign activity subject to traditional strict scrutiny." *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004) (emphasis removed). In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Supreme Court explicitly applied strict scrutiny to a state statute that compelled an on-communication proclaimer when a speaker agitated against a local revenue measure. There, the Court determined that because "the category of covered documents is defined by their content," the Ohio law was not "an ordinary election restriction" and was therefore subject to strict scrutiny. *McIntyre*, 514 U.S. at 345-346. And just last Term, the Court acknowledged that where the government demands a private actor to speak from a

"government-drafted script" this amounts to a "content-based regulation[] of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __; 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*").

The sole relevant exception to the general rule that compelled speech is subject to strict scrutiny involves a mere authorship requirement. In *Citizens United*, the Court reviewed, along with off-communication, traditional donor disclosure, a federal requirement for an attribution statement stating "'___ is responsible for the content of this advertising…'" in a 'clearly spoken matter,' and displayed on the screen in a 'clearly readable manner' for at least four seconds…[and a] state[ment] that the communication 'is not authorized by any candidate or candidate's committee,'" as well as a non-verbal "display [of] the name and address (or Web site address) of the person or group that funded the advertisement." 558 U.S. at 366. Without remotely suggesting that it was overruling *McIntyre*, the Court "subjected these requirements to 'exacting scrutiny.'" *Citizens United*, 558 U.S. at 366.

This somewhat reduced demand likely was contingent on the "novelty and plausibility of the justification raised" for such a proclaimer. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The short federal authorship statement provides the name of the organization and its connection to any campaign, information necessary for a viewer or listener to be able to access donor reports from the Federal Election Commission or a third-party organization like OpenSecrets.org. Here, however, Massachusetts makes novel demands, which provide the electorate with only extraneous and unnecessary information while imposing much greater burdens on the Alliance's actual messages. "By compelling individuals" and groups "to speak a particular message," as opposed to merely noting authorship, Massachusetts will "alter the content of their speech." *NIFLA*, 138 S. Ct. at 2371 (internal quotation marks omitted, brackets removed). This "is a content-based regulation of speech," that triggers review under strict scrutiny. *Reed v. Town of*

Gilbert, 576 U.S. __; 135 S. Ct. 2218, 2227 (2015); *Rideout v. Gardner*, 838 F.3d 65, 71 (1st Cir. 2016) ("Standards to evaluate justifications by the state of a restriction on speech turn, inter alia, on whether the restriction focuses on content, that is, if it applies to particular speech because of the topic discussed") (internal quotation marks omitted) (quoting *Reed*, 135 S. Ct. at 2227). Thus, as a content-based regulation of political speech and association, Mass. Gen. Laws, ch. 55, § 18G and its attendant regulations should be subject to strict scrutiny. *See Mass. Ass'n of Private Career Schs. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) ("[A] content-based restriction on speech is subject to strict scrutiny regardless of the government's motive…").

But even if exacting scrutiny applies, that review must be *exacting*. Exacting scrutiny, in the campaign finance context, may or may not be equivalent to strict scrutiny. *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013) ("'Though *possibly* less rigorous than strict scrutiny…'") (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*)) (emphasis supplied). Most often, however, it is treated as a form of heightened judicial scrutiny, *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016), which is far more rigorous "than a rubber stamp." *Swanson*, 692 F.3d at 876; *Shrink Mo. Gov't PAC*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Thus, even if "the Court is not applying strict scrutiny, [it] still require[s] a fit that is not necessarily perfect," but rather "a means narrowly tailored to achieve the desired objective." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (internal quotation marks omitted).

Under this exacting standard of review, Massachusetts's proclaimer regime cannot survive. The Commonwealth cannot "adequately demonstrate[] that" its statute and regulations "are substantially related to a sufficiently important government interest." *Worley*, 717 F.3d at 1253.

B. The tripartite proclaimer regime is not tailored to a legitimate subordinating governmental interest.

As discussed *supra*, there are three elements of the section 18G proclaimer system, a "statement of responsibility," a "top contributors" disclosure, and a brief "government advertisement." At least two of these proclaimers apply to each category of media the Alliance will use. But even if taken singly, no element of the proclaimer advances "subordinating interests of the State" which can "survive exacting," let alone strict, "scrutiny." *Buckley*, 424 U.S. at 64; *see NIFLA*, 138 S. Ct. at 2375 ("the licensed notice cannot survive even intermediate scrutiny").

a. The "statement of responsibility" proclaimer.

Massachusetts has provided a script that must be sourced to the "chairman or principal officer of the group," Mass. Gen. Laws, ch. 55, § 18G, where that officer personally states his or her name and "stands by" the communication on behalf of the organization. Although federal law requires a similar proclaimer from candidates for office (but not outside groups), 52 U.S.C. § 30120(d), that statute's constitutionality has never been tested in federal court. The Supreme Court has, however, twice struck down mere text-based "statement of responsibility" proclaimers. *See McIntyre*, 514 U.S. at 345, 357; *Talley v. Cal.*, 362 U.S. 60, 66 (1960).[3]

And while the *Citizens United* Court did bless a four-second, audio-only verbal proclaimer, "[i]n for a calf is not always in for a cow." *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). The responsibility proclaimers here are far more onerous, invasive, and controlling of Plaintiff's speech. When it upheld the fleeting federal proclaimer, the Supreme Court identified an

[3] The text-based proclaimer on the Alliance's video internet ad is particularly onerous, as it appears that Massachusetts requires that message to run for the full course of the communication, rather than the four seconds required by federal law. Moreover, the internet disclaimer requires a puzzling script: "I am Michael Cohen and I am the chairman of the Massachusetts Fiscal Alliance," which will only confuse viewers since Mr. Cohen will not be speaking at all.

important—albeit not necessarily compelling—interest in providing consumers with information to "help citizens 'make informed choices in the political marketplace.'" *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. 93, 197 (2003)). A simple identification of the communication's source as responsible for the advertising suffices to advance that interest in Massachusetts. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure…").

To label section 18G's requirements as authorship statements or mere "paid for" notations, however, would be a grave error. *NIFLA*, 138 S. Ct. at 2375 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection") (quoting *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988)) (brackets in original). For example, the statement of responsibility will take the Alliance's chairman approximately eight seconds to say—which is twice as long as the audio requirement in federal law. Thus, Plaintiff has a choice of either paying extra for eight more seconds of airtime at additional cost, or to cut eight seconds of its own message to provide room for the Commonwealth's. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) ("The extra verbiage required by the rule goes well beyond the short disclaimer required…[and] consume[s] a significant amount of paid advertising time in a broadcast ad"). Either way, the government's script will end up swallowing a good deal of the Alliance's speech. Eight seconds of a 38-second ad is still 21 percent of that communication, and eight seconds constitutes nearly 27 percent of a thirty second spot. *See Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 228-229 (5th Cir. 2011) (striking down "verbal disclaimers that require so much time that attorneys are unable to effectively use short (ten-to-sixty-second) television or radio advertisements" as "overly burdensome and violat[ive of] the First Amendment"). The Commonwealth cannot "drown[] out the [Alliance's] own message." *NIFLA*, 138 S. Ct. at 2378.

In the context of commercial speech, the First Circuit has upheld a warning label that took up "twenty percent of any advertisement" for cigars that was designed to warn consumers about the unique health dangers of that product. *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir. 2000).[4] No similar regulation of *political* speech has been upheld by that Court or any court. After all, restrictions on commercial advertising for cancer-causing products cannot be equated, constitutionally speaking, to onerous restrictions upon "the free discussion of governmental affairs" protected by the First Amendment. *Mills v. Ala.*, 384 U.S. 214, 218 (1966); *see NIFLA*, 138 S. Ct. at 2374 (noting the "inherent risk" that compelled speech "seeks not to advance a legitimate regulatory goal") (internal quotation marks omitted).

But the extra length of the government's script is not the only burden the Commonwealth adds. The requirement that groups display their principal officer, providing information about his or her race, sex, gender, speech pattern, and other irrelevant personal characteristics does not "help citizens 'make informed choices in the political marketplace.'" *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197). If anything, it urges distraction—forcing viewers to consider a principal officer's characteristics rather than "evaluat[ing] the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see Heller*, 378 F.3d at 994 ("[I]dentifying the publisher can interfere with that evaluation by requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message."). These burdens wrest control of the message from the speaker without advancing an appropriate government interest. *See McIntyre*, 514 U.S. at 342 (noting "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity").

[4] It bears some notice that under the much lower standard of scrutiny in commercial speech context, compelled speech must still be purely factual and uncontroversial. *NIFLA*, 138 S. Ct. at 2372.

The government's legitimate interest in speaker identification could easily, and constitutionally, be accomplished without these burdens. Massachusetts could merely require the Alliance to state that it paid for the communication at the conclusion of its radio, television, and internet ads. *Cf.* Ark. Code Ann. § 7-1-103(a)(7); D.C. Code § 1-1163.15; Neb. Rev. Stat. § 49-1474.01; 25 Pa. Stat. Ann. § 3258(a). Viewers and readers curious about the Alliance and its donors could then turn to the internet (merely by running a Google search with the Alliance's name in quotation marks) to find out more information. *McCutcheon*, 572 U.S. at 224 ("Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided").

b. The "top contributors" proclaimer

The Alliance's television, internet, and print communications will also have to carry the "top contributors" proclaimer. If this "content appears on the communication, it may be circulated; if the content is absent," however, "the communication is illegal." *Heller*, 378 F.3d at 992.

Any publication of private contributors touches on "the right of association," which "is a 'basic constitutional freedom, that…lies at the foundation of a free society." *Buckley*, 424 U.S. at 25 (citations and quotation marks omitted). The right of association not only encompasses the right to privately associate via financial participation, *NAACP v. Ala.*, 357 U.S. 449, 466 (1958), but also the "right to eschew association for expressive purposes." *Janus v. Am. Fed'n of State, Cty. and Mun. Emps., Council 31*, 585 U.S. __; 138 S. Ct. 2448, 2463 (2018).

Of course, "[t]he right to participate in democracy through political contributions…is not absolute." *McCutcheon*, 572 U.S. at 191. The disclosure of some general donors, to organizations dedicated to the election or defeat of candidates, has long been upheld. *See Buckley*, 424 U.S. at 75-82. But requiring the disclosure of general contributors merely because a group engages in

issue speech as one of its many activities, threatens fundamental First Amendment liberty, *Van Hollen*, 811 F.3d at 501, and compelling the publication of that information directly on the communication itself only magnifies the constitutional injury. *Heller*, 378 F.3d at 994.

Faced with a Nevada statute that "require[d] certain groups or entities publishing 'any material or information relating to an election, candidate[,] or any question on a ballot' to reveal *on the publication* the names and addresses of the publications' financial sponsors," the Ninth Circuit facially invalidated the state law "because it violate[d] the Free Speech Clause of the First Amendment." *Heller*, 378 F.3d at 981 (emphasis in original). That Court of Appeals found a constitutional difference between "the reporting of funds used to *finance* speech," via after-the-fact reporting, as opposed to compelled disclosures "affect[ing] the *content of the communication itself*." *Heller*, 378 F.3d. at 987 (emphasis in original). Indeed, that Court considered the "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" to be "constitutionally determinative." *Heller*, 378 F.3d at 991. So it is here.

The government's interest in donor disclosure is akin to its informational interest in identifying the author of a communication. *Citizens United*, 558 U.S. at 367. Placing the names of general donors directly on the face of a communication compounds the constitutional harm already wrought by the Commonwealth's other compelled disclosure demands. By listing donors that did not directly fund the communication on the face of the communication itself, the law will "mislead voters as to who really supports the communications" by suggesting those contributors are directly responsible for the ad's production. *Van Hollen*, 811 F.3d at 497.

This is particularly true where, as here, Massachusetts's regime targets speech made by a group whose major purpose is policy activism, not election advocacy. Two years ago, the D.C. Circuit pointedly observed the issues that can arise from such an uncabined disclosure regime:

> Imagine the following not unlikely scenario. A Republican donates $5,000 to the American Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?

Van Hollen, 811 F.3d at 497 (emphasis in original).

There, the D.C. Circuit was merely discussing the dangers of *off-communication* reporting of general donors. The Commonwealth has gone one step further and compelled the release of these names directly on the communication, as though those donors had authored or approved it. This information will only further confuse, conflating the general financial supporters of an organization with a communication's specific authors. And given that Massachusetts classifies issue speech as "electioneering" speech, there is an additional risk that the disclosed donors will be improperly perceived as political opponents or supporters of Senator Pacheco, rather than general supporters of the Alliance's mission.[5] *Cf. Janus*, 138 S. Ct. at 2464 (finding that the government cannot, consistent with the First Amendment "[f]orc[e] free and independent individuals to endorse ideas…"). Where compelled disclosure will not help voters make decisions, there is no constitutional ground to infringe on a contributor's privacy, and "something...outweighs nothing every time." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) (ellipsis in original) (citation and quotation marks omitted).

As the Ninth Circuit noted in the *Heller* opinion, "[c]ampaign regulation requiring off-communication reporting of expenditures made to finance communications" are "considerably

[5] Given that the Alliance's radio, television, and internet ads are neutral as to Senator Pacheco's actual positions, it is possible that different viewers will perceive the communication's message differently. *Cf. WRTL II*, 551 U.S. at 470, n.6.

more effective[]" at "informing the electorate" and "does not involve the direct alteration of the content of a communication." *Heller*, 378 F.3d at 994.[6] That type of reporting, including the reporting of earmarked donors for independent speech, is precisely the form of disclosure that has been upheld in the Supreme Court and First Circuit. *See Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34, 59-61 (1st Cir. 2011) (upholding $100 independent expenditure reporting regime). "Compared to communication-altering requirements…the imposition on freedom of speech of such reporting requirements is less, while the fit between the regulation and the interest it serves is superior." *Heller*, 378 F.3d at 994. Massachusetts has just such a reporting regime, which the Alliance does not challenge. Mass. Gen. Laws, ch. 55, § 18F.

c. The "government advertising" proclaimer

The final proclaimer, which would apply to the Alliance's relevant print, internet, and television communications, alerts readers and viewers to the existence of the Office of Campaign and Political Finance's website. Just last Term, the Supreme Court struck down a state law that compelled a private entity to notify the general public "about the availability of state-sponsored" information and services. *NIFLA*, 138 S. Ct. at 2371. Here, Defendants force the Alliance to carry an advertisement for their website. But the Commonwealth may not "co-opt" private actors "to deliver its message for it." *NIFLA*, 138 S. Ct. at 2376.

And it is not for the Alliance to advertise the Commonwealth's web presence, even if that site contains databases of donor information that might conceivably be of public interest. As the *McCutcheon* Court observed, "private entities" also supplement government reporting of donors. 572 U.S. at 224. That this information is available is a widely-known fact, with "massive quantities

[6] Moreover, "[t]he assistance provided by" on-communication disclosure, if any, "toward enforcing the campaign finance laws is therefore minimal." *Id*. at 999.

of information" only a "click of a mouse" or a tap of a smartphone screen away. *Id*. There is therefore no legitimate governmental interest in forcing the Alliance to have its message contorted to advertise a government agency.

C. The guidelines for placing a proclaimer on a digital advertisement are unconstitutionally vague.

"[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockville*, 408 U.S. 104, 108 (1972). Vagueness is especially troubling in the First Amendment context. *Id*. at 109.

But Massachusetts law requires that its text-based proclaimers on television and online ads contain a "reasonable degree of color contrast," Mass. Gen Laws, ch. 55, § 18G, which is "legible to the average viewer." 970 Code of Mass. Regs. 2.20(6)(a). While this language is vague even as it applies to television communications, the Alliance is at a loss to determine what is a "reasonable degree of color contrast" that is "legible to the average viewer" for online content. Internet advertisements can be viewed on such a wide array of applications, devices, and machines that it is impossible to truly know how to comply with the law. Accordingly, at a minimum, this requirement for online speech should be facially struck. *Schwann v. FedEx Ground Package Sys.*, 813 F.3d 429, 440-41 (1st Cir. 2016) (acknowledging general presumption of severability).

II. The Remaining Non-Merits Factors Support The Alliance's Motion.

The remaining three factors all balance in favor of the Alliance. First, "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Sindicato*, 699 F.3d at 11; *see also id.* at 15 (collecting cases). Next, the equities favor Plaintiff. "[T]he value of political speech is at its zenith at election time," and the Alliance's self-

imposed silence will deprive the people of Massachusetts of precisely that speech at precisely that time. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("*N.Y. Progress*"). Meanwhile, weighed against the Alliance's desire to speak freely, the Commonwealth only has an enforcement interest in a likely unconstitutional law. But "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); Thus, "[g]ranting the preliminary injunction would not result in a greater harm to the State because the State 'does not have an interest in the enforcement of an unconstitutional law[.]'" *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388-89 (3d Cir. 2012).

Finally, the public interest also favors granting Plaintiff's motion, because the law at issue likely violates the Constitution. As a sister district court in this Circuit observed, "[i]t is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation." *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997). In particular, "securing First Amendment rights is in the public interest." *N.Y. Progress*, 733 F.3d at 488; *accord Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

CONCLUSION

For the foregoing reasons, Plaintiff's motion for injunctive relief ought to be granted.

Respectfully submitted,

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Dated: October 11, 2018
* admitted *pro hac vice*

LOCAL RULE 7.1(a)(2) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, and Plaintiff's Memorandum of Law in Support of Plaintiff's Motion was served on each other party or attorneys of record for each other party by mail and electronic mail, at the addresses below, on October 11, 2018.[1]

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Dated this 11th day of October, 2018

s/ Allen Dickerson
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[1] As noted in the motion, while all Defendants have been served by process server, no attorney has yet entered an appearance for any Defendant. Nevertheless, Plaintiff has sought to comply in good faith with Rule 7.1(a)(2). Counsel for Plaintiff conferred on October 10, 2018, with Robert Toone, Chief of the Attorney General's Government Bureau to advise that office that this motion would be filed. A message left with the Suffolk County District Attorney's office on October 11, 2018 was not returned at the time of filing.