UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CASE NO. 1:18-CV-12119-RWZ

MASSACHUSETTS FISCAL ALLIANCE,

Plaintiff,

v.

MICHAEL J. SULLIVAN, Director of Campaign and Political Finance, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Respectfully submitted,

/s/ Julie E. Green
Julie E. Green, BBO # 645725
Abrisham Eshghi, BBO# 703020
Assistant Attorneys General
Office of the Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 963-2085
Julie.Green@state.ma.us
Abrisham.Eshghi@state.ma.us

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Defendants Michael J. Sullivan, as Director of the Office of Campaign and Political Finance ("OCPF"), Maura Healey, as Attorney General of the Commonwealth of Massachusetts, and John P. Pappas, as District Attorney for Suffolk County (collectively, "Defendants") respectfully submit this Opposition to the Motion for Temporary Restraining Order and Preliminary Injunction of Massachusetts Fiscal Alliance ("MassFiscal").

INTRODUCTION

MassFiscal is requesting that this Court enter a preliminary injunction that would exempt MassFiscal from complying with a provision of Massachusetts' campaign finance laws that requires it to disclose specified information about sponsorship of certain advertisements ("ads") made within 90 days before an election. General Laws c. 55, § 18G was originally enacted in 2010, after the Supreme Court held that, under the First Amendment, campaign finance *disclosure* requirements, in comparison to independent expenditure *limits*, are a less restrictive alternative that "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010).

There is no basis to enjoin application of any of § 18G's three disclosure requirements to MassFiscal.[1] Each one easily passes constitutional muster under the intermediate level of scrutiny, known as "exacting scrutiny," that applies to campaign finance disclosure regulations under *Citizens United*. Each one is substantially related to the well-recognized important government interest in providing the electorate with information about the sources of election-related spending. The first disclosure challenged by MassFiscal is a requirement that the principal officer of the organization sponsoring the ad make a brief statement identifying the

[1] For clarity, this Opposition Memorandum uses the term "disclosure" to refer to each of the three informational statements required by G.L. c. 55, § 18G and challenged by MassFiscal here. These types of required informational statements are referred to in the caselaw variously as "disclosures" or "disclaimers," and in MassFiscal's Memorandum as "proclaimers."

organization as the sponsor of the ad (sometimes called a "stand by your ad" statement). G.L. c. 55, § 18G, ¶ 1. This requirement informs voters who funded the ad, and does so in an accessible and easily-understood way that imposes only a modest burden on the advertiser. A very similar disclosure statement was upheld in *Citizens United*. The second disclosure challenged by MassFiscal is a requirement that the ad display a written statement disclosing the top five contributors to the sponsoring organization. G.L. c. 55, § 18G, ¶ 2. Because organizations can hide behind uninformative and even misleading names, disclosure of contributor information is vital to inform voters about the sources of election-related spending. The third is a requirement that the ad reference the website address of OCPF. This requirement imposes only a slight burden while providing important information to assist voters to locate publicly-filed campaign finance information. For the foregoing reasons, MassFiscal is unlikely to prevail in this case, and there is no basis to enjoin application of any of the three disclosure requirements. Further, the Court should be wary of issuing the requested injunction on the eve of the November 6, 2018 election, since MassFiscal let two-thirds of the 90-day window for "electioneering communications" lapse before even filing this action.

STATUTORY SCHEME

General Laws c. 55, § 18G provides that any electioneering communication[2] made by "an individual, corporation, group, association, labor union or other entity which is transmitted through paid radio, television or internet advertising" must include a statement disclosing the identity of the individual or entity paying for the advertisement. MassFiscal is challenging three requirements under § 18G that apply to it.

[2] An "[e]lectioneering communication" is defined as "any broadcast, cable, mail, satellite or print communication" that both "refers to a clearly identified candidate" and is "publicly distributed within 90 days before an election in which the candidate is seeking election or reelection." G.L. c. 55, § 1.

First, as relevant here, if a group or association pays for a radio or television advertisement, "the following statement shall be made by . . . the chairman or principal officer of the group or association . . . : 'I am _____ (name) the _____(office held) of _____ (name of corporation, group, association or labor union) and _____ (name of corporation, group, association or labor union) approves and paid for this message.'" G.L. c. 55, § 18G. If this statement is transmitted on television, it must "be conveyed by an unobscured, full-scene view of the person making the statement"; if this statement is transmitted on the internet, "the statement shall appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement." *Id.*

Second, if the electioneering communication "is transmitted through paid television, internet advertising or print advertising appearing larger than 15 square inches, or direct mail or billboard," it 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 such persons or entities, that made the largest contributions to that entity, regardless of the purpose for which the funds were given; provided, however, that only contributions in excess of $5,000 reportable under [G.L. c. 55] during the 12-month period before the date of the advertisement or communication shall be listed." *Id.*

Third, advertisements or communications (except over the radio) "shall also include a written statement, as specified by the director, at the bottom of the advertisement or communication that directs viewers to the official web address of the [OCPF]." G.L. c. 55, § 18G. For this requirement, OCPF regulations provide the following text: "for more information regarding contributors, go to www.ocpf.us." 970 C.M.R. §§ 2.20 (1), (7).

ARGUMENT

The Court should deny the requested injunction because MassFiscal has failed to establish a likelihood of success on the merits. The three challenged disclosures easily pass "exacting scrutiny" – the intermediate level of scrutiny that the Supreme Court applies to campaign finance disclosures – because they directly and substantially further Massachusetts' interest in ensuring that voters receive information about the funding sources behind electioneering communications like MassFiscal's proposed ads. Moreover, in deciding whether a preliminary injunction is warranted, the Court should look with skepticism on MassFiscal's claim of irreparable harm, where MassFiscal voluntarily forwent advertising, or seeking relief in court, for over two-thirds of the 90-day window leading up to the elections during which MassFiscal's proposed ads were subject to § 18G's requirements.

I. MassFiscal Does Not Have a Likelihood of Success on the Merits Because the Three Challenged Disclosure Requirements Easily Withstand "Exacting Scrutiny."

A. Standard of Review

1. An Intermediate Level of Scrutiny, Termed "Exacting Scrutiny," Applies in First Amendment Challenges to Campaign Finance Disclosure Regulations.

The standard of review applied under the First Amendment to campaign finance disclosure requirements is now well-established: such requirements are subject to a level of scrutiny that is more lenient than strict scrutiny, called "exacting scrutiny." *Citizens United*, 558 U.S. at 366-67; *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) ("*NOM*"); *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 12 (1st Cir. 2012) (exacting scrutiny is "more lenient" and "less stringent" than strict scrutiny). "Exacting scrutiny" requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67 (citing *Buckley v. Valeo*, 424 U.S. 1,

64, 66 (1976) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231-32 (2003)). In contrast to strict scrutiny, exacting scrutiny does not require a court to impose "the least restrictive alternative analysis" in evaluating the means chosen by the government to advance its objective. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 309 n.4 (3d Cir. 2015) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989)). In these respects, "exacting scrutiny" is similar to other forms of intermediate scrutiny applicable under the First Amendment. *See*, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997); *March v. Mills*, 867 F.3d 46, 68 n.15 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 1545 (2018).

Unlike the independent expenditure limits held invalid in *Citizens United*, disclosure requirements "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S. at 64, and thus are a "less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. *See Buckley*, 424 U.S. at 68 ("[D]isclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist"). And while campaign finance disclosure requirements "may burden the ability to speak," the requirements "'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366-67 (quoting *McConnell*, 540 U.S. at 201). These kinds of regulations can be "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 U.S. at 367 (citing *Buckley*, 424 U.S. at 66).

Thus, in recent years, the vast majority of United States Courts of Appeals, including the First Circuit, have upheld various state and federal campaign finance disclosure regimes under exacting scrutiny. *See NOM*, 649 F.3d at 54-55.[3]

2. Strict Scrutiny Does Not Apply.

Despite this now well-established level of scrutiny, MassFiscal claims that strict scrutiny applies to all campaign finance disclosure statements *except* those with the precise text of the statement that the Supreme Court upheld in *Citizens United* (which MassFiscal terms a "mere authorship requirement"). MassFiscal's Memorandum of Law ("MassFiscal Br.") at 9. Essentially, MassFiscal is asking this Court to limit the disclosure analysis under *Citizens United* to its facts, and to apply strict scrutiny to everything else. As the subsequent decisions of the courts of appeals demonstrate, this position is manifestly wrong. *See*, *e.g.*, *NOM,* 649 F.3d at 54-55.

In addition, the other grounds asserted by MassFiscal for application of strict scrutiny are equally without merit. *First*, MassFiscal's claim that it engages only in "issue advocacy" – as opposed to "express advocacy" for a particular candidate – does not trigger strict scrutiny.[4]

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[3] *See*, *e.g.*, *Del. Strong Families*, 793 F.3d at 308; *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 131 (2d Cir. 2014); *Justice v. Hosemann*, 771 F.3d 285, 301 (5th Cir. 2014); *Indep. Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016); *Free Speech v. FEC*, 720 F.3d 788, 795-96, 798 (10th Cir. 2013); *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 551-52 (4th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*CIF*"); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

[4] "Express advocacy" urges, expressly, the election or defeat of a clearly identified candidate, whereas "issue advocacy" can have the same objective but does not "use . . . 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe.'" *McConnell*, 540 U.S. at 126-27. The two categories "proved functionally identical in important respects," and both "were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* at 126. For this reason, Congress "[d]etermined to close this loop[hole]" when it enacted the Bipartisan Campaign Reform Act (BCRA) in 2002, by

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"[T]he Supreme Court has explicitly rejected an attempt to 'import [the] distinction' between issue and express advocacy into the consideration of disclosures requirements." *NOM*, 649 F.3d at 55 (quoting *Citizens United*, 558 U.S. at 368-69). Thus, the First Circuit has made clear that "the distinction between issue discussion and express advocacy has no place in First Amendment review of *these sorts of disclosure-oriented laws*." *NOM*, 649 F.3d at 55-56 (emphasis added) (upholding law requiring both on-air spoken disclosures, and after-the-fact reporting); *see also Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010).

Second, MassFiscal's demand for strict scrutiny relies primarily on cases that pre-date the definitive conclusion in *Citizens United* that disclosure requirements are subject only to the lesser standard of exacting scrutiny. *Citizens United*, 558 U.S. at 366-67. Indeed, MassFiscal places heavy reliance on the case *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), which concluded that an individual, engaged in face-to-face leafletting concerning a local school levy, was not required to identify herself on the leaflets; the Court took pains to distinguish this individual activity from larger-scale campaign finance disclosures. *McIntyre*, 514 U.S. at 353-56; *see also Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1254 (11th Cir. 2013) ("*McIntyre* was narrow decision that expressly disavowed application to other forms of media"). Not surprisingly, *McIntyre* was not cited to or discussed in *Citizens United*. *See Citizens United*, 558 U.S. at 366-71. Indeed, at least two courts view *McIntyre*, which long predates *Citizens United*, as essentially limited to its unique facts, *Worley*, 717 F.3d at 1254; *Yamada v. Snipes*, 786 F.3d

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defining a category known as "electioneering communications" which looks only at whether the communication identifies a specific candidate (regardless of magic words). *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 489-90 (D.C. Cir. 2016). Massachusetts adopted a comparable category in its statute, G.L. c. 55, § 1. MassFiscal does not dispute that its proposed ads constitute electioneering communications.

1182, 1203 n.14 (9th Cir. 2015); and it is beyond question that exacting scrutiny is the correct standard of scrutiny. *See*, *NOM*, 649 F.3d at 55 (citing *Citizens United*, 558 U.S. at 366-67).

Third, MassFiscal is wrong to claim that the disclosure statement required by § 18G is subject to strict scrutiny because it is "compelled speech." MassFiscal Br. at 10. The statement upheld in *Citizens United* was subject to exacting scrutiny, even though it was no less compelled than this one. *Citizens United*, 558 U.S. at 366 (quoting 2 U.S.C. § 441d). The Supreme Court has concluded that the government may require, in electioneering communications, disclosures that provide useful information to voters. MassFiscal has no basis to urge that cases arising in other areas, ostensibly concerning "compelled speech," control in the specific context of campaign-finance disclosure law. The concern underlying some compelled speech cases – protecting individuals against having to espouse a state-sponsored message – has no application to the informational disclosures here. In particular, MassFiscal's reliance on *National Inst. of Family and Life Advocates v. Becerra ("NIFLA")*, 138 S.Ct. 2361 (2018), is entirely misplaced: while *NIFLA* involved a disclosure that "require[d] primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions," *id.* at 2379 (Kennedy, concurring), § 18G applies even-handedly to all speakers wishing to make electioneering communications, regardless of viewpoint, and requires only the provision of information identifying the speaker, its contributors, and OCPF's website. Unlike *NIFLA*, MassFiscal does not allege that the required statement "compels individuals to contradict their most deeply held beliefs," *id.*, nor could it plausibly do so. Thus, MassFiscal has failed to demonstrate that strict scrutiny applies here.

B. The Disclosure Requirements of § 18G are Substantially Related to an Important Government Interest in an Informed Electorate.

1. The Commonwealth Has an Important Interest In Ensuring That the Electorate Receives Information About Election-Related Spending Sources.

The sufficiency of the Commonwealth's interest in its disclosure requirements under exacting scrutiny review is well-settled: campaign finance disclosures further an important governmental interest in providing "'the electorate with information' about election-related spending sources." *Citizens United*, 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 66). As part of this, the government has an interest in "'insur[ing] that the voters are fully informed' about who is speaking," *Citizens United*, 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 76), and "avoid[ing] confusion by making clear that the ads are not funded by a candidate or political party." *Citizens United*, 558 U.S. at 368. Because "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," disclosures allow citizens "to react to the speech … in a proper way." *Id*., 558 U.S. at 361. Otherwise, voters who are inundated by political ads without easy access to information regarding who funds those ads may be deprived of the opportunity to fully evaluate the messages and weigh them against countervailing arguments. By providing voters with information that is crucial to self-governance, campaign finance disclosure laws expand robust public debate and advance fundamental First Amendment interests. *See NOM*, 649 F.3d at 61.

2. The Challenged Disclosures Requirements Are Substantially Related to the Interest in an Informed Electorate.

a. The "Stand By Your Ad" Statement Provides a Clear Identification of the Source of the Ad.

First, MassFiscal challenges § 18G's requirement that electioneering communications made by television, radio and internet "include a statement disclosing the identity of the . . .

entity paying for the advertisement." In particular, MassFiscal challenges the requirement for television and video ads that a principal officer of the organization that paid for the ad appear briefly on screen to identify herself as well as the organization funding the ad. G.L. c. 55, § 18G. This statement provides important information to voters in a manner that facilitates effective communication while imposing only very modest burdens on the advertiser. Having the disclosure spoken by the organization's principal officer in a direct and personal message, making eye contact, is more effective and accessible to the viewer than having the same information read off-screen by a disembodied voice. It gives center stage to the sponsorship information for the few brief seconds that it takes the officer to read the statement, and prevents the information from being overwhelmed by unrelated visual footage.

As a threshold matter, MassFiscal's assertion that the disclosure takes eight seconds to read is exaggerated. The disclosure can undoubtedly be read in as few as five seconds, as some representative examples demonstrate.[5] Even if the disclosure did take eight seconds to read, it would actually take up a smaller portion of MassFiscal's proposed 30-38 second ads than the disclosure that the Court upheld in *Citizens United*, which took up 40% of a ten-second ad. *Citizens United*, 558 U.S. at 320. *See also Worley*, 717 F.3d at 1254 (upholding 6-second disclosure in 30-second ad).[6]

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[5] *See, e.g.,* ads available at https://www.youtube.com/watch?v=YnvLEbhzmK0 and https://www.youtube.com/watch?v=5iRA93Xngcc&feature=youtu.be. (Note that the "stand by your ad" disclosure does not apply to ballot question advertising. G.L. c. 55, § 18G.)

[6] The cases cited by MassFiscal on page 13 of its Memorandum are a far cry from this one. One involved a "long and repetitive regulatory disclaimer" that "simply repeat[ed]" the more succinct statutorily-required disclaimer that made "the very same point"; accordingly, the court enjoined the enforcement of the regulation against 30-second radio ads and ads of a shorter duration. *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014). The other involved a rule of professional conduct that regulated "speed of speech" and required attorney ads to include copious amounts of information "spoken slowly" that attorneys were "unable to effectively use"

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With regard to the on-screen element of the disclosure, the Legislature can permissibly conclude that having a principal officer appear in person is an effective tool for identifying the sponsoring organization. A similar in-person "stand by your ad" disclosure was recently upheld in *Committee to Elect Dan Forest v. EMPAC*, 817 S.E.2d 738, 740 (N.C. App. Ct. 2018). In that case, the disclosure had to be spoken by the sponsor's chief executive officer or treasurer while the ad featured a "full-screen picture" of the disclosing individual. *Id.* The court had no difficulty recognizing that the disclosure was similar to, and no more onerous than, the disclosure upheld in *Citizens United*, and rejected the plaintiff's First Amendment challenge. *Id*. at 745.

Further, MassFiscal's claim that it is burdened by having to display Mr. Cohen's appearance and personal characteristics is unpersuasive as applied here, because MassFiscal itself chooses to display these very characteristics by posting his picture (along with the pictures of thirteen other MassFiscal officers) prominently on its website. *See* http://www.massfiscal.org/mfaleadership (last visited on October 25, 2018). The fact that MassFiscal voluntarily, and prominently, displays these images belies its claim in this case that it is harmed by exposing Mr. Cohen's and MassFiscal's messages to prejudice. In short, even if this Court were to temporarily enjoin the on-screen requirement, voters knowing nothing more than MassFiscal's name could obtain the same information about Mr. Cohen with two clicks of a computer mouse. The First Amendment does not prohibit the Commonwealth from requiring an in-person statement in these circumstances.

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short ads; therefore, the court held that such "overly burdensome" ads violated the First Amendment. *Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd*., 632 F.3d 212, 228-29 (5th Cir. 2011).

b. The Top-Five Contributor Disclosure Requirement Furthers The Commonwealth's Interest in Preventing Evasion of Contributor-Disclosure Requirements.

Next, MassFiscal challenges § 18G's requirement (applicable to television, internet or print advertising) that its advertising include a statement identifying the entity's top five contributors over $5,000, "regardless of the purpose for which the funds were given." In particular, MassFiscal objects to disclosing contributors who have not explicitly "earmarked" their contributions to fund electioneering communications. At least two United States Courts of Appeals have, however, rejected this contention in the course of upholding non-earmarked contributor-disclosure laws. *Del. Strong Families*, 793 F.3d at 311-12 (upholding law requiring disclosure of all contributions greater than $100; affirming that "earmarking" is not constitutionally required); *Center for Individual Freedom v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding contributor-disclosure statute, and reversing district court decision imposing an earmark limitation to avoid unconstitutionality); *see also Family PAC v. McKenna*, 685 F.3d 800, 803 (9th Cir. 2012) (upholding statute requiring disclosure of all contributors over $25, explaining that informational interest outweighs any burden on contributor anonymity interest). Indeed, a federal disclosure statute that did not contain an earmarking limitation (at the time) was upheld by the Supreme Court in 2003 against a First-Amendment facial challenge. *McConnell*, 540 U.S. at 194-202 (reviewing Bipartisan Campaign Reform Act of 2002, § 201 (52 U.S.C. § 30104)).[7] MassFiscal's reliance on *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016), is misplaced because that case merely held that the earmark-limitation was a permissible construction of BCRA, and made no determination as to whether it was constitutionally required.

[7] The earmarking limitation was added later by a 2007 Federal Elections Commission regulation. 11 C.F.R. § 104.20(c)(9). *Del. Strong Families*, 793 F.3d at 311-12.

Like the other disclosure statutes upheld in the foregoing cases, § 18G easily withstands exacting scrutiny. Its burdens are modest: only very large contributors (making contributions over $5,000 within the 12 months before the ad) need be disclosed, and only during the 90-day period preceding an election. G.L. c. 55, §§ 1, 18G. The Supreme Court and lower courts have recognized the importance to voters of knowing who funded a political message – indeed, the First Circuit describes this interest as "compelling." *NOM*, 649 F.3d at 57 (citing *Citizens United*, 558 U.S. at 371) (upholding Maine statute requiring disclosure of name and address of person who made or financed communication). *See*, *e.g.*, *Citizens United*, 558 U.S. at 366-69; *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 so that the people will be able to evaluate the arguments to which they are being subjected"); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 477 n.8 (7th Cir. 2012) ("*CIF*") (collecting Supreme Court cases). As the Supreme Court has recognized, "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981), and "often only disclosure of the *sources* of their funding may enable the electorate to ascertain the identifies of the real speakers." *CIF*, 697 F.3d at 481. "In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the 'marketplace of ideas,' has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin." *NOM*, 649 F.3d at 57.

Although exacting scrutiny does *not* require that the burden on speech is the "least restrictive alternative," *Del. Strong Families*, 793 F.3d at 309 n.4, here, Massachusetts has a less-restrictive earmark-limited alternative and has found it subject to evasion. *See* Mass. G.L. c. 55,

§ 18F (after-the-fact reporting requirements for groups making electioneering communications).[8] The earmark limitation in § 18F turned out to be a loophole that allowed organizations to evade disclosure of contributors altogether simply by not soliciting contributions expressly earmarked for the purpose of electioneering communications.[9] In fact, MassFiscal candidly admits that this is what it does.[10] VC ¶¶ 50, 51 (MassFiscal "does not solicit" or "accept" earmarked funds).

That an earmarking limitation would encourage this kind of evasion is hardly surprising: as one court of appeals has observed, the real effect of an earmark limitation is that "unions and corporations need not disclose who has contributed to pay for [their] ads 'unless the donor is dumb enough to specifically direct the organization to use the money for a particular ad.'" *CIF*, 697 F.3d at 489 n.27. In 2016, the Legislature closed this loophole with respect to paid television, internet, and print advertising by adding the words "regardless of the purpose for which the funds were given" to ¶ 18G's contributor-disclosure requirement. *See* An Act Relative

[8] General Laws c. 55, § 18F requires entities (other than political committees) making "an electioneering communication expenditure" over $250 to file a report with OCPF within 7 days after making the expenditure. G.L. c. 55, § 18F. The statute contains an earmark-limited disclosure regime, as it requires the report to disclose contributions received "to make electioneering communications." *Id*.

[9] The Campaign Finance Disclosure Task Force ("CFDTF") was created pursuant to G.L. c. 210, § 29 to study campaign finance and disclosure issues and thereafter provide a report to the clerks of the House of Representatives and the Senate. The CFDTF found that evasion was occurring. *See* CFDTF Meeting Minutes, 12/18/14 ("people who fund 501(c)(4) and other non-profits are not identified on anything filed with OCPF unless the organizations raise money 'for the purpose' of distributing the communications" and "the public cannot find top five contributor information relating to such entities"); CFDTF Meeting Minutes, 11/20/14 (expressing concern about "fundraising appeals that specifically do not mention the goal of influencing elections even though everyone knows that the group's purpose is to influence elections").

[10] The donation page of MassFiscal's website tells donors how to avail themselves of this loophole, explaining that MassFiscal "does not solicit contributions for the stated purpose" of influencing any election, and then advising that "[g]eneral contributions to Massachusetts Fiscal Alliance are not required to be publicly disclosed." https://massfiscal.nationbuilder.com/donate (last accessed 10/25/2018).

to Disclosure of Top Contributors for Independent Expenditures or Electioneering Communications, Bill H. 543, 189th Legislature (2015-2016). The Court should not accept MassFiscal's invitation to reopen the loophole. "The Supreme Court has frequently warned of the 'hard lesson of circumvention' in campaign finance reform." *CIF*, 697 F.3d at 489 (citing *McConnell*, 540 U.S. at 165). In light of its experience with the earmark-limited disclosure regime for OCPF filings in G.L. c. 55, § 18F, the Legislature's decision in 2018 to clarify that no earmark limitation is implied in § 18G does not contravene the First Amendment because it is "substantially related" to the important informational interest at stake.

i. MassFiscal Has Failed to Demonstrate a Basis for its Assertion of Potential "Voter Confusion"

MassFiscal argues that the contributor-disclosure requirement provides information that is more confusing than helpful to voters, purportedly because voters could be misled into thinking that the contributors opposed or supported the specific candidate identified in the ad, whereas those contributors may have only intended to support the organization's general mission. MassFiscal Br. at 17. However, MassFiscal offers no basis to believe that this is a real concern in this case. It does not explain what supposedly non-advocacy mission it has, separate and unrelated to its electioneering communications. In fact, MassFiscal presents itself as an advocacy organization that is openly dedicated to advocating for "fiscal responsibility, transparency, and accountability" – precisely what its proposed electioneering communications do. MassFiscal's example of the American Cancer Society (drawn from *Van Hollen*) is inapposite, because that organization has a medical research mission completely unrelated to any political issue advocacy. MassFiscal Br. at 17 (quoting *Van Hollen*, 811 F.3d at 497). As applied to MassFiscal's proposed ads, MassFiscal's attempted distinction between advocacy for or against Senator Marc Pacheco, on the one hand, and advocacy for "fiscal responsibility," on the

other hand, is a distinction without a difference, as the Supreme Court recognized when it rejected the distinction between "express" and "issue" advocacy ads in this context. *McConnell*, 540 U.S. at 126-27.

Even if MassFiscal's concern were justified, voter confusion is not a persuasive reason to invalidate a statute. Voters should be allowed to determine for themselves how much weight to attribute to the top-five contributor information. They will certainly not be *better* informed by being denied the information altogether. *Worley*, 717 F.3d at 1248-49 (rejecting voter-confusion argument, concluding "*Citizens United* does not command states to enact disclosure laws, but it does suggest that First Amendment analysis must be wary of the argument that *less* speech is *more*") (emphasis in original).

ii. Contributor-Disclosure Does Not Impermissibly Burden Associational Rights Under the First Amendment.

Next, MassFiscal insists that it has a constitutionally-protected right of association that prohibits the Commonwealth from closing the loophole that had allowed organizations like MassFiscal to escape § 18G's disclosure requirements prior to the 2016 amendment. MassFiscal Br. at 15. Notably, MassFiscal does *not* claim that disclosure burdens this right by potentially subjecting its contributors to threats, harassment and retaliation. The Supreme Court has foreclosed such a claim as a ground to avoid disclosure requirements unless the plaintiff can make a factual showing that there is "a reasonable probability" of such harms, *Doe v. Reed*, 561 U.S. 186, 201 (2010); *Citizens United*, 558 U.S. at 370, which MassFiscal has not done. In fact, MassFiscal does not even claim that disclosure would actually deter contributions. *See Family PAC*, 685 F.3d at 807; *Brumsickle*, 624 F.3d at 1021-22. MassFiscal simply alleges in its Verified Complaint that it refuses to "violate the privacy of its general donors" – but without any

indication that the donors themselves share that privacy concern. VC ¶ 75. The Court should not enter an injunction to serve interests that appear to be no more than theoretical.

Rather, MassFiscal derives its argument chiefly from a 2004 Ninth Circuit case that invalidated a law requiring on-publication disclosure of contributors, *ACLU of Nevada v. Heller,* 378 F.3d 979 (9th Cir. 2004) *("Heller")*. But that case cannot support a decision in MassFiscal's favor because essential elements of it are no longer good law after *Citizens United*. First, *Heller* applied strict scrutiny, *Heller*, 378 F.3d at 987-88, but *Citizens United* settled that exacting scrutiny is the correct standard of review. 558 U.S. at 366-67; *NOM*, 649 F.3d at 55. Second, it relied heavily on *McIntyre*, which is inapposite here, as described above. Third, *Heller* found "constitutionally determinative" the distinction between on-publication disclosure requirements (which it found constitutionally prohibited) and after-the-fact disclosure requirements (which it had to acknowledge were constitutionally permitted), *Heller*, 378 F.3d at 991, but that distinction has never been adopted by the Supreme Court, which applied the same level of scrutiny to uphold both types of disclosures. *Citizens United*, 558 U.S. at 366-67. Post-*Citizens United*, the Ninth Circuit has upheld both forms of disclosure. *Yamada v. Snipes*, 786 F.3d 1182, 1202 (9th Cir. 2015) (upholding on-air disclosure after concluding it "imposes only a modest burden on First Amendment rights"). Fourth, the foundational reasoning in *Heller* has been rejected for the types of disclosures challenged here. In 2004, the *Heller* court was concerned with preventing voters from "prejudging" a political message based on the identity of the speaker, *Heller*, 378 F.3d at 989. By 2018, it is well recognized that information identifying the source behind a particular political ad is not only appropriate, but necessary, to a well-informed electorate, as

discussed above. *See*, *e.g.*, *Citizens United*, 558 U.S. at 368; *NOM*, 649 F.3d at 61.[11] Thus, while *Heller* has not been explicitly overruled, it is entirely unpersuasive in this case. *Yamada*, 786 F.3d at 1203 n.14 ("*Citizens United*'s post-*McIntyre*, post-*Heller* discussion makes clear that disclosure laws such as Hawaii's may be imposed on political advertisements that discuss a candidate shortly before an election"). The associational interests that MassFiscal purports to advance do not compel invalidation of § 18G's disclosure requirements.

3. The Website Reference Assists Voters in Finding Publicly-Filed Contributor-Disclosures.

Finally, MassFiscal challenges the requirement that electioneering communications include the statement "for more information regarding contributors, go to www.ocpf.us." 970 C.M.R. §§ 2.20 (1), (7). This website reference directly advances the Commonwealth's interest in informing voters about campaign-finance funding sources, by informing voters where to find more detailed contributor information that advertisers must report to the state but do not have to include on the air. To be clear, MassFiscal does not challenge the requirement to *make* reports, VC ¶ 52, just the requirement to inform voters where to *find* them.

MassFiscal contends that this website reference impermissibly forces MassFiscal to "contort" its message to "advertise a government agency," MassFiscal Br. at 19, but it does not explain how this simple website reference "contorts" anything. In fact, the argument that MassFiscal seeks to import from the *NIFLA* case is completely inapposite. That case involved a "government-drafted script" about the availability of state-sponsored abortion, among other services. *Id*. at 2371. In striking down the requirement, the Supreme Court reasoned that

[11] Notably, one of the reasons that *Heller* discounted the importance of the state interest in disseminating speaker-identity information was that funders can hide behind "creative but misleading names." *Heller*, 378 F.3d at 994. The court itself admitted that a contributor-disclosure requirement *would* "provide useful information" to voters. *Id.* at 994.

"requiring petitioners to inform women how they can obtain state-subsidized abortions – at the same time petitioners try to dissuade women from choosing that option – the licensed notice plainly alters the content of petitioners' speech." *Id*. (internal quotation marks omitted)). Here, in contrast, the website reference does not counter the message the Plaintiff wishes to advance. Instead, it merely informs the electorate of the existence of a web address with information about campaign contributors, which is far from the "government-drafted script" amounting to "content-based regulation[] of speech" that the Supreme Court was concerned with in *NIFLA*. Listing the web address plainly advances transparency and informed decision-making in elections by pointing voters to a source of information about campaign contributors. As such, it is substantially related to the important government interest of providing voters with information about election-related spending sources.

C. MassFiscal Has Not Demonstrated That Any Claimed Vagueness As To "Color Contrast" or "Legibility" Creates a Substantial Risk of Suppressing Speech.

Finally, MassFiscal asks the Court to facially strike, on void-for-vagueness grounds, two requirements for written disclosures in television and online ads: the requirement to have a "reasonable degree of color contrast," G.L. c. 55, § 18G, and be "legible to the average viewer." 970 C.M.R. 2.20(6)(a). MassFiscal has not met its burden to obtain this relief. These terms are clear on their face. *See*, *e.g.*, 52 U.S.C. § 30120 ("reasonable degree of color contrast"). "[T]o prevail on a facial vagueness challenge on First Amendment grounds … a challenger 'must demonstrate a substantial risk that application of the provision will lead to the suppression of speech.'" *Massachusetts Assoc. of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 213 (D. Mass. 2016) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). Here, MassFiscal has not demonstrated any substantial risk of suppression of speech. Nor is there one:

any conceivable chill here is to esthetic choices about what color scheme or font size to use, not to the choice of whether to speak at all.

II. MassFiscal's Claim of Irreparable Harm Lacks Force in Light of Its Delay in Seeking Relief, and the Balance of Harms Weighs Against the Requested Relief.

MassFiscal's claim of irreparable harm in this as-applied challenge does not go beyond observing that "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." MassFiscal Br. at 19. Even if MassFiscal could show some likelihood of success on the merits, the Court should be wary of entering the extraordinary relief requested by MassFiscal, where MassFiscal has allowed over two-thirds of the 90-day window to make "electioneering communications" lapse without seeking to vindicate the rights it claims here. MassFiscal waited until October 10, 2018 to file this action – less than *one month* before the November 6, 2018 election and *over two months* into the 90-day window prior to an election in which MassFiscal's publicly-distributed communications became electioneering communications under G.L. c. 55, § 1, thus subjecting them to the requirements under G.L. c. 55, § 18G. The balance of harms also weighs against enjoining application of a campaign finance law that has been in place for years in the days immediately before an election, because the electorate will be deprived of valuable information about the sources of the ads published by MassFiscal. Further, in determining the weight to be accorded MassFiscal's claim of harm, the Court may consider that the "'emergency' is largely one of their own making." *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010).

CONCLUSION

For the foregoing reasons, MassFiscal's Motion for Temporary Restraining Order and Preliminary Injunction should be denied.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Julie E. Green

Julie E. Green, BBO# 645725
Abrisham Eshghi, BBO # 703020
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108-1698
(617) 963-2085
(617) 727-5785 (Facsimile)
Julie.Green@state.ma.us
Abrisham.Eshghi@state.ma.us

Dated: October 25, 2018

CERTIFICATE OF SERVICE

I certify that this document filed through the ECF system will be sent electronically to registered participants on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participants as of October 25, 2018.

/s/ Julie E. Green
Julie E. Green
Assistant Attorney General