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 OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

INTRODUCTION AND STATEMENT OF FACTS

The Parties have sought to narrow the scope of discovery and the eventual issues requiring this Court's resolution.[1] These efforts have involved good faith undertakings on both sides and across a range of issues.[2] For purposes of this motion, they include efforts by Plaintiff Massachusetts Fiscal Alliance ("Alliance") to focus this lawsuit on the facial invalidity of Mass. Gen. Laws, ch. 55, § 18G, as opposed to that statute's application to the Alliance's specific circumstances.

One sticking point remains. In a case about the confidentiality of donors to nonprofit entities, Defendants ("Commonwealth" or "Government") have demanded the identities of the

[1] In a doubtless inadvertent oversight, the Commonwealth omitted a third conference between the Parties, held on May 16, 2019. *Compare* Pl. Mot. to Compel ("Mot.") at 6 ("The parties conferred regarding their discovery responses on May 7, 2019, and again on June 7th, 2019").

[2] The Parties have, for example, agreed to production of a narrow group of representative documents in place of the Commonwealth's original request for extensive documentation of the Alliance's work.

Alliance's significant donors "for all relevant 12-month periods since 2014." Def. Mot. to Compel ("Mot.") at 15.

The Commonwealth does not suggest that these donors' identities are relevant in themselves to the resolution of this case. Instead, the Government has sought this information to facilitate "further discovery" into those contributors' "subjective concern[s]." Mot. at 13, 15. But such subjective concerns are irrelevant in a facial First Amendment challenge, which turns on the scope of the statute and the government's legitimate informational needs, not the subjective fears of any particular contributor. Moreover, the Commonwealth's avowed intention to conduct third-party discovery of the Alliance's principal donors over the past five years is obviously invasive, violates the fundamental constitutional right to privacy of association and belief, *NAACP v. Ala.*, 357 U.S. 449, 466 (1958), and will irrevocably damage the Alliance's relationships with those supporters and its future activities.

For these reasons, the Alliance asks this Court to deny the Commonwealth's motion.

ARGUMENT

I. The Commonwealth's Demand Is Irrelevant

The cornerstone of Rule 26 is relevance, and the burden is on the Commonwealth to demonstrate that its discovery demands are "relevant to a[]…claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); *Equal Employment Opportunity Comm'n v. Baystate Med. Ctr., Inc.*, 2017 U.S. Dist. LEXIS 179016 at 6 (D. Mass. Oct. 30, 2017) ("'The party seeking information in discovery over an adversary's objection has the burden of showing its relevance'") (quoting *Caoutee v. OfficeMax, Inc.*, 352 F. Supp. 2d 134, 136 (D.N.H. 2005)). While "[i]nformation within this scope of discovery need not be admissible" at the trial, discovery should only be compelled if the request at issue is relevant. Fed. R. Civ. P. 26(b)(1). "Therefore, when an

objection arises as to the relevance of discovery," the court must "determine whether the discovery is relevant to [a party's] claims or defenses, and if not, whether good cause exists for authorizing it, so long as it is relevant to the subject matter of the action." *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008) (citation and quotatin marks omitted).

"In order to determine what discovery is relevant," then, "it is necessary to understand what [a plaintiff] is required to prove." *Baystate Med. Ctr., Inc.* at 7. The Alliance brings a facial challenge. V. Amended Cmplt. at 30, ¶ 130-131. To prevail, it must demonstrate that "a substantial number of [the challenged law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation and quotation marks omitted). Necessarily, this analysis turns not on the specifics of a particular plaintiff, but on the statute's overall scope, including "other situations not before the Court." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989) (citation and quotation marks omitted).

To meet its burden, the Alliance relies on three interlocking arguments:

First, the compelled disclosure of general donors, as opposed to donors giving to fund a specific communication or campaign,[3] is in that category of "significant encroachments on First Amendment rights…that compelled disclosure *imposes*." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*) (emphasis supplied). These harms cannot be easily justified, and the Commonwealth bears the burden of doing so.

Second, even if the "reporting of funds used to finance" an electioneering communication is constitutional, regulations that alter "the content of the communication itself" are not. *Am. Civil*

[3] Massachusetts law requires the reporting of earmarked donations for the purpose of making electioneering communications. Mass. Gen. Laws ch. 55, § 18F. The Alliance is *not* challenging the constitutionality of that requirement. V. Amended Cmplt. at 11, ¶ 53.

Liberties Union v. Heller, 378 F.3d 979, 987 (9th Cir. 2004) (emphasis removed); *Talley v. Calif.*, 362 U.S. 60 (1960). This "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" is "constitutionally determinative." *Heller*, 378 F.3d at 991; *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797-798 (1988) ("[C]ompulsion burdens protected speech…Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech").

Third, in "a substantial number of its applications," *Stevens*, 559 U.S. at 473, the compelled speech of listing an organization's top five general donors on an electioneering communication will not "aid the voters in evaluating those who seek…office," nor will it assist the electorate in identifying a candidate's direct financial constituency. *Buckley*, 424 U.S. at 67, 79-81; *see Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016). Thus, this "government-scripted, speaker-based disclosure requirement" is unconstitutionally "disconnected from the State's informational interest." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __; 138 S. Ct. 2361, 2377 (2018).

By contrast, the Commonwealth will likely defend its statute by arguing that, facially speaking, there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-367 (quotation marks and citations omitted). But the Government's papers do not show how the names of major Alliance donors get them from here to there. There is nothing about a *particular* contributor's name that would be relevant to the Government's facial defenses under exacting scrutiny.

Instead, the Government makes two arguments:

First, it argues that identifying and investigating Plaintiff's major donors is necessary "to test [the Alliance's] allegation that the law has a chilling effect." Mot. at 2. The Commonwealth even hints that discovery might close the courthouse door. *Id*. at 14 ("[D]iscovery may even undermine any factual basis for MassFiscal's subjective claims of chill, potentially calling into question its claim of injury-in-fact for the purposes of Article III standing").

But here, donor-identifying information is irrelevant to rebut any claims of chill. The Alliance's speech has already been chilled. The Alliance did not run its planned advertisements before the 2018 election, precisely because it did not wish to comply with any challenged element of the proclaimer law. Yet, "[t]he Alliance did run substantially similar radio, television, and internet communications after the electioneering communications window closed." V. Amended Cmplt. at 8, ¶ 41. Absent judicial relief, this process will only repeat in future election years. This more than suffices to demonstrate Article III standing. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling").[4]

In any event, in these types of cases, standing is held by the association seeking to prevent the compelled disclosure — here, the Alliance. *NAACP*, 357 U.S. at 459 ("…it is manifest that this right is properly assertable [*sic*] by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion"). Even if an individual donor begged the Alliance to comply with the proclaimer regime, so that all her

[4] Any additional argument related to chill could not be defended by identifying donors. *Cf.* Mot. at 2. The Alliance might, for example, argue that fewer electioneering communications have run since the imposition of the expanded proclaimer requirement in 2014. To defeat this argument, all the Government would have to do is count the number of reported electioneering communications after 2014 and compare them with previous years.

neighbors might know of her robust support for fiscal probity, the Alliance would still object to being required by law to reveal that person's name on the face of its ads.

The Government next argues that it needs donor lists to assess the "impact" on particular donors to the Alliance, under the hypothesis that "discovery may reveal that MassFiscal's top five contributors have no subjective concern to prevent disclosure of their identities." Mot. at 13. This admission is remarkable: The Commonwealth concedes that it does not want donor identities because this information, in and of itself, will help their case under exacting scrutiny. Rather, they wish to have it so they can take discovery from those persons, determine the public nature of their relationship with the Alliance, and audit the donors' subjective views and motivations. As explained *infra*, this will be an invasive and trying process. But, more importantly, the entire exercise will be irrelevant. While the Commonwealth appears to wish that the individual donors were the plaintiffs here rather than the Alliance, the fact is that they are not. It is the Alliance (and through its facial challenge all affected groups) that is resisting these disclosures.

Donor motivations and circumstances might be probative if the Alliance were pursuing an as-applied challenge to a campaign finance disclosure law on the grounds that disclosure would subject its specific individual donors to an elevated risk of threats, harassments, or reprisals. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (noting "extensive discovery" provided "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters") (quotation marks omitted). In such circumstances, the Commonwealth might be able to show a need for donor identity, so it could test whether the Alliance's donors' fear of harassment is reasonable. *See Ams. for Prosperity Found. v. Harris*¸ 182 F. Supp. 3d 1049, 1055-1056 (C.D. Cal. 2016), *rev'd Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) ("For example, Lucas Hilgemann, Chief Executive Officer of AFP,

testified that in 2013, the security chief of AFP alerted him that a technology contractor working inside AFP headquarters posted online that he was 'inside the belly of the beast' and that he could easily walk into Mr. Hilgemann's office and slit his throat. That individual was also found in AFP's parking garage, taking pictures of employees' license plates") (citation omitted).

But that case is not *this* case. And that difference is dispositive.

II. The Commonwealth's Demand Is Unconstitutional

This motion should be resolved on relevance alone. *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("And the 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more'") (quoting *PDK Labs., Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment)).

Nevertheless, in the context of a motion to compel, it is unquestioned that a "judge's discretion is bounded by important values under the First Amendment to the United States Constitution," *Wojcik v. Boston Herald, Inc.*, 803 N.E. 2d 1261, 1264 (Mass. App. Ct. 2004), and, in discovery disputes, courts must be "[m]indful [when] important First Amendment issues are at stake." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 710 (1st Cir. 1998); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) ("As to the relevancy issue, it is crucial to remember we are considering the essence of First Amendment freedoms…the freedom to organize, raise money, and associate with like-minded persons").

The First Amendment right to associational privacy is longstanding, *NAACP*, 357 U.S. at 466, and "all legitimate organizations are the beneficiaries of [its] protections." *Gibson v. Fla. Legis. Investigative Comm.*, 372 U.S. 539, 556 (1963). Because "'[f]inancial transactions can reveal much about a person's activities, associations, and beliefs,'" the First Amendment protects

the "privacy of belief" of donors giving to nonprofit corporations such as the Alliance. *Buckley*, 424 U.S. at 66 (quoting *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) (brackets in original); *Shultz*, 416 U.S. at 98 (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong to or contribute to the organization").

This constitutional right is reflected in our federal laws, which protect donor information to nonprofits from being made public by the government, 26 U.S.C. § 6104(d)(3)(A), including a recent decision by the Treasury Department to cease demanding and warehousing the major donor lists of § 501(c)(4) organizations. Rev. Proc. 2018-38. In reliance on this constitutional and statutory right, Plaintiff has consistently and repeatedly assured its donors for many years that their information will remain a private relationship between the donor and the Alliance. *Alharbi v. TheBlaze, Inc.*, 199 F. Supp. 3d 334, 350 (D. Mass. 2016) (a party's pre-litigation "promise of confidentiality to the sources" to be disclosed "weighs against compelled disclosure").[5]

Thus, it is well-established that the "[i]nformation that may be privileged on the basis of associational rights includes…contributor lists." *Sexual Minorities of Uganda v. Lively*, 2015 U.S. Dist. LEXIS 104636 at 10 (D. Mass. Aug. 10, 2015); *Int'l Action Ctr.*, 207 F.R.D. at 3 ("The courts have long recognized the sensitivity of information related to such activities and consequently have ruled that the following information is protected by the First Amendment…contributor lists").[6] Indeed, the case establishing a First Amendment right in associational privacy came in the context

[5] *E.g.* "Donate", Massachusetts Fiscal Alliance, https://www.massfiscal.org/donate ("General contributions to Massachusetts Fiscal Alliance are not required to be publicly disclosed").

[6] Even in cases where a government's demand is relevant within the meaning of Rule 26, the Constitution trumps. U.S. Const. art. VI, cl. 2; *see Gibson*, 372 U.S. at 545 ("The fact that the general scope of inquiry is authorized and permissible does not compel the conclusion that…[courts are] free to inquire into or demand all forms of information").

of a discovery fight, where a civil society group defied a production order. *NAACP*, 357 U.S. at 466 ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing"). There is good reason for this. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. That benefit is precisely why "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. at 460-461.

The Government, to its credit, has explained that it wants the Alliance's donor lists so it can research those persons and conduct third-party discovery concerning them. Donors will be asked, under oath, as to how they might feel—in advance and with limited context—about their identities being possibly associated with ads that will not be run until the 2020 election cycle.[7] *Compare* Tr. of Oral Arg., *Citizens United v. Fed. Election Comm'n*, No. 08-205 (U.S. Mar. 29, 2009) at 50 ("That doesn't work…somebody who gave contribution 5 years ago may decide, boy, I don't like what they're doing. I'm not going to give anymore") (Roberts, C.J.). The Alliance's donors will be forced to secure counsel, retain records, respond to document requests and interrogatories, and sit for depositions. This *prima facie* harm should be avoided. In addition, it is likely this Court will be required to address a range of objections to these efforts, further complicating what should be a straight-forward case. Finally, at some future time, possibly after the next election, this information would be available for introduction at a public trial. Any public disclosure of contributors is an injury to "First Amendment rights" in and of "itself. Regardless of

[7] There is no guarantee that any of the donors sought by the Commonwealth will be the Alliance's top five donors by the time the 2020 electioneering communication window opens.

whether [the Alliance] prevail[s] at trial, this injury will not be remediable on appeal." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1137 (9th Cir. 2009).

In sum, these *prima facie* harms are not only "'consequences which objectively suggest an impact on, or 'chilling' of the members' associational rights,'" *Sexual Minorities of Uganda* at 11-12 (quoting *Perry*, 591 F.3d at 1160), they will make it difficult for the Alliance itself to properly operate while the Government is vetting its donors. *NAACP*, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as direct regulation).

And why does the Commonwealth want to do this? To assess a subjective "impact, if any." Mot. at 15. A fishing expedition is insufficient to justify a motion to compel. Such an outcome contravenes the Supreme Court's own instruction against such expeditions, as articulated in the Chief Justice's controlling opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). There, the Court recounted the "extensive discovery" that had been permitted "on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech." *WRTL II*, 551 U.S. at 468 n.5. If such burdens are unconstitutional against the plaintiff itself in an adversarial proceeding, these burdens only multiply against the non-parties the Government seeks to thoroughly review here. Organizational plaintiffs and their supporters should not have to bear those burdens before the organization itself can be heard on a facial First Amendment challenge.

These real-world consequences are enough to invoke what is sometimes referred to as a First Amendment privilege or an associational privilege, firmly placing "the devoir of persuasion" on the Government to overcome that showing. *Fed. Deposit Ins. Corp. v. Ogden Corp.*, 202 F.3d 454, 460 (1st Cir. 2000). At this juncture, ""[t]he requesting party's 'interest in disclosure [of a donor list] will be relatively weak unless the information goes to the 'heart of the matter' that is, unless it is crucial to the party's case.'" *Sexual Minorities of Uganda* at 13 (quoting *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (brackets in original)). The Commonwealth's own papers answer this query in the negative: it concedes that the heart of this case lies elsewhere. Mot. at 9 ("Rather, MassFiscal's main objection is that the challenged law compels speech") (quotation marks omitted); *id*. at 9-10 ("More specifically, although MassFiscal explains the impacts of the statute in its Amended Complaint, only one of the cited impacts even concerns contributor disclosure"). In such circumstances, "without a more substantial basis to the request," the motion "must be denied because disclosure of the list might implicate the First Amendment right to association." *Blumenthal v. Dodge*, 186 F.R.D. 236, 245 (D.D.C. 1999).

CONCLUSION

The Government seeks to compel the disclosure of irrelevant private information, a violation, in this context, of the Federal Rules and the Constitution itself. Its motion should be denied.

Respectfully submitted,

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Date: July 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that I caused an electronic filing of a true copy of the foregoing using the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all counsel of record, constituting service on those parties they represent.

/s/ Allen Dickerson

Dated: July 26, 2019

Allen Dickerson