UNITED STATES COURT OF APPEALS
For the First Circuit

No. 11-1196

NATIONAL ORGANIZATION FOR MARRIAGE, INC., and AMERICAN PRINCIPLES IN ACTION, INC.

Plaintiff – Appellants,
v.

WALTER F. MCKEE**,** ANDRE G. DUCHETTE, MICHAEL P. FRIEDMAN, FRANCIS C. MARSANO, AND EDWARD M. YOUNGBLOOD, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES; MARK LAWRENCE, STEPHANIE ANDERSON, NORMAN CROTEAU, EVERT FOWLE, R. CHRISTOPHER ALMY, GEOFFREY RUSHLAU, MICHAEL E. POVICH, AND NEAL T. ADAMS, IN THEIR OFFICIAL CAPACITIES AS MAINE DISTRICT ATTORNEYS; AND JANET T. MILLS, IN HER OFFICIAL CAPACITY AS MAINE ATTORNEY GENERAL

Defendant – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

AMICUS BRIEF OF GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF APPELLEES TO AFFIRM THE DISTRICT COURT'S DECISION

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DISCLOSURE STATEMENT

The Gay & Lesbian Advocates & Defenders (GLAD) is a non-profit organization organized under 26 U.S.C. § 501(c)(3) that has made an election under 26 U.S.C. § 501(h)(3). Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that GLAD is not a corporation that has issued stock or has parent corporations that issue stock.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE AMICI BRIEF

GLAD urges the Court to reject the appeal of Plaintiffs National Organization for Marriage, Inc. ("NOM") and American Principles in Action, Inc. from the judgment of the District Court (Hornby, J.), upholding the disclosure requirements of 21-A M.R.S. § 1056-B.

As elaborated upon in more detail in GLAD's Motion for Leave to File an Amicus Brief in Support of the Defendant-Appellees, pursuant to which this Brief is attached and to which they seek authority to file this Brief pursuant to Fed.R.App.P. 29(b):

GLAD is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. It has pursued marriage equality, as both a party and amicus curiae in litigation, *e.g.*, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (amicus); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (party). GLAD is also litigating federal constitutional challenges to Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, now pending in the U.S. Court of Appeals for the First Circuit. *See Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal pending*, First Circuit No. 10-2207; *see also Pedersen v. Office of Personnel Management*,

No. 3:10 cv 1750 (VLB) (D. Ct.) (representing couples and widow married under state law who challenge DOMA).

In addition to its litigation efforts, GLAD works in partnership with grassroots and advocacy organizations across New England to advance marriage equality efforts in the court of public opinion, as well as in the legislative arena. This work has included initiative, referenda and constitutional convention activities in Massachusetts; legislative efforts and ballot campaigns in Maine; constitutional convention votes in Connecticut; and legislative activity in New Hampshire.

In all of those efforts over a number of years, GLAD, as a 501(c)(3) organization, has consistently followed all state and federal rules applicable to its activities, including reporting its activities wherever and whenever required. As an advocate speaking on the same topic in opposition to NOM, GLAD seeks a transparent process and an informed electorate.

On March 8, 2011, this Court granted GLAD leave to file an amicus brief in an action filed by NOM challenging Rhode Island disclosure provisions relating to candidate campaigns. *National Organization for Marriage v. Daluz*, Docket No. 10-2304. That appeal remains pending, with oral argument held on April 5, 2011. GLAD's interest in upholding disclosure rules in the context of ballot question campaigns, the subject matter of the Maine statute at issue here, is even more

direct and acute, given NOM's promotion and activity in ballot campaigns to oppose or repeal anti-discrimination measures advancing GLAD's mission.

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel states that: a) no party's counsel authored any part of this brief; and b) no person, party or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

GLAD supports Judge Hornby's conclusions and Appellees' position. Maine's disclosure statute is constitutional, imposes no unreasonable burdens and serves vital public interests. This Brief focuses on the last point, from the perspective of an organization regularly engaged in legal and educational issues surrounding ballot campaigns, which organization acts transparently and plays by disclosure rules, but finds its opposition not doing or seeking not to do the same.

Disclosure of the identity and funding sources behind ballot question campaigns furthers a compelling interest in an informed electorate, which not only advances the First Amendment interests of voters as speech recipients, but is essential to the functioning of a democratic society. Additionally, disclosures relating to monetary contributions are qualitatively different from disclosures regarding speech itself, as reflected by Supreme Court precedent, which has never recognized a general right to spend money anonymously in campaigns. To the contrary, the Court has repeatedly upheld disclosure requirements in both ballot measure and candidate elections. Given factors such as the lack of heuristic cues from party affiliation, moreover, such disclosures are even more important in the ballot question context than in candidate elections – not less, as Appellants argue. (Appellant Br. at 66.)

Appellants do not and cannot argue that this compelling interest is countervailed by any interest of their own. The Maine disclosure requirements are not burdensome, and there is no suggestion of that any privacy or associational interest of Appellants is or could be impaired, let alone any colorable evidence of any such impact.

Finally, under Appellants' vision of the electoral arena, with a perverse "major purpose" and insurmountable vagueness test for ballot question disclosure statutes that ignores common sense, hiding information of importance to the electorate would reign, undermining the robust and informed debate crucial to a working democracy.

ARGUMENT

I. The First Amendment interest in an informed electorate, served through disclosure rules, is essential to our democratic system.

The Supreme Court has repeatedly underscored that disclosure rules – which prevent no one from speaking, *McConnell v. Federal Election Comm.*, 540 U.S. 93, 201 (1993) – advance the interest of serving an informed electorate. *See Citizens United v. Federal Election Comm.*, 130 S. Ct. 876, 916 (2010) (disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages"); *McConnell*, 540 U.S. at 196 (citing lower court decision noting how disclosure rules advance "the First Amendment interest of individual citizens seeking to make informed choices in the political marketplace"); *First Nat'l Bank of Bos. 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"); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (citing interest in providing electorate with information); *see also Daggett v. Comm'n on Govern. Ethic.*, 205 F.3d 445, 465-66 (1st Cir. 2000) ("In *Vote Choice* [*Inc. v. Stefano*, 4 F.3d 26, 32 (1st Cir. 1993)], we explained that the state has a "compelling interest in keeping the electorate informed about which constituencies may command a candidate's loyalties.").

This importance of the interest in an informed electorate cannot be underestimated; it is crucial to a functioning democracy. *See Citizens United*, 130 S.Ct. at 898 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *Buckley*, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices … is essential"); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 88 (Lawbook Exchange 2000) (1948) (to ensure "that all the citizens shall, so far as possible, understand the issues which bear upon our common life," the First Amendment provides that "no relevant information, may be kept from them"); Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 Yale L.J. 925, 939 (1990) ("audience interests must be given preeminent weight in cases of explicitly political debate because the paramount concern here is that citizens be able to make wise, well-informed choices about matters of shared public concern.").

An educated and engaged electorate debating the issues lies at the core of the values protected under the First Amendment:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government …[i]f there be time to expose through discussion the falsehood

> and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech ….

Whitney v. California, 274 U.S. 357, 377 (1926) (Brandeis, J., concurring). As Justice Holmes similarly stated: "The ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (dissenting).

Transparency and disclosure facilitate the electoral debate and serve the marketplace of ideas: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley*, 424 U.S. at 67, citing L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933.) One of "the primary values protected by the First Amendment [is] 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983), quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see id* at 796 ("[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."); *Bellotti*, 435 U.S. at 783 (noting the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas").

By providing information about who is supporting a campaign position through substantial financial contributions, Maine's disclosure rules not only provide information helpful to voters in their decision-making, but facilitate the debate among those identified. Put simply, as Justice Scalia stated, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Doe v. Reed*, 130 S.Ct. 2811, 2836 (2010).

II. Disclosure in the ballot question context is even more important than in candidate elections.

The importance of disclosure specifically in context of ballot question campaigns has also been repeatedly recognized by the Supreme Court. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 202-03 (1999) (noting that the state has a substantial interest in disclosing the names of initiative sponsors and the amounts that they have spent gathering support for their initiatives); *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290, 299-300 (1981) (recognizing that "legislation can outlaw anonymous contributions" to support ballot initiatives because of the important public interest in the identification of the source of such support).

Indeed, disclosure is even more important in this direct democracy context than in candidate campaigns, for multiple reasons.

A. Disclosure is more important in the ballot question context because of the lack of heuristic cues available in candidate campaigns.

In the course of their decision-making, voters often rely on heuristic cues – informational shortcuts, such as party affiliation and endorsements. Information as to who is funding a ballot initiative or referendum, at what levels, is particularly important, because in the ballot question context party affiliation and other candidate-related heuristic cues are lacking. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. Rev. 1141, 1153 (2003) ("[B]ecause "there is no party cue, the presence of an uninformed electorate is more problematic than in partisan/candidate elections") (citing David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 128 (1984); Kang, 50 UCLA L. Rev. at 1160 ("provision of heuristic cues in direct democracy is an efficient and effective means of improving voter competence. Heuristic cues are not a perfect substitute for full information, but they represent a pragmatic shortcut that both improves voter competence and preserves voters' evaluative autonomy."). *See also* Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev. 63, 72 (1994) (describing surveys indicating the usefulness of heuristic cues in five complicated ballot initiatives on insurance reform); Elizabeth Garrett & Daniel A.

Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Election L.J. 297, 298 (2005) ("the position of an economic group with known preferences on an issue can serve as an effective shortcut for ordinary voters, substituting for encyclopedic information about the electoral choice."), citing Lupia, 88 Am. Pol. Sci. Rev. at 72.

B. The remaining heuristic cues available in ballot question campaigns are important to informing the electorate.

Whether the money supporting an initiative is coming from out-of-state, or particular industry interests, or whether the contributions are smaller amounts from many or larger amounts from a few, are all pieces of information particularly useful to the electorate in the absence of party and candidate cues. *See Buckley*, 525 U.S. at 214 (Thomas, J. concurring) ("I am willing to assume … that Colorado's interest in having this information made available to the press and its voters [ ] before the initiative is voted upon … is compelling. The reporting provision … ensures that the public receives information demonstrating the financial support behind an initiative proposal before voting."); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1224 n.11 (E.D. Cal. 2009) (concluding that it is "very probable" that the California electorate would be

interested in knowing the extent to which financial support for a ballot initiative comes from outside the state).[1]

For example, with respect to the referendum campaign advanced by Appellants to defeat Maine's law allowing the government to license marriage for same-sex couples, NOM was the single largest contributor by far to the repeal effort in the Maine campaign.[2] Whether most of the money supporting NOM's effort came from out of state is information probably of substantial interest to Maine voters.

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[1] Hence, the reasonableness of the $5,000 trigger for reporting as a ballot question committee, and the value of requiring disclosure of its contributors of $100 or more. In Maine, group support of $5000 and contributions of $100 can reflect significant commitments. They show the identity, depth and breadth of support for a ballot question position. *Cf. Vote Choice Inc v. DiStefano*, 4 F.3d 26, 32 (1st Cir. 1993 ("signals are transmitted about a candidate's positions and concerns not only by a contribution's size but also by the contributor's identity").

[2] *See* Glenn Adams, "No on 1 still collecting more funds than effort to repeal marriage law," Portland Press Herald, Oct. 24, 2009, *available at* pressherald.com/archive/no-on-1-still-collecting-more-funds-than-effort-to-repeal-marriage-law_2009-10-24.html (reporting that "[t]hroughout the campaign, the Princeton, N.J.-based National Organization for Marriage has donated a total of $1.5 million to the effort to repeal the law legalizing same-sex marriage. The diocese has given $550,000.") To the credit of the Portland Diocese of the Roman Catholic Church – as opposed to NOM – the Diocese reported its many out-of-state donations from other dioceses and from the Knights of Columbus. *See* Chuck Colbert, "Dioceses Major Contributors to Repeal Same-Sex Marriage," National Catholic Reporter, Nov. 25, 2009, *available at* http://www.bishop-accountability.org/news2009/11_12/2009_11_25_Colbert_DiocesesMajor.html (reporting that $286,000 of over $550,000 in contributions to the repeal effort came from the Portland, Maine diocese and that 50 other dioceses provided the bulk of additional funds contributed by the Portland diocese).

In the months leading up to the election in the California Prop 8 campaign, the press, relying on disclosure reports, revealed that nearly one-third of the $15 million raised in support of Prop 8 was raised by the Mormon Church. "Mormons Boost Antigay Marriage Effort: Group Has Given Millions in Support of California Fund," Sept. 20, 2008, *available at* http://online.wsj.com/article/SB122186063716658279.html?mod=googlenews%20wsj – again, information likely of interest to the voters.

In sum, disclosure "furthers the state interest, particularly compelling in direct democracy, of giving voters relevant information to assess whether a ballot proposal is supported by a broad grassroots movement or by an overflowing political war chest." Elizabeth Garrett, *Money, Agenda Setting and Direct Democracy*, 77 Tex. L. Rev. 1845, 1887 (1999).

Direct access to the data showing who is funding a campaign also enables voters to test the accuracy of statements that proponents of an initiative make during a campaign regarding their support. During the 2008 presidential campaign, for example, the Obama campaign widely publicized its claim that it had raised a significant amount of money from small donors. Campaign finance disclosure data enabled reporters to analyze that information. *See* Michael Luo & Griff Palmer, "Fictitious Donors Found in Obama Finance Records," New York Times, October 10, 2008 (addressing concerns, after false names were discovered

on the candidate Obama's campaign finance records, that the Obama campaign was not vetting its "unprecedented flood of donors" properly), *available at* www.nytimes.com/2008/10/10/us/politics/10donate.html?r=1&scp=1&sq=fictitious%20donors&st=cse; Kimberly Kindy & Sarah Cohen, "The Donors Who Gave Big and Often," The Washington Post, January 18, 2009 at A02 ("Nearly 100 wealthy families and power couples contributed at least $100,000 each to help Barack Obama over the past two years"); Jeanne Cummings, "Big Pharma Veers to the Left," Politico, September 23, 2008, *available at* www.politico.com/news/storiesI0908/13766.html (reporting that to date 'the drug companies have given a total of $17 million, with half ($8.5 million) going to Democrats and half ($8.5 million) going to the old allies"). *See also Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (quoting a journalist crediting campaign finance disclosure laws as allowing her to tell readers that the support for a particular ballot measure did not come primarily from small businesses, as had been publicly represented by its supporters, but instead from "giant tobacco [c]ompanies").

While such examples reflect the importance of access to this information in order to prompt media investigation, direct interest in such information by the public is also undeniable. Opensecrets.org aggregates and synthesizes large amounts of campaign related information made public through disclosure

requirements in a format that is easy to use by both the public and the press. www.opensecrets.org/about/tour.php. According to searches in Westlaw's ALLNEWS database, the website's campaign finance data has been used in news and opinion articles in more than 10,000 instances.[3]

C. Disclosure is more important in the ballot question context because of unavailability of educational avenues present in representational democracy.

Aside from the lack of heuristic cues present in ballot question campaigns, making those that are available even more important, information provided by disclosure laws is also needed more in the direct democracy context because elected representatives enjoy information resources and deliberative opportunities that the people do not. *See Public Disclosure of Referendum Petitions*, 124 Harv. Law Rev. 269, 278 (2010), citing Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 Hastings Const. L.Q. 185, 205 (2002) ("Indirect lawmaking has major advantages, especially the benefit of specialization of labor. The legislature can set up committees, gather information, and develop expertise.")). And while informed representatives can ultimately correct for the mistaken policy judgments

[3] A search made on May 26. 2010, in the Westlaw ALLNEWS database for the website's administering organization, the Center for Responsive Politics, generated over 10,000 instances in which the website's campaign finance data has been used in news and opinion reports and articles. Other websites that generate reports and articles from campaign finance disclosure data include the Campaign Finance Institute site, www.cfinst.org/, and the National Institute on Money in State Politics' www.followthemoney.org.andpolitico.com.

that result in their election, "the mistaken judgments that underlie initiatives and referenda translate into direct policy results." 124 Harv. Law Rev. at 278.

D. Disclosure is most important in the ballot question context affecting disadvantaged classes.

Finally, the importance of such information is perhaps most acute in the context of ballot questions affecting disadvantaged classes, such as the LGBT population.

One step to address and alleviate discrimination animating a ballot measure is the disclosure of those who stand for or against a measure strongly enough to donate to that position. Since prejudices can arise from fear triggered by lack of exposure to and dialogue with members of the disadvantaged class, the "best response" to such obstacles is "to ensure that members of deliberating enclaves are not walled off from competing views." C. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 77 Yale L. J. 71, 77 (2000). Identification of supporters not only provides a global view of which interest groups support which positions, but allow the electorate to see what their neighbors stands are and to initiate a dialogue with them.[4]

Most relevant to the present case, lesbian and gay persons have been targeted by scores of ballot measures designed to treat them unequally to others.

[4] As Judge Hornby noted in his decision (Appellants' Br. at 106 n. 85), there is no suggestion here of any infringement of Appellants' associational interests by the colorable threat of any harassment.

After a comprehensive study, University of Michigan political scientist Barbara S. Gamble concluded that "[g]ay men and lesbians have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-58 (1997). Between 1974 and 2009, 115 ballot measures in 16 states sought to repeal prohibitions of discrimination against LGBT people in the workplace, prevent or inhibit such prohibitions from being passed, or mandate discriminatory or stigmatizing conduct or speech towards LGBT people. *See* Brad Sears, Christy Mallory & Nan Hoter, *Voters' Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974-Present* at 15-1 – 15-2 (2009) ("Voters' Initiatives"), *available at* http://www.escholarship.org/uc/item/58j4w7k3.7.

Such measures included Colorado's Amendment 2, which repealed existing sexual orientation antidiscrimination protections statewide and prohibited them from being adopted in the future, and which the Supreme Court held unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). Notwithstanding the Court's decision in *Romer*, almost two dozen similar initiatives were subsequently introduced at local levels, including some as recently as last year. Voters' Initiatives at 15-8. Measures seeking to repeal laws prohibiting gender identity

discrimination have now joined the fray. *See Doe v. Montgomery County Bd. Of Elections*, 962 A.2d 342 (Md. 2008).

In recent years, many measures have sought to overturn or block legislation and court decisions affording rights to same-sex couples. Over the last decade, state initiatives or referenda barring same-sex couples from marrying and, in some instances, from obtaining civil unions, domestic partnerships or any rights at all have been on the ballot in Arizona, Arkansas, California, Florida, Maine, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, and Oregon. All of those measures passed except an initial initiative in Arizona that would have barred domestic partner benefits. *See* Initiative and Referendum Institute, *Ballotwatch, Same-Sex Marriage: Breaking the Firewall in California?* at 3 (Oct. 2008); Jesse McKinley & Laurie Goodstein, "Bans in 3 States on Gay Marriage," N.Y. Times (Nov. 5, 2008), at A1; Maria Sacchetti, "Maine Voters Overturn State's New Same-Sex Marriage Law," Boston Globe, (Nov. 4, 2009), at 1. Initiative or referendum campaigns also led to the repeal of existing domestic partnership policies in Austin, Texas; Columbus, Ohio; Northampton, Massachusetts; and Santa Clara County, California. *See* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 Law & Soc'y Rev. 151, 181 n.10 (2009).

The pervasive use of the ballot initiative as a tool for attacking the lesbian and gay community is no accident. The ballot initiative process bypasses all of the "political processes ordinarily to be relied upon to protect minorities." *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). It eliminates bicameralism and presentment, removing veto points at which persuadable representatives or executives might be willing to prevent enactment of hostile measures. It lacks a deliberative process or opportunity to propose amendments, thereby depriving minority members of opportunities to identify and persuade potential supporters or to engage in coalition-building. And it disconnects the fate of proposed legislation from other proposals, eliminating any opportunity for minorities to engage in bargaining through which they might secure temporary, situational majorities in their favor. *See generally* Akhil R. Amar, *Choosing Representatives by Lottery Voting*, 93 Yale L.J. 1283, 1304 (1984) ("Because of the structure of legislatures, minorities command more respect from majorities in a legislature than in the polity at large."); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1555 (1990) ("Group representation ensures that diverse views are continually expressed, increasing 'the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected'"). In addition, voters, unlike legislators, take no oath to uphold the Constitution, nor do they engage in the same deliberative process that helps steer legislative action

toward constitutional outcomes. *Compare Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions"). The absence of a deliberating mechanism in ballot initiatives allows popular "bare . . . desire to harm a politically unpopular group" more easily to find political expression and to infect legislation. *Romer*, 517 U.S. at 634-35, quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (ellipses in original).

These structural features leave minorities with few defenses against discriminatory initiatives – making the disclosures required by the Maine statute even more important to their ability to defend their rights in this arena.

III. Disclosure combats the obfuscation of "astroturfing."

An important value of contributor information is helping to uncover the actual identity of the interests supporting a position.

The phenomenon of "astroturfing" – artificially suggesting a grassroots campaign by use of innocuous sounding committees to hide the actual interest groups behind an initiative – is well known. *See generally* Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 Conn. L. Rev. 357 (2010). As Kang summarizes:

> Currently, the practical problem in direct democracy is that voters struggle to identify which interest groups stand on which side of a ballot question. Interest groups strategically obscure their involvement when they believe identification would hurt their campaigns….Interposition of these intermediary entities hides the involvement of financial contributors and intentionally removes salient heuristic cues from public view.

50 U.C.L.A. L. Rev. at 1158-59 (footnotes omitted).

While groups such as GLAD are transparent as to their objectives and support, mandatory disclosure rules help inform the electorate with respect to groups or individuals that use these astroturf mechanisms to obscure their presence. *See McConnell*, 540 U.S. at 196-97 (citation from lower court decision noting that disclosure rules assist in revealing entities that seek to influence elections while concealing their identities by "hiding behind dubious and misleading names"); *Citizens Against Rent Control*, 454 U.S. 290, 298 (1981) ("[T]here is no risk that the … voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known.").

The decision in *Voters Educ. Comm. v. Washington State Public Disclosure Commn*, 166 P.3d 1174 (Wash. 2007) describes how the U.S. Chamber of Commerce gave $1.5 million dollars to a group called the "Voters Education Committee," which in turn spent the money on political television advertisements criticizing Deborah Senn, a candidate for Attorney General of Washington, without registering as a political committee or disclosing information about its

contributions and expenditures. *Id.* at 1177, 1190. Concluding that the organization should have been registered as a political action committee under Washington law, the court explained that "these disclosure requirements do not restrict political speech--they merely ensure that the public receives accurate information about who is doing the speaking." *Id.* at 1189.

The record before the Court in *McConnell* contained many examples of interests that veiled their federal political expenditures with misleading names. There, the Court found that the "The Coalition-Americans Working for Real Change" was a business organization opposed to organized labor, and "Citizens for Better Medicare" was funded by the pharmaceutical industry. 540 U.S. at 128, 197.

Wealthy individuals have used similar tactics. For example, Texas millionaires and brothers Charles and Sam Wyly spent approximately $25 million on advertisements endorsing George W. Bush during the 2000 primaries. They did so, however, in secrecy, using the name of "Republicans for Clean Air" to shield their involvement. *McConnell v. FEC*, 251 F. Supp. 2d 176, 232 (D.D.C), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003).

Just as "the sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office," *Buckley*, 424 U.S. at 67, similar

information as to the true funders of a ballot campaign is even more valuable in revealing the interests most likely to be served by its passage or defeat. Indeed, in *Citizens Against Rent Control*, the Supreme Court acknowledged that, although limitations on contributions to ballot initiatives could not withstand constitutional scrutiny, the government can constitutionally prohibit anonymous contributions in order to maintain of the integrity of the political system. 454 U.S. at 299-300.

IV. Disclosure is the least burdensome means available of serving core First Amendment interests.

Providing electorate information through financial disclosures is the least burdensome means available to serve these compelling First Amendment interests. As the Supreme Court noted in *Citizens United*, disclosure rules "merely provide [ ] for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). 130 S.Ct. at 915, citing *U.S.* v. *Harriss*, 347 U. S. 612, 625 (1954) (upholding lobbying disclosure rules). It is a minimally intrusive mechanism to fulfill the crucial informational First Amendment interest providing the glue that holds together our democratic form of government. *See* S. Issacharoff, *The Constitutional Logic of Campaign Finance Regulation*, 36 Pepp. L. Rev. 373, 376 (2009) ("Disclosure is the least intrusive form of finance regulation and has been tolerated in almost all settings").

In a recent article, Kathleen Sullivan summarized how disclosure rules fulfill fundamental interests grounding free speech rights and protections. *Two Concepts*

of Freedom of Speech, 124 Harv. L. 143 (2010). From one perspective, the First Amendment promotes political equality; disclosure in this context

> is obviously attractive because it facilitates voter and interest group monitoring of the speech of those with concentrated resources, lowering the costs of detection and counterspeech. To equality advocates, disclosure is a less restrictive alternative to source and amount limitations; it might not level the speech of the powerful and wealthy, but it makes it easier to call it out and to expose unseemly responses to it ….

Id. at 173 (citations omitted).

Additionally or alternatively, free speech rights promote political liberty. The Supreme Court's alignment of eight of nine justices upholding the disclosure rules at issue in *Citizens United* reflect support of these liberty values by

> focus[ing] on the interests of listeners, in a system of freedom of speech, to assess speech and speakers without paternalistic government intervention….
>
> Technological change reinforces this understanding by making disclosure more robust. When the 1974 campaign finance laws were enacted, disclosure meant that an overburdened civil servant might retrieve an index card from a musty file cabinet; today, disclosure of the source and amount of expenditures can be instantaneously disseminated over the internet. As Justice Kennedy observed in the majority opinion, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

Id. at 174, citing *Citizens United*, 130 S. Ct. at 913-16.

In sum, our system of government makes an informed electorate essential. The values undergirding the First Amendment seek to facilitate voter education in order to promote political equality and liberty. Financial disclosures are key means

to ensuring robust informed debate, and are even more important in the direct democracy context than in candidate elections. The Maine statute is clear, and the registration and filing burdens imposed on Appellants minimal, particularly in light of the importance of communicating this information to the electorate in the ballot question context, where efforts often aimed at affecting basic rights of disadvantaged classes are promoted through attempts to launder and "astroturf" the identities behind such efforts. Appellants' attempt to advance a perverse "major purpose" and insurmountable vagueness test and to belittle the importance of the First Amendment interests in the direct democracy context ignores precedent and common sense. In brief, they make a transparent effort to leave voters in the dark. The First Amendment does not countenance, let alone, require such a result.

CONCLUSION

For the reasons set forth herein, as well as in Appellees' Brief, GLAD respectfully asserts that the Court should reject Appellants' appeal and affirm the District Court's decision upholding Maine's ballot question disclosure rules.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

The type-volume limitation of Fed. R. App. P. 32(a)(7)(B) imposes a 14,000 word limitation on a party's principal brief. Pursuant to Fed. R. App. P. 29(d), an amicus brief may be no more than one-half the length authorized for a party's principal brief. This brief complies with Rules 29(d) and 32(a)(7)(B) because it contains 4,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), including the Statement of Interest.

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CERTIFICATE OF SERVICE

I certify that the within brief has been electronically filed with the Clerk of the Court on June 2, 2011. All attorneys of record are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing.

s/ Catherine R. Connors