UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ROGER STENSON, and CITIZENS FOR LIFE, INC.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 00-514-JD
PHILIP MCLAUGHLIN, in his official capacity as the New Hampshire Attorney General and JEANNE SHAHEEN, in her official capacity as Governor of the state of New Hampshire,	)	
Defendants.	)	

MEMORANDUM OF LAW OF *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Amici Curiae League of Women Voters of New Hampshire and New Hampshire Public Interest Research Group submit this memorandum of law in opposition to plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, which the Court has "consolidated with a consideration of the case on the merits." Procedural Order, November 7, 2000. To the extent that the Court Order transformed plaintiffs' pleadings into a motion for summary judgment, *Amici* submit this memorandum of law to oppose summary judgment in favor of plaintiffs.

STATEMENT OF THE CASE

Plaintiffs filed a Verified Complaint on October 31, 2000, seeking temporary and permanent injunctive relief in the form of a court order declaring three provisions of RSA Chapter 664 unconstitutional. Though plaintiffs' complaint alleges four causes of action,

they in effect make only two arguments: 1) that the definition of "political advertising" set forth in RSA § 664:2, VI impermissibly regulates so-called "issue advocacy"; and 2) that the modest signature and identification requirements of RSA §§ 664:14 and 664:16 violate the First Amendment of the United States Constitution by "compelling speech". Plaintiffs' Verified Complaint ("Complaint") at ¶¶ 24-40.

Plaintiffs have not carried their burden justifying the injunctive relief they seek. To the extent that plaintiffs' complaint raises questions concerning the interpretation of certain New Hampshire statutes, *Amici* join and adopt defendants' request that this Court certify said questions to the New Hampshire Supreme Court. In the alternative, *Amici* respectfully request that the Court sever any unconstitutional applications of RSA §§ 664:2, VI, 664:14, and 664:16 in a fashion that will give effect to the Legislature's intent in the remainder of the statute.

STATEMENT OF MATERIAL FACTS

A. Facts Concerning New Hampshire's Interests in the Disclosure and Identification Required by N.H. REV. STAT. ANN §§ 664:14 and 664:16.

The provisions at issue in this action, RSA §§ 664:2, VI, 664:14 and 664:16, are part of a package of campaign finance reform measures enacted by the New Hampshire Legislature, many of which have existed in New Hampshire law since 1915, now codified in RSA Chapter 664 ("Political Expenditures and Contributions"). Among other things, the legislation regulates political contributions, creates reporting and disclosure requirements, and provides a program for voluntary limitation of political expenditures by candidates for office. The compelling governmental objectives served by § 664 include preventing corruption in the political process, strengthening the public's confidence in the integrity of government, promoting compliance with contribution

limits, and providing voters with information that will assist them in evaluating candidates for office and holding them accountable once elected. *See infra* at II, A, 3.

The reporting and disclosure provisions of RSA § 664:14 and 664:16[1] were designed to address several pressing concerns that warranted action by the New Hampshire Legislature. First, disclosure and reporting requirements for political advertising help deter corruption and the appearance of corruption. Spending that benefits candidates for office creates political debts. If spending is undisclosed or disguised, the public has no means of holding candidates accountable if they attempt to repay such debts through their actions as elected officials. Even if candidates refrain from such direct quid pro quo corruption, secrecy concerning the sources of spending on campaigns undermines public confidence in the integrity of government.

Second, the new reporting and disclosure requirements promote the effectiveness of NH's system of voluntary spending limits for political candidates. NH election law permits a candidate for state office to file an affidavit declaring that he or she will abide by specified spending limits. RSA §§ 664:5-a, 664:5-b. Accepting such limits tends to promote the public's confidence that the candidate will not be beholden to large special interest contributors. Without disclosure and reporting requirements for third-party spending on political campaigns, however, this voluntary system can be undermined, as candidates that have agreed to abide by spending limits may be able to evade the intent of the law. Further, for candidates who are determined to abide by the voluntary limits, it is

[1] The text of RSA § 664 is attached to this Memorandum of Law as Exhibit D.

important to know the extent of third-party spending so that the candidate can avoid any accusation of overspending or unsolicited influence. *See* RSA § 664:5-a, II.

More broadly, NH's campaign reforms have the goal of protecting its electoral process against the abuses and excesses in the federal campaign system that have fostered increasing public cynicism toward government. At the federal level, evasion of contribution limits through soft-money spending on campaign ads disguised as "issue ads" has been the subject of extensive reporting and public criticism in recent years.[2]

Finally, the disclosure and reporting provisions serve the important interest in providing NH citizens with information that will assist them in evaluating political campaigns and making informed choices as voters. As attested by *Amici* League of Women Voters of New Hampshire and the New Hampshire Public Interest Research Group, disclosure of the sponsors of political advertising will be essential to them as voters and as government watchdogs. *See* Declaration of Steve Blackledge, ("Blackledge Decl."), at ¶¶ 2-5; Declaration of Jane Armstrong, ("Armstrong Decl."), at ¶¶ 2-4, both attached to Proposed Intervenors' Motion to Intervene, filed Dec. 27, 2000.

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[2] *See, e.g., Interest Groups Spending Up and The Ads Are More Aggressive,* N.Y. Times, March 18, 2000, at A7; John Broder and Don Van Natta Jr., *Clinton is Raising Millions to Push Early 'Issue* Ads', N.Y. Times, Feb. 10, 2000; *Dictum Without Data: The Myth of Issue Advocacy and Party Building*, David Magelby ed. (Pew Charitable Trusts, 2000), available at <http://www.byu.edu/outsidemoney/dictum>; Jonathan Krasno and Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, (Brennan Center for Justice, 2000); Jill Abramson, *Political Parties Channel Millions to "Issue" Attacks*, N.Y. Times Oct. 26, 1998; Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash*, Wash. Post, February 9, 1997, at A01 (cited in Anthony Corrado, *Giving, Spending and "Soft Money*," 6 Journal of Law & Pub. Pol. 45, 52-53 (1997)). *See also* Jill Abramson & Leslie Wayne, *Democrats Used the State Parties to Bypass Limits*, N. Y. Times, October 2, 1997, at A1.

B. Facts Concerning Plaintiffs

Plaintiff Citizens for Life, Inc. ("Citizens") is a non-profit corporation with branches organized under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. Citizens also runs a registered political action committee ("PAC") under the laws of NH and a PAC for spending on federal elections. *See* Deposition of Roger Stenson, Dec. 19, 2000 ("Stenson Dep.") at 29-30, excerpts attached hereto as Exhibit D. Citizens is an "affiliate" of the National Right to Life Committee, Inc.. *See id.* In addition to monies received from the National Right to Life Committee, Citizens has received money from for-profit business corporations to fund its activities. Stenson Dep. at 101. Plaintiff Stenson is Executive Director of Citizens. Complaint ¶ 4. He is also the Chairman and Treasurer of the Citizens for Life State and Federal PACs. Stenson Dep. at 19-20.

Citizens alleges that it intends to publish political advertising that will advocate the success or defeat of candidates for office. Complaint ¶ 14; Stenson Dep. at 50. Citizens makes the legal conclusion that its advertising will not expressly advocate the success or defeat of candidates for office, but admits that it is intended "implicitly" to do so. Complaint ¶ 14. On November 3 and 4, 2000, Citizens paid for two advertisements to run in the Manchester Union Leader. *See* Manchester Union Leader, Advertisement, November 3, 2000 ("11/3 Ad"), attached hereto as Exhibit A; Manchester Union Leader, Advertisement, November 4, 2000 ("11/4 Ad"), attached hereto as Exhibit B. Citizens has not published any other political advertising. Stenson Dep. at 35-36.

Citizens has never engaged in any form of, "does not see the value in", and has "no interest in doing", anonymous advertising. *Id*. at 44, 105. In all advertisements it has published, as well as those it intends to publish, Citizens has included, and will include,

the name of the organization and its address. *Id*. at 38, 41, 70 In fact, Stenson testified that such identification was a good idea, necessary to establish the credibility of Citizens' communications and to allow persons who may be misidentified in its ads to contact Citizens for correction. *Id.* at 44, 72. Most notably, plaintiffs admit that the identification and disclosure requirements at issue in this suit do not prevent them from doing anything they would want to do. *Id*. at 105.

ARGUMENT

I. THE COURT SHOULD CERTIFY QUESTIONS OF INTERPRETATION OR SEVERANCE OF NEW HAMSPHIRE STATUTES TO THE NEW HAMPSHIRE SUPREME COURT.

Amici join defendants' motion that this Court certify any questions of interpretation or severability of the challenged statutes to the NH Supreme Court, adopting defendants' arguments as though fully set forth herein. Defendants' Motion for Certification, filed December 28, 2000; NH SUPREME COURT RULE 34; *Hungerford v. Jones*, 722 A.2d 478, 143 N.H. 208 (1998). *See also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Wiggington v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88 (1st Cir. 1999); *Pyle v. South Hadley School Committee*, 55 F.3d 20 (1st Cir. 1995).

II. THE FIRST AMENDMENT DOES NOT PROHIBIT APPLICATION OF RSA 664:2, VI TO PLAINTIFFS' CONDUCT.

In Counts I and IV of their complaint, plaintiffs claim alternately that RSA § 664:2, VI is "substantially overbroad and unconstitutional on its face" and a "penal statute" that is "void for vagueness". Complaint ¶¶ 27, 38. However, § 664:2, VI is merely a definition that does not by itself regulate or otherwise compel any behavior. The gravamen of plaintiffs' complaint is that § 664:2, VI defines "political

advertisement" so broadly that the disclosure and identification of provisions of §§ 664:14 and 664:16 operate unconstitutionally to regulate so-called "issue advocacy".

Amici recognize that § 664:2, VI may suffer from a constitutional infirmity to the extent that it could be read to bring the requirements of §§ 664:14 and 664:16 to bear on *pure* issue advocacy. *See McIntyre v. Ohio Elections* Commission, 514 U.S. 334 (1995); *Buckley v. Valeo*, 424 U.S. 1 (1976); *but see Richey v. Tyson*, -- F. Supp. 2d --, 2000 WL 1736935 (S.D. Ala. Nov. 13, 2000) (disclosure requirements for ballot issue advocacy expenditures upheld). Plaintiffs' complaint, however, does not present the Court with a question of pure issue advocacy. Plaintiffs' allegations exclusively address political communications in the context of candidate campaigns. The U.S. Supreme Court long ago established the propriety of regulating political communications that expressly advocate the success or defeat of candidates for office. *Buckley v. Valeo,* 424 U.S. 1 (1976). Accordingly, the Court should not take up plaintiffs' wholesale invitation to "declare RSA §§ 664:2, VI unconstitutional on its face". Complaint ¶ 28. Instead, the Court should closely examine the nature of the plaintiffs' activities, the triviality of the burden they claim, and the legitimacy of the state's interest in modest disclosure provisions in order to determine the broad scope of permissible applications of § 664:2, VI. The Court should not grant any injunctive relief that inhibits § 664's valid and proper application to express advocacy.

A. The Disclosure Requirements Do Not Impede Protected Issue Advocacy.

The disclosure requirements of §§ 664:14 and 664:16 are designed to provide voters with basic information about the source of political advertisements that "expressly or implicitly advocate the success or defeat of any . . . person at any election." RSA §

664:2, VI. Citizens' attack on these provisions rests on a faulty, two-step argument. First, Citizens adopts an overly literal reading of the "express advocacy" test set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), erroneously arguing that the First Amendment places campaign advertising beyond the scope of permissible state regulation – even the limited requirement of disclosure – so long as the advertisements do not employ one of the short list of phrases set forth in the *Buckley* opinion as examples of express campaign advocacy. Second, Citizens argues that this court is *required* to construe § 644:2, VI in the broadest possible manner as infringing upon protected issue advocacy, and to reject all traditional rules for construction of NH statutes in the process. This court should reject Citizens' strained effort to create a constitutional violation where none exists.

1. State Authority to Regulate Electoral Advocacy Is Not Limited to Communications that Contain the "Magic Words" Listed in *Buckley*.

The Supreme Court has addressed the so-called "express advocacy" standard in two cases: *Buckley v. Valeo* and *Federal Election Commission* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). In *Buckley*, the Supreme Court adopted the so-called "express advocacy" standard as a means of judicially narrowing two provisions of the Federal Election Campaign Act of 1974 in response to a First Amendment challenge. The provisions sought to regulate expenditures "relative to a clearly identified candidate," 424 U.S. at 41, or made "for the purpose of . . . influencing" the election of candidates to federal office, 424 U.S. at 79.

The potential vagueness of these formulations in FECA prompted the Supreme Court to adopt a narrowing construction that would distinguish between electoral advocacy and protected discussion of public issues. The *Buckley* Court therefore held

that a reporting requirement for independent expenditures over $100 should be construed to reach only "communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. In a footnote, the Court listed examples of "communications containing express words of advocacy of election or defeat," such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n.52.

Though the Court created the "express advocacy" test in *Buckley*, it had no occasion to apply it to a particular set of facts until *Federal Election Commission* v. *Massachusetts Citizens for Life* ("*MCFL*"). In *MCFL* – whose holding Citizens does not describe – the Court did not apply the rigidly literal construction urged by plaintiff here, and indeed held that a pro-life voter guide constituted "express advocacy" within the meaning of *Buckley* even though its electoral message was "'marginally less direct' than 'Vote for Smith'", and even though the voter guide expressly stated that it was *not* intended as an endorsement of any candidate. 479 U.S. at 249. The Supreme Court also pointed to other contextual factors distinguishing the newsletter from a pure discussion of public issues, such as the fact that MCFL printed far more copies of its election newsletter than it usually printed of its standard newsletter, and the fact that the election newsletter was printed prior to the September primary elections. 479 U.S. at 243. By describing "express advocacy" as communication that "provides *in effect* an explicit directive", the *MCFL* Court thus confirmed that the "express advocacy" test of *Buckley* does not preclude a realistic evaluation of the electoral message conveyed by a

communication, contrary to plaintiffs' insistence that any such evaluation is forbidden under the First Amendment. 479 U.S. at 249 (emphasis added).[3]

Plaintiffs' rigid interpretation of the express advocacy standard, if accepted, would essentially bar meaningful regulation of any political advertisements. It would open the door to easy evasion of any such regulations so long as the sponsor of a political advertisement has access to a thesaurus providing substitutes for the words of advocacy listed as examples in footnote 52 of *Buckley*. As the Ninth Circuit has pointed out:

> The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act.

Federal Election Commission v. Furgatch, 807 F.2d 857, 863 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987); *accord Iowa Right to Life Comm. Inc. v. Williams*, 187 F.3d 963, 969-970 (8th Cir. 1999) ("*IRLC*"). Contrary to plaintiffs' misleading inclusion of *Furgatch* and *IRLC* in a string cite of lower federal courts that have "followed" the bright-line approach, the *Furgatch* court properly emphasized that the express advocacy test requires

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[3] Notably, the Court found the independent expenditures restriction challenged in *MCFL* unconstitutional *as applied* to that non-profit organization. *MCFL*, 479 U.S. at 263-64. In reaching this holding, the Court announced three "essential" features of the type of organization whose political speech could not be constitutionally restricted, implying that the validity of restrictions on political speech depends upon the nature of the entity whose speech is subject to regulation. *Id*.; *accord Austin v. Michigan*, 494 U.S. 652 (1990). The third of the "essential" features justifying protection under the First Amendment was that "MCFL was not established by a business corporation . . . and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 265. As Stenson stated in his deposition, Citizens *does* accept contributions from for-profit business entities. Hence, Citizens' speech is not entitled to the same level of First Amendment protection as the organization in *MCFL* because organizations like Citizens can "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *Id*.

an electoral message that is "unmistakable and unambiguous, suggestive of only one plausible meaning," 807 F.2d at 864, but declined to make the test meaningless by treating it as a "magic words" test. *See* Plaintiffs' Memorandum ("Pl. Mem.") at 10-11. Similarly, the *IRLC* court required "express language of advocacy with an exhortation to elect or defeat a candidate" while citing *Furgatch* approvingly. 187 F.3d 970. These guardedly flexible understandings of express advocacy – like the analysis of the Supreme Court in *MCFL* itself – demonstrates that the express advocacy standard can be applied in a manner broadly protective of First Amendment rights while still permitting some respect for the compelling governmental interest in reasonable campaign regulation.

Citizens argues that the use of the word "implicitly" in the NH statute alone is sufficient to require *facial* invalidation of § 664:2, VI, without regard to the language of the statute as a whole, without considering the construction of the statute advanced by its proponents and the authorities charged with enforcing it, and without benefit of *any* example of an improper application of the statute in practice. The legal question presented here is whether NH's disclosure provisions are subject to *facial* invalidation, because there has been no application of the statutes to any communication by plaintiffs.[4] Section 664:2's definition does not rest on the detection of a subjective, implicit *purpose* of influencing an election. Instead, it applies only to a communication that "expressly or implicitly advocates the success or defeat of a candidate". If a communication does not

[4] The advice letter from the New Hampshire Attorney General cannot qualify as an application of § 664 because no actual advertisement was presented nor did the state express any opinion about what would constitute compliance with § 664:14.

unquestionably and unambiguously advocate the success or defeat of a candidate, it is not covered advocacy under § 664:2, VI.[5]

Plaintiffs' string citation to numerous court decisions that have allegedly "adhered to" the express advocacy test, Pl. Mem. at 10-11, is thus beside the point. The Ninth Circuit's decision in *Furgatch* also adheres to the express advocacy test, as did the Supreme Court's decision in *MCFL* – as does the State of New Hampshire in interpreting the disclosure provisions at issue here. As the Seventh Circuit cogently pointed out in addressing a facial challenge to a Wisconsin provision:

> The question seemingly before the [Elections] Board . . . was not whether to apply *Buckley* – for every responsible official in Wisconsin believes that this is necessary – but what its approach means in practice. Appellate decisions such as *Furgatch* and *Christian Action Network* give different answers not because they disagree about whether *Buckley* and *Massachusetts Citizens for Life* "apply" but because these decisions do not give unambiguous answers to the myriad situations that arise.

Wisconsin Right to Life v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998). Even cases that strike down particular applications of the express advocacy test do not treat *Buckley* as a "magic words" test. *E.g., Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) ("*CLITRIM*"). *See also* Michael D. Leffel, Note, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 Mich. L. Rev. 686, 700 n. 84 (1996) (noting that holding of *CLITRIM* was

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[5] *Compare FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995) (declining to resolve "difficult" issue of whether particular communication constituted express advocacy, *id. at* 290 n.2, but holding disclosure could be required for solicitation letter under FECA even if communication did not constitute express advocacy, so long as solicitations "clearly indicat[e] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office", *id.* at 295).

based on numerous factors such as mailer's failure to mention congressman's political party or existence of election). Plaintiffs' facial challenge is thus an inappropriate vehicle for challenging New Hampshire's disclosure provisions.

While the First Circuit has struck down particular regulations concerning express advocacy on their face, the applicability of these decisions to the instant case is subject to question. *See Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471-72 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991) (striking down FEC regulation); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997) (*"MRLC")* (striking down FEC regulation). Notably, *Faucher* involved an FEC regulation which purported to ban entirely expenditures by an organization under the authority of § 441b(a) of the Federal Election Campaign Act. In announcing a bright-line approach and rejecting the FEC's authority to adopt its regulation, the court overlooked the U.S. Supreme Court's contextual analysis in *MCFL*. Moreover, the *Faucher* decision cites only *Furgatch* and *CLITRIM* as precedents where courts "have recognized the express advocacy test". 928 F.2d at 471. By citing approvingly two cases which adopt a substantially more nuanced approach to the analysis of express advocacy, the First Circuit cast some doubt on the strength of its own insistence on the bright-line test. Such doubt is amplified in the district court opinion adopted by the First Circuit in *MRLC*. In the decision below, Judge Hornby admitted that "the meaning of words is not fixed, but depends heavily on context" and that the bright-line approach "does not give much recognition to the policy of the election statute to keep corporate money from influencing elections". *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 11-13. It should be noted that *MRLC* also addressed a complete ban on a type of corporate expenditure, not

the modest type of disclosure law challenged in this case.[6] Neither of these cases, of course, addressed anything like the modest disclosure statutes at issue here.[7]

2. The Court Is Not Required to Read § 664:2, VI in the Overbroad Manner Urged by Citizens.

Plaintiffs argue that § 664:2, VI's language – "expressly or implicitly advocates the success or defeat of a . . . person" – is not susceptible of any construction other than a construction that covers protected issue advocacy, and therefore must be struck down on its face. As already demonstrated, plaintiffs' arguments are flawed in the first instance because they assume an overly rigid interpretation of *Buckley*'s express advocacy standard. *See* II.A.1., *supra*. Further, plaintiffs' arguments are flawed for the independent reason that federal courts simply are not required to choose the broadest possible interpretation of a state statute when that statute has never been interpreted by a state court and when a perfectly plausible and narrower interpretation is available.

As the Supreme Court held in addressing the constitutionality of a Missouri statute: "Where fairly possible, courts should construe a statute to avoid a danger of

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[6] If plaintiffs are correct that *Faucher* and *MRLC* control the instant matter, *Amici* respectfully submit that First Circuit's highly restrictive interpretation of the express advocacy test, which effectively denies any meaningful weight to the critical governmental interest in promoting disclosure and preventing corruption and the appearance of corruption in electoral politics, should be reconsidered.

[7] It bears emphasis that the other circuit court decisions cited by Citizens, with the exception of *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), have merely rejected particular applications of the express advocacy test in specific FEC enforcement actions, *e.g.*, *Federal Election Comm'n v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997), or have held that particular statutes do not apply to a particular entity, *e.g.*, *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998). As mentioned above, the *IRLC* case did not insist on a bright-line test and cited *Furgatch* approvingly. 187 F.3d 963 (8th Cir. 1999).

unconstitutionality." *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 (1983) (upholding challenged Missouri statute based on narrowing construction). *See also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (rejecting facial First Amendment challenge to city ordinance, and holding that "[t]o the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties"); *Virginia v. American Bookseller Ass'n*, 484 U.S. 383, 397 (1988) ("in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld") (citations omitted).

Further, because the NH state courts have never construed § 664:2, VI, it is the task of the federal court to carefully predict how the highest court of the forum state would resolve the uncertainty. *National Pharmacies Inc. v. Feliciano De*-Melicio, 221 F.3d 235 (1st Cir. 2000). *See also Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998) (in First Amendment challenge to state statute, federal court "must attempt to divine how the Supreme Court of Indiana would interpret the definition of a 'political action committee'"). When faced with a choice, the NH Supreme Court will assume that the legislature intended a constitutional result and construe statutes accordingly. *See Belkner v. Preston*, 332 A.2d 168, 115 N.H. 15 (1975). In this regard, it is worth noting that the NH Attorney General (charged by law with authority to enforce § 664) has consistently maintained that § 664 is not designed nor intended to infringe upon protected issue advocacy. *See* Letter of Attorney General, attached to Complaint as Exhibit E.

Citizens' strained effort to support an overbreadth challenge depends upon first isolating the word "implicitly" from the remainder of § 664:2, VI, ignoring the remainder of the definition which focuses on communications that "advocate the success or defeat of any . . . person." The next step in plaintiffs' argument requires them to insist that the word "implicitly" as so isolated has one and only one possible meaning – namely, the opposite of "expressly." The argument then proceeds by asserting that since "implicitly" can only mean the opposite of "expressly," § 664:2, VI can only be construed as an unconstitutional rejection of *Buckley*'s express advocacy standard.

Citizens' argument founders at each step. First, it is inherently unreasonable to lift the adverb "implicitly" out of its context and ignore the requirement that any covered communication must "advocate the success or defeat of a candidate for office." This defies the cardinal principle that the meaning of a statute should be determined by examining the statute as a whole, not by arbitrarily isolating one word or phrase. *See, e.g.*, *Schwartz v. Romnes*, 495 F.2d 844, 849 (2d Cir. 1974) (construing the word "political" in provision of New York election law with reference to statute as a whole and in manner that preserved provision's constitutionality against First Amendment challenge); *Kay v. Austin*, 621 F.2d 809, 810 (6th Cir. 1980) (noting that "[t]he word 'advocated' cannot be read in isolation from the complete phrase 'advocated to be a potential candidate'", and adopting construction that avoided constitutional violation).

Second, even if the word "implicitly" were properly isolated from the remainder of the definition, plaintiffs cannot successfully argue that it is susceptible of only one meaning. "Implicitly" need not mean the opposite of "expressly." One dictionary definition of "implicit" is "without doubt or reservation; unquestioning." Merriam-

Webster's Collegiate Dictionary 583 (10th ed. 1997). A communication that "without doubt" or "unquestionably" advocates the election or defeat of a candidate for office may certainly be regulated under *Buckley*, which itself read FECA as "directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added). *See also MCFL*, 479 U.S. at 249 (electoral message "in effect" consisted of exhortation to vote for particular candidates despite express disclaimer that any endorsement was intended).

Plaintiffs simply have not demonstrated that its overbroad interpretation of § 664:2, VI is mandated by either the language or logic of the statute as a whole. While the Second Circuit decision in *VRLC* may be read to support plaintiffs' argument, *Amici* respectfully suggest that the District Court's decision in *VRLC* reflected a more correct resolution of the issue. *Vermont Right to Life Committee v. Sorrell*, 19 F.Supp.2d 204 (D. Vt. 1998) (statute readily susceptible to narrowing construction which it deemed "reasonable [and] consistent with . . . *Buckley*"). It is not unusual for federal courts to uphold state statutes against constitutional challenges by accepting narrower interpretations in preference to broader ones. The Court did so in *Schwartz v. Romnes*, holding that a New York law prohibiting corporate contributions "for any political purpose whatsoever" should be narrowly construed so as not to apply to contributions to a referendum campaign. 495 F.2d at 848-852. Other circuits routinely perform such narrowing interpretations. *See also, e.g., Excalibur Group, Inc. v. City of Minneapolis*, 16 F.3d 1216, 1224 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 855 (1998); *Sherman v. Community Consol. School Dist. 21*, 980 F.2d 437, 442-443 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993); *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*,

944 F.2d 137, 144 (3d Cir. 1991); *White v. City of Norwalk*, 900 F.2d 1421, 1424 (9th Cir. 1990); *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North Am.*, 794 F.2d 213, 220 (6th Cir. 1986); *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980). A narrowing construction is reasonable in this case.

3. The Disclosure Requirements Serve New Hampshire's Compelling Interests in Deterring Corruption and the Appearance of Corruption, Promoting an Informed Electorate, and Enhancing Compliance with Contribution and Spending Limits.

Plaintiffs' facial challenge completely disregards the compelling state interests supporting the NH disclosure requirements for political advertisements. The strong justifications for these requirements are described in the Statement of Material Facts, *supra* at 2-6, and summarized here. First, as the Supreme Court recognized in *Buckley v. Valeo*, deterring corruption and the appearance of corruption is a vital governmental interest served by disclosure requirements:

> [D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. . . .

424 U.S. at 67. Spending that promotes candidates for office creates political debts. If spending is undisclosed, the public has no means of holding candidates accountable if they attempt to repay such debts through their actions as elected officials. Even if candidates refrain from direct quid pro quo corruption, secrecy concerning the sources of spending on campaigns undermines public confidence in the integrity of government.

Second, disclosure requirements serve the important interest of promoting a more informed electorate. As the Supreme Court recognized in *Buckley*:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. *Buckley*, 424 U.S. at 66-67.

The disclosure provisions of §§ 664:14 and 664:16 serve precisely these interests.

Finally, *Buckley* recognized that reporting and disclosure requirements are an essential means of helping to prevent violations of contribution limits. 424 U.S. at 67-68. Disclosure and reporting requirements for third-party spending on political campaigns in New Hampshire are particularly important in promoting compliance with the voluntary spending caps that candidates may adopt under current law.

By contrast, §§ 664:14 and 664:16 impose the most minimal requirements on parties who publish political advertising. Neither provision limits or prevents any speaker from spending money to express their political ideas. Those who speak on behalf of candidates must merely admit that they do; while those who do not must specify that they do not. Notably, at his deposition, plaintiff Stenson could not identify how these requirements in any way alter the content of the political advertising Citizens produces.

In sum, RSA §§ 664:14 and 664:16 are narrowly tailored to avoid infringing on protected issue advocacy, and serve compelling state interests. Section 664:2, VI permissibly regulates express advocacy activities. This court should reject plaintiffs' facial challenge to those provisions by construing those provisions narrowly to protect only those parties engaged in pure issue advocacy or certifying the matter to the Supreme Court of New Hampshire for an authoritative construction.

III. NEITHER RSA §§ 664:14 NOR 664:16 COMPELS PLAINTIFFS' SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

Plaintiffs' claims of compelled speech rest on a mistaken, absolutist appraisal of the constitutional protection provided to anonymous speech. Courts around the country have considered and rejected similar claims brought against similarly modest disclosure provisions. *See e.g. Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir.) *cert. denied sub nom. Kentucky Right to Life v. Stengel*, 522 U.S. 868 (1997); *Seymour v. Elections Enforcement Commission*, 2000 WL 1806504 (Conn. Dec. 19, 2000); *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998). These courts have recognized that the chief case upon which plaintiffs rely, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) did not overrule the core holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976) recognizing the overriding anti-corruption, record-keeping, and informational interests which justify disclosure and identification statutes. 424 U.S. at 64-68; *see also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.").[8] *McIntyre* is properly limited to its own facts, namely enforcement of a blanket ban on all anonymous political literature against an individual doing pure issue advocacy, as the Court itself suggested by admitting that a State's interest in protecting the election process "might justify a more limited identification requirement." 514 U.S. at 353.

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[8] *See also First National 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 people will be able to evaluate the arguments to which they are being subjected. In addition, we emphasized in Buckley the prophylactic effect of requiring that the source of communication be disclosed.")(citations omitted).

As argued above, to the extent that § 664:2, VI would appear to bring pure issue advocacy by natural persons -- of the sort addressed in *McIntyre* -- under the purview of the state's disclosure provisions, this Court should certify a question to the NH Supreme Court for an authoritative, narrowing construction. However, the disclosure and identification provisions in §§ 664:14 and 664:16 are narrowly tailored to advance the state's compelling interests in: 1) preventing actual and perceived corruption in the political process; 2) notifying the public about the sources of campaign expenditures; 3) enforcing voluntary expenditure limit compliance and detecting expenditures which are not truly independent; and 4) preventing fraud and libel in the electoral process.[9] *Compare Buckley v. Valeo*, 424 U.S. at 64-68. As such, any narrowing construction applied to § 664:2, VI should carefully retain application of these statutes to all political advertising that does not fall under the *McIntyre* rule.

Even in the context of issue advocacy, the U.S. Supreme Court has recognized that the state has a legitimate interest in letting voters know the identity of sponsors of initiatives and the amounts they have spent. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999); *accord Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *compare FEC v. Public Citizen, Inc.*, 64 F. Supp2d 1327, 1336 (N.D.Ga. 1999) ("[t]he disclosure used by Defendants which stated that the ads were paid for by Public Citizen is sufficient to accomplish all of the goals asserted by the

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[9] Unlike the Ohio laws addressed in *McIntyre*, New Hampshire does not have any "detailed and specific prohibitions against making or disseminating false statements during political campaigns." *McIntyre*, 514 U.S. at 1520. The *McIntyre* Court found the existence of these duplicative statutes undermined the state's claimed interest in preventing fraud and libel through disclosure. *Id.*

government"). Accordingly, modest disclosure requirements of the sort contemplate by §§ 664:14 and 664:16 do not necessarily run afoul of the First Amendment, even when political advertising only addresses issues. *See Richey v. Tyson*, -- F. Supp.2d --, 2000 WL 1736935 (S.D. Ala. Nov. 13, 2000).

The cases cited by plaintiffs are inapposite in critical respects. In *Washington Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000), the court invalidated detailed statutes requiring disclosure of names, addresses, and amounts paid to hired initiative circulators. This information could not further the state's interest in preventing fraud. *Id*. at 1139. Nor could this particular type of disclosure educate voters in a substantial way, because the compelled information was also available through a "panoply" of other disclosure laws. *Id*. *Rippie* has no bearing on the modest and narrowly-tailored disclosure laws challenged in this suit. The statute invalidated by the district court in *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D. Ind. 1997) was essentially the same as that invalidated in *McIntyre*. Both these statutes were held unconstitutional because they amounted to blanket prohibitions of all anonymous campaign literature. *Yes for Life Political Action Committee v. Webster*, 74 F. Supp.2d 37 (D. Maine 1999), involved only non-candidate ballot measures. Thus the court did not face there the legitimate state interests in disclosure in the context of candidate campaigns outlined above.

The issue of compelled speech addressed in *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) is also distinguishable. The FEC rule at issue in *Clifton* required publishers of voter guides to devote equal space and prominence to all candidates included. The First Circuit deemed this requirement offensive to the First Amendment by analogy to the statute struck down in *Hurley v. Irish-American Gay, Lesbian &Bisexual Group of*

Boston, 515 U.S. 557 (1995), which required private parade sponsors to make their parade equally open to all groups, including persons with whom sponsors might not choose to associate. The modest disclosure provisions of §§ 664:14 and 664:16 do nothing of this sort. They merely require sponsors of political advertising to identify themselves and disclose any candidates on whose behalf an ad is placed, or alternatively, to announce that the ad was placed without such candidate co-ordination. In its relevant provisions, § 664:16 further requires that publishers of printed political advertising legibly identify political advertising with the phrase "political advertising".

The burdens arising from NH's modest disclosure provisions are trivial, especially when applied to experienced political organizations like plaintiffs. At deposition, Citizens' Executive Director was unable to specify how the signature requirements of § 664:14 in any way altered or impaired Citizens' communications. Further, Citizens has always been in substantial compliance with this regulation by prominent inclusion of its organizational name and address. Stenson further testified that Citizens has "no problem" putting its organization's name of all its communications, noting that signed advertisements carry greater "credibility". Stenson Dep. at 44, 72. Stenson's objections to including the name of the organizations' chairman were entirely pretextual: since the statute does not require the inclusion of any phone number (much less any individual, as opposed to organizational phone number), he has no legitimate claim to fearing harassment. Nor can inclusion of an officer's name in merely "legible" type subvert or overwhelm an organization's message or the ability of the organization to present itself (as opposed to its chairman) as the sponsor of the communication. *See* RSA

§ 664:14, III. Most critically, plaintiffs admit that identification does not materially alter the message of their political communications. Stenson Dep. at 85.

Plaintiffs' objection to the identification of "political advertisements" in § 664:16 is similarly insubstantial. First, this requirement is in fact a directive to publishers, not sponsors, of political advertisements. Hence, plaintiffs are not the proper parties to object to its terms. Second, the identification required by § 664:16 does not appear anywhere in an advertisement, but rather, "before or after" it. Accordingly, it cannot be found to meaningfully alter the contents of the message itself. At deposition, Stenson complained that § 664:16 inappropriately labels Citizens' communications as "political". This objection rests on the faulty, circular argument that, because § 664:2, VI cannot be constitutionally applied to pure issue advocacy, it is impermissible to use the word "political" to describe advertisements that are in fact issue advocacy. *See also* Stenson Dep. at 78. This reasoning is mistaken; any communications not properly under the purview of § 664:2, VI would not be subject to § 664:16. Plaintiffs cannot seriously contend that organizations spending vast amounts of money to help elect or defeat candidates have a constitutional right to hoodwink the public about the nature of their partisan activities. *Cf. Buckley,* 424 U.S. at 64-68; *Bellotti,* 435 U.S. at 791-92.[10]

[10] Under repeated questioning, Stenson could not identify any actual injury or specific chill caused by § 664:14 and 664:16. Stenson Dep. at 86-91, 102-105. Stenson's counsel pointed only to the complaint itself to substantiate the harms they allege. *Id.* at 89, 91. The complaint, however, does not describe any specific harm to plaintiffs messages or activities. Plaintiffs' claim of harm or chill amounts only to the circular argument that their First Amendment rights will be violated. Such an abstract claim of harm does not establish a basis for this court to order relief. Notably, it is precisely the type of generalized, abstract grievance that federal courts have long deemed insufficient to establish standing under Article III.

Lastly, this requirement is justified by the state's legitimate interest in enforcing the other provisions of § 664:16, namely the requirement that publishers of political advertising make their space available to all sponsors at the same rates. It is also critical to the state's ability to monitor compliance with its contribution and voluntary expenditure provisions. If publishers of political advertising were allowed to cast paid advertising as news or entertainment, then the state would have no effective means of monitoring campaign expenditures. Nor would the citizens of New Hampshire have any way to discover the source of campaign funds, weed out, and perceive corruption.

In sum, §§ 664:14 and 664:16 create modest, narrowly tailored requirements that effectuate the state's overriding interests in assuring the integrity of the electoral process. While these requirements may not be constitutionally applied to certain persons under *McIntyre*, application of the provisions in other contexts is entirely consistent with the First Amendment. Any questions regarding a narrowing construction or severance of these statutes should be certified to the Supreme Court of New Hampshire. Beyond this, the Court should not grant plaintiffs' request for injunctive relief.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that the Court deny plaintiffs' motion for injunctive relief. In the alternative, *Amici* join defendants' request that the Court certify any questions of interpretation or severance of RSA §§ 664:2, 664:14, and 664:16 to the Supreme Court of New Hampshire.

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Respectfully Submitted,

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