IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PLAINTIFF'S MOTION FOR LEAVE OF COURT TO FILE REPLY BRIEF

Under Local Rule 7.1(b)(3), Plaintiff Massachusetts Fiscal Alliance ("Alliance") moves for leave of court to file a reply brief to Defendants' ("Commonwealth") Opposition filed October 25, 2018. (ECF No. 17). As grounds, the Alliance states:

1. This case presents a novel question of First Amendment law in this Circuit, specifically the constitutionality of the Commonwealth's law requiring certain communications to bear compulsory, government-directed information on their face.

2. Because this is a question of first impression in this Circuit, Plaintiff could not reasonably have been able to anticipate the arguments that the Commonwealth would marshal in its opposition papers, and therefore could not have preclusively addressed those points in its initial memorandum of law. Both this Court and Defendants will benefit from Plaintiff's considered, brief response to the Commonwealth's arguments in advance of the hearing scheduled for October 31, 2018.

3. Plaintiff's proposed reply on this question of first impression is 10 pages long, exclusive of counsel's signature blocks, and the Commonwealth will not be prejudiced by its filing. The Commonwealth will have ample time to review and consider its content in advance of the hearing scheduled for October 31.

4. On Friday, October 26, 2018, Counsel for Plaintiff consulted with counsel for Defendants pursuant to Local Rule 7.1(a)(2). Counsel for Defendants has represented that the Commonwealth does not take a position on this motion.

Plaintiff therefore requests that this Court grant leave to file its attached Reply Memorandum.

Respectfully submitted,

/s/ Allen Dickerson

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Dated: October 29, 2018

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PLAINTIFF'S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

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October 29, 2018

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INTRODUCTION

Plaintiff Massachusetts Fiscal Alliance ("Alliance") wishes to produce written, radio, internet, and television communications that are "merely ideological policy statements, principally about the revenue generation and state spending preferences of members of the Massachusetts General Court." Pl. Br. in Supp. of Mot. ("Opening Br.") at 3. Because those communications will refer to candidates for office, in particular "an unopposed candidate for re-election," they must carry scripts drafted by the Commonwealth of Massachusetts ("Commonwealth" or "Government"). Opening Br. at 2. This compelled speech will "give[] center stage" to the Government's message at the Alliance's expense. Def. Br. in Opp'n to Pl. Mot. at 10 ("Opp'n Br."). This commandeering of the Alliance's speech is out of all proportion to any relevant governmental interest, and accordingly violates the First Amendment.

ARGUMENT

I. The Commonwealth's Proclaimer Regime Is Likely Unconstitutional And Should Be Enjoined.

A. Both Parties agree that heightened judicial scrutiny applies.

The Parties differ as to whether strict or exacting scrutiny applies to compelled speech. Opening Br. at 9; Opp'n Br. at 9. The Government believes its regime survives the "strict test," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*), of "exacting scrutiny." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-367 (2010). Exacting scrutiny, like all forms of heightened judicial review, is fact specific, and "the quantum of empirical evidence" the government must provide "will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Because the Government can point to no similar law reviewed by a federal court, this quantum is high.

Plaintiff contends the proper standard is strict scrutiny. Unlike mere "'paid-for' attributions subject to exacting scrutiny rather than strict scrutiny," *Montanans for Community Dev. v. Mangan*, 735 Fed. Appx. 280, 284 (9th Cir. 2018), the Commonwealth's scripts "dictate the terms and circumstances under which" the Alliance is "permitted to express political opinions. Stated differently, [the proclaimers]…are designed to regulate the if and how" of the Alliance's "political speech." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 12 (1st Cir. 2012) ("*Sindicato*"). "Accordingly, strict scrutiny applies," *id.*, "regardless of the government's benign motive." *Reed v. Town of Gilbert*, 576 U.S. __; 135 S. Ct. 2218, 2228 (2015).

Nevertheless, the Commonwealth's proclaimer regime cannot survive either level of scrutiny. *Cf. Am. Bev. Ass'n v. City & Cty. of San Francisco*, 871 F.3d 884, 891, 898 (9th Cir. 2017), *reh'g* en banc *granted* 880 F.3d 1019 (9th Cir.) (applying "intermediate scrutiny" and enjoining commercial proclaimer where the compelled language occupied 20 percent of an ad).

B. The Commonwealth has no license to compel and control the content of the Alliance's speech.

The First Amendment protects two relevant rights. First, the right of a speaker to control its own message free from "inclu[sion of] a government-drafted statement." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __; 138 S. Ct. 2361, 2378 (2018) ("*NIFLA*"). Second, the privacy of donors supporting that organization without any substantive connection to its specific, regulated speech. *Buckley*, 424 U.S. at 66.

The Commonwealth avers that because these rights "protected by the First Amendment" are "not absolute," *McCutcheon v. Federal Election Commommission*, 572 U.S. 185, 191 (2014), Massachusetts has *carte blanche* to compel speech if it thinks "that voters [will] receive information about…funding sources." Opp'n Br. at 4. But the informational interest does not permit the Commonwealth to interrupt the Alliance's communications to provide any information

the State finds interesting. "In for a calf is not always in for a cow." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring).

To support its claim, the Commonwealth cites to virtually every campaign finance case from this century where a federal court denied a First Amendment challenge and used the word "disclosure." But none of those cases upheld the forced publication of donors directly on a communication. *Cf. Am. Civil Liberties Union v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004). None of those cases upheld a mandate that a political speaker advertise a government agency. None of those cases upheld a proclaimer regime forcing anyone other than a candidate to "mak[e] eye contact" with the audience and take "center stage" to deliver state-drafted words. Opp'n Br. at 10.

Undoubtedly, "disclosure" has a better track record in the federal courts than compelled speech, but such "labels cannot be dispositive of [the] degree of First Amendment protection." *NIFLA*, 138 S. Ct. at 2375 (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988)) (brackets in *NIFLA*). There is a fundamental difference between "disclosure" in a report to the government, *e.g. Delaware Strong Families v. Attorney General of Delaware.*, 793 F.3d 304, 307 (3d Cir. 2015), and "disclosure" that hijacks private speech to deliver a State message.

1. Massachusetts's "stand by your ad" proclaimer is fundamentally different in kind from the fleeting, non-visual authorship statement upheld in *Citizens United*.

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The Commonwealth argues that drafting Mr. Cohen as a state actor is "a modest burden" and "very similar" to the proclaimer "upheld in *Citizens United*." Opp'n Br. at 2. This is deeply misleading, as discussed *infra*. It also elides the fact that Citizens United sought the right to speak anonymously, whereas the Alliance has no issue identifying itself as the author of its own advertisements. *Compare* Amended V. Cmpt at 12, ¶ 35, *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274 (D.D.C. Dec. 21, 2007) *with* Opening Br. at 15.

At the threshold, however, the Alliance must correct the Government, which suggests that its script will take five, not eight, seconds to read. Opp'n Br. at 10. The difference, of course, is only relevant because the Commonwealth is taking expensive advertising time paid for by the Alliance. But, regardless, the Government's own brief undermines its point. *See* Opp'n Br. at 10, n.5. The spoken disclaimer in the first ad cited starts 24 seconds into the message and runs until 0:32—the precise eight seconds claimed by Plaintiff.[1]

Turning back to *Citizens United*, Massachusetts claims its "stand by your ad" proclaimer "is similar to, and no more onerous than, the disclosure upheld in *Citizens United*." Opp'n Br. at 11. But: (1) Massachusetts demands Mr. Cohen to physically appear on camera, while federal law does not, (2) Massachusetts forces Mr. Cohen to personally speak from a government-drafted script, and federal law does not, (3) Massachusetts forces Mr. Cohen to identify himself personally, even though an organization is speaking, while federal law does not, and (4) Massachusetts demands twice as much time as the federal government, eating up over 20 percent of a communication at the cost of thousands of dollars.[2] Put simply, Plaintiff would be willing to abide by the requirements upheld in *Citizens United,* and is before this Court because the Commonwealth's regime goes so much further.

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[1] Commonwealth Future – "Should Know," YouTube https://www.youtube.com/watch?v=YnvLEbhzmK0. The other ad, "Worked," runs six seconds, with the CEO speaking uncomfortably quickly. Commonwealth Future – "Worked," YouTube https://www.youtube.com/watch?v=5iRA93Xngcc&feature=youtu.be.

[2] At a rate of $56 per time the radio ad will run and $667 the TV ad will run. For the radio ad, which will run 20 times, V. Cmpt. at 8, ¶ 35, compliance with the speech mandate in this fashion would cost an extra $1,120. For the television ad, compliance would cost an extra $2,668. V. Cmpt. at 6, ¶ 30. *See Murdock v. Penn.*, 319 U.S. 105, 113 (1943) (noting the "destructive effect" of a "tax imposed on the exercise of a privilege granted by the Bill of Rights").

The Government's other cases fare no better.[3] After a nationwide canvass, it found only one intermediate state court case where a "stand by your ad" proclaimer (with no accompanying contributor disclosure) was upheld. Opp'n at 11 (citing *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 817 S.E.2d 738 (N.C. App. Ct. 2018) ("*Forest*")). North Carolina repealed that law five years before the court of appeals issued its opinion, replacing it with a modest "paid for by" tag with a "not authorized by a candidate" statement. N.C. Gen. Stat. § 163A-1476.[4]

2. The Government's demand that its speech take "center stage" is unconstitutional.

The Commonwealth argues that "the concern underlying some compelled speech cases – protecting individuals against having to espouse a state-sponsored message – has no application" against its proclaimer regime. Opp'n Br. at 8. This is an odd claim, as the Commonwealth is quite particular about how Mr. Cohen speaks, and stresses just how important it is for him to deliver the Government's message precisely as the government would like. Opp'n Br. at 10.[5] Defendants

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[3] Nor are the on-air proclaimers at issue in *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), or *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), comparable to Massachusetts's law. The Maine law at issue in *McKee* requires no proclaimer to be spoken at all, except in the understandable case of a radio ad. 21-A Me. Rev. Stat. § 1014(2). Likewise for the Hawaii statute in *Yamada*. Haw. Rev. Stat. § 11-391. Notably, unlike Massachusetts law, neither Maine nor Hawaii mandates the exact wording of these attribution statements. The Alliance would not be before this Court if the Commonwealth's statute conformed to Maine or Hawaii's examples.

[4] The *Forest* case involved a six-year old campaign finance complaint that persisted despite repeal of the proclaimer statute in 2013. The state court of appeals decided that because "[n]either party made any argument concerning any effect the repeal may have had on the Committee's right to bring this action" there was no need to consider mootness. *Forest*, 817 S.E.2d at 740, n.1.

[5] The Commonwealth suggests that the Alliance has no room to complain because it has posted Mr. Cohen's photograph on its own website. This misunderstands the First Amendment harm wrought by this demand, which sounds not in privacy, but in autonomy. The Commonwealth would force the Alliance to "show [Mr. Cohen's] physical appearance, sex, gender, race, speech pattern…and other irrelevant personal characteristics," V. Cmplt. at 25, ¶ 104, as a condition of engaging in political speech, simply because that information may be "two clicks of a computer mouse" away, if someone cares to look for it. Opp'n Br. at 11. The Alliance objects because its message should be judged on its own merits, not on the basis of the Government's choice of spokesman, because it is not for the Government to decide whether these extraneous personal

require that Mr. Cohen must be "direct and personal…making eye contact" with the viewer. Opp'n Br. at 10. The Commonwealth insists Mr. Cohen stare at the viewer because it thinks "unrelated visual footage" (which might contain non-State supplied information) will make the Government's message less "effective and accessible to the viewer." Opp'n Br. at 10.[6]

Bluntly, the Government wants to personally direct the content of 21-27 percent of the Alliance's proposed ads. These facts conform with the kind of direct commandeering of private speech has been repeatedly struck down by the Supreme Court and other courts under heightened judicial scrutiny. *NIFLA*, 138 S. Ct. at 2378; *McIntyre*, 514 U.S. at 356; *Riley*, 487 U.S. at 804; *Talley v. Calif.*, 362 U.S. 60, 66, (1960); *Am. Beverage Ass'n*, 871 F.3d at 899. This Court should not take the Commonwealth's invitation to water down heightened scrutiny on the specious grounds that *McIntyre* was not cited in *Citizens United*—it was[7]—or that *NIFLA*'s admonition against forcing independent speakers to parrot "a government-drafted script," 138 S. Ct. at 2371, only applies in the context of abortion rights.[8]

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characteristics are relevant and force groups—at their own expense—to reveal them as a condition of speaking.

[6] The Commonwealth's claim that Mr. Cohen's presence and "eye contact" enhances its message is pure, uncited conjecture. *Shrink Mo. Gov't PAC*, 528 U.S. at 392 ("mere conjecture" is "never…adequate to carry a First Amendment burden"); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion….").

[7] The Commonwealth claims that "*McIntyre* was not cited to or discussed in *Citizens United*," Opp'n Br. at 7, but both the principal opinion and Justice Thomas's concurrence were cited by the majority. *Citizens United*, 558 U.S. at 353.

[8] "[C]ompelling individuals to speak a particular message…alter[s] the contents of their speech," betraying "the fundamental principle that governments" have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *NIFLA*, 138 S. Ct. at 2371 (quoting, through *Reed*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) (brackets supplied).

3. The differences between after-the-fact reporting requirements and on-publication identity disclosures are "constitutionally determinative."

The Commonwealth defends its "top contributors" proclaimer with numerous citations to cases upholding general donor disclosure in campaign finance filings. Opp'n at 12-13. But that argument, and those cases, only extend to the content of after-action reports. Presently, the Commonwealth has no such requirement for its campaign finance filings, Mass. Gen. Laws ch. 55, § 18F, which the Alliance do not challenge. The Commonwealth's cases, then, do not cover its demand.[9]

To the contrary, the Ninth Circuit has found the "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" to be "constitutionally determinative." *Heller*, 378 F.3d at 991. That Court determined that "the reporting of funds used to finance speech" is generally constitutional, whereas altering "the content of the communication itself" is not. *Id.* at 987 (emphasis removed). This difference is so profound that, despite the Commonwealth's suggestion to the contrary, Opp'n Br. at 16, on-publication identity disclosure may be found unconstitutional even in the absence of threats, harassments, and reprisals. *Talley*, 362 U.S. at 69 (Clark, J., dissenting) (acknowledging that the Court facially struck on-publication identity disclosure despite "neither allegation nor proof that Talley or any group sponsoring him would suffer economic reprisal, loss of employment, threat of physical coercion or other manifestations of public hostility") (quotation marks, citation, and brackets omitted).

In response, the Commonwealth first claims that *Heller* is not persuasive "because essential elements of it are no longer good law after *Citizens United*." Opp'n Br. at 17. But *Citizens United*

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[9] Even if the Commonwealth merely compelled a list of earmarked donors on the face of communications, this demand would still be unconstitutional, which puts the lie to the Government's suggestions that the Alliance is trying to open a "loophole" or invite "evasion." Opp'n Br. at 12-15.

did not consider whether donors could be forcibly published on a communication, because federal law makes no such demand. And federal law requires only donors giving for the purpose of a regulated communication.11 C.F.R § 104.20(c)(9). Second, the Government notes that *Heller* is a strict scrutiny case. True enough, but the Ninth Circuit has given no indication that the *Heller* proclaimer would have survived any "lesser" form of heightened judicial scrutiny. Third, the Commonwealth argues that *Heller* is inapposite because it relies on *McIntyre*—but this conveniently ignores the fact that now, no less than in 2004, "*McIntyre*…remains fully governing law." *Heller*, 378 F.3d at 988; *Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) (citing *McIntyre*).

The Government next suggests that the Ninth Circuit's decision in *Yamada v. Snipes*, which did not deal with on-communication donor disclosure, somehow overrides *Heller*. Opp'n Br. at 17. To the contrary, in *Yamada*, the Court of Appeals specifically "reject[ed]" any "comparison" between Hawaii's minimal attribution statement, which demanded less than the federal proclaimer upheld in *Citizens United*, and "the disclosure provision invalidated by this court in *ACLU of Nev. v. Heller*." *Yamada*, 786 F.3d at 1204 n.14. Lastly, the Commonwealth posits that "the foundational reasoning in *Heller* has been rejected" in other courts "for the types of disclosures challenged here." Opp'n at 17. In support, the Government recycles its citations to *Citizens United* and *National Organization of Marriage, Inc. v. McKee*, neither of which upheld the on-communication disclosure of financial supporters. Opp'n at 17-18.

Unable to turn *Heller* against Plaintiff, the Government seeks to shift the burden of proof. Specifically, the Commonwealth suggests that the burden is on the Alliance to dispute the commonsense assumption that an ad signed by the Alliance's donors will misleadingly suggest those donors are responsible for the ad. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497

(D.C. Cir. 2016) (noting that such a rule "would thus mislead voters as to who really supports the communications"). Of course, if it does not do so, it is not remotely clear what purpose is served by that information in the first place.

More importantly, it is the Commonwealth's responsibility to ensure that "requiring the introduction of potentially extraneous information" will not "interfere with [a reader's] evaluation" of the ad. *Heller*, 378 F.3d at 994. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures [it] would otherwise omit." *Id.* (citation and quotation marks omitted). As the U.S. Supreme Court stated in *Riley v. National Federation of Blind*, a case unaddressed by the Government's brief:

> [C]ompulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. 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.

487 U.S. at 797-98.

At the end of the day, the Commonwealth suggests that because off-communication donor reporting has been upheld, Massachusetts's novel form of on-communication donor reporting must be as well. But the two approaches are not similar. This slippery-slope approach is insufficient under any form of heightened judicial scrutiny. *See Shrink Mo. Gov't PAC*, 528 U.S. at 391.

4. The "government advertising" proclaimer will not provide useful information about the Alliance to the electorate.

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The Commonwealth claims that its "government advertising" requirement is lawful because "the website reference does not counter the message the Plaintiff wishes to advance," and thus it may force the Alliance to advertise a state website. Opp'n Br. at 19. This is wrong for

two reasons. First, even "benign" content-altering of speech is unacceptable. *Reed*, 135 S. Ct. at 2228. Second, as-applied here, the proclaimer plainly states that OCPF has more information about contributors to the Alliance, while the Commonwealth admits that the Alliance will have no donor disclosure reports on file. Opp'n Br. at 14. Thus, sending viewers to that agency website serves no informational interest whatsoever.

II. The Government's Non-Merits Arguments Are Unavailing.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1963). Massachusetts law prevents the Alliance from speaking, uninterrupted by the Government, at a time of its own choosing, irreparably preventing it from communicating when and how it wishes. *Sindicato*, 699 F.3d at 12. A lawsuit's timing does not negate this harm, as other courts have demonstrated by issuing injunctions on roughly the schedule requested here. *See*, *e.g.*, *Yes for Life PAC v. Webster*, 74 F. Supp. 2d 37, 43 (D. Me. 1999) (court, on October 29, 1999, ordering a preliminary injunction against Maine's disclaimer statute based on a complaint was filed on the 8th of that same month (V. Compl., No. 2:99-cv-00318-DBH (Oct. 8, 1999)); *cf. Inst. for Free Speech v. Jackley*, No. 3:18-CV-03017-RAL, 2018 U.S. Dist. LEXIS 177659, at *1, 19 (D.S.D. Oct. 16, 2018) (issuing preliminary injunction 8 days after challengers filed a verified complaint on October 8, 2018, in connection to speech regarding ballot initiatives in South Dakota).

CONCLUSION

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

Respectfully submitted,

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Dated: October 29, 2018
* admitted *pro hac vice*

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

I hereby certify that counsel for Plaintiff Massachusetts Fiscal Alliance has conferred in good faith with opposing counsel regarding this motion but were unable to narrow the issues.

I further certify that I electronically filed 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.

Dated: October 29, 2018

/s/ Allen Dickerson
Allen Dickerson