UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NATIONAL ORGANIZATION FOR MARRIAGE, INC., Plaintiff, v. JAMES WALSH, in his official capacity as co-chair of the New York State Board of Elections; DOUGLAS KELLNER, in his official capacity as co-chair of the New York State Board of Elections; EVELYN AQUILA, in her official capacity as commissioner of the New York State Board of Elections; and GREGORY PETERSON, in his official capacity as commissioner of the New York State Board of Elections, Defendants.	Case No.: 10-CV-751

BRIEF OF AMICUS CURIAE BRENNAN CENTER IN OPPOSITION TO PLAINTIFF'S PRELIMINARY INJUNCTION MOTION

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CORPORATE DISCLOSURE STATEMENT

FED. R. APP. P. 26.1

Amicus Curiae The Brennan Center for Justice certifies that it has no parent corporation and that it does not issue stock. Therefore, no publicly held company owns 10% or more of its stock.

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I. INTRODUCTION

The Brennan Center for Justice at NYU School of Law (the "Brennan Center") – a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice – submits this *amicus curiae* opposition to the National Organization For Marriage, Inc.'s ("NOM") motion for a preliminary injunction. All parties have consented to the filing of this brief.

NOM cannot succeed on the merits of its claim that portions of New York's Election Law are unconstitutional. As the briefs of the State Defendants and of *amici curiae* Common Cause for New York and Citizens Union ("*Amici*") lay out in detail, the very basic accounting and reporting requirements for political committee status are in no way vague or overbroad, and impose no chilling effect on speech. Rather than repeating the arguments of the State Defendants and *Amici*, however, this opposition addresses (1) the lack of irreparable harm to NOM; (2) the severe harm to the public's and to New York's interests if political spenders are permitted to cloak their influence in secrecy, and (3) the remedies to cure any constitutionally suspect portion of a statute – namely, a narrowing construction or severance – that would address any potential invalidity and, at the same time, preserve the intent of the state legislature and the prior statutory interpretation of the New York state courts.

First, NOM has not – and cannot – establish any irreparable harm to it caused by New York's Election Law. The type of minor disclosure requirements imposed onto political committees by New York's Election Law may burden the ability to speak, "*but they… do not prevent anyone from speaking*." *See Citizens United v. Federal Election Comm.*, 130 S. Ct. 876, 914 (2010) (emphasis added). In addition, there is simply no factual evidence that political committee status has any chilling effect on NOM's speech. There has not been any prior restraint on NOM's speech, as NOM successfully registered as a political committee in 2009 and spent

over $100,000 that year in a special election. When viewed in the context of other suits recently filed by NOM, this suit appears to be a small part of a larger legal strategy to eradicate state disclosure laws, rather than one seeking to redress any actual injury.

Second, we urge this Court to remember that New York voters have considerable informational and anti-corruption interests in ensuring the transparency of money in state politics. These interests are particularly pressing now, only weeks from Election Day, at a time when New York citizens are actively debating the qualifications of their potential representatives. Information about who is funding political advertisements is necessary for New York voters to make informed electoral decisions; such information is also needed to ensure that the democratic process remains free of corruption. Indeed, how can "uninhibited, robust, and wide-open speech [] occur when organizations hide themselves from the scrutiny of the voting public?" *See McConnell v. FEC*, 540 U.S. 93, 197 (2003). As illustrated in detail below, granting NOM's eleventh-hour injunction request would allow it and other organizations the ability to cloak their political spending, ushering in a new dark age for New York politics.

Third, should any portion of New York's Election Laws be found constitutionally deficient, the Court should first explore whether any invalid language of New York's Election Laws can be cured via a narrowing construction. The accused language of New York's Election Laws is readily amenable to a narrowing construction that would preserve the intent of the New York State Legislature. Indeed, a New York appellate court has previously interpreted the language at issue here to apply only to entities that engage in express advocacy, and found that language to be neither vague nor facially unconstitutional. Deference to such state law determinations is especially appropriate where a state's ability to regulate the conduct of its own elections is at issue.

In the alternative, if the Court finds itself unable to employ a narrowing construction, severance of any phrase deemed constitutionally infirm would be a preferred alternative to wholesale invalidation of the statute. Other courts, including the Supreme Court, have applied such remedies to address any invalid portions of laws regulating political advocacy.

Thus, the Brennan Center respectfully requests that the Court deny NOM's request for a preliminary injunction. We further submit that, even if the Court determines that NOM has established a likelihood of success on the merits of their claim, the Court should employ a remedy that substantially preserves the validity of the "political committee" definition, thereby saving a key portion of New York's disclosure regime. [1]

II. ARGUMENT

A. NOM Fails To Demonstrate That It Is Entitled To A Preliminary Injunction.

There is little doubt that NOM has failed to meet the well-established standards necessary to warrant the "extraordinary remedy" of a preliminary injunction. *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010); *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007).[2] First, as thoroughly demonstrated by the State Defendants and by *Amici*, NOM has

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[1] In the interest of brevity, the Brennan Center incorporates the discussion of the relevant factual background found in the briefs of the State Defendants and of *Amici*.

[2] To be entitled to a preliminary injunction, the moving party must show (i) irreparable harm absent injunctive relief, (ii) either a likelihood of success on the merits, or serious questions going to the merits to make them fair ground for trial, with a balance of the hardships decidedly tipped in the movant's favor, and (iii) that the public's interest weighs in favor of granting an injunction. *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010); *see also Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008). In considering element (ii), where, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007); *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000); *see also Beal v. Stern*, 184 F.3d 117, 122-23 (2d Cir.1999). In this context, the moving party "must establish a clear or substantial likelihood of success on the merits." *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000). As a preliminary injunction is an "extraordinary" and "drastic" remedy, it should only be granted when the movant clearly satisfies the burden of persuasion. *Sussman*, 488 F.3d at 140.

failed to show that the merits of its claims are likely to succeed,[3] (*see* D.I. 34), especially in light of the heavy burden faced by one who challenges a statute's constitutionality. *City of New York v. New York*, 76 N.Y.2d 479, 485, 562 N.E.2d 118, 120 (1990) (per curiam); *see also Comiskey v. Arlen*, 55 A.D.2d 304, 307, 390 N.Y.S.2d 122, 125 (2d Dep't 1976) (holding that this burden is particularly heavy when court in which challenge is made is trial court). Similarly, NOM cannot show any threat of irreparable harm. Finally, and as explored in particular detail below, the public's interest weighs heavily against the grant of a preliminary injunction.

1. NOM Cannot Establish That It Will Suffer Irreparable Harm

NOM has utterly failed to establish that New York's Election Law will cause it any irreparable harm if an injunction is not granted.[4] (*See* D.I. 34, pp. 20-22).

In particular, while NOM contends that the "political committee" designation imposes "a panoply" of administrative burdens, this claim is simply wrong as a matter of fact and law. (D.I. 1, ¶ 19). Instead, the Supreme Court has made clear that "[d]isclaimer and disclosure requirements may burden the ability to speak, *but they . . . do not prevent anyone from speaking*." *Citizens United*, 130 U.S. at 914 (emphasis added).

New York's Election Law imposes nothing more than basic disclosure requirements for entities that fall under the definition of a "political committee." N.Y. Elec. Law § 14-100(1). For instance, a political committee must disclose contributions received and expenditures made in connection with an election. *Id.* § 14-102(1). But, small contributions of less than $50, or an aggregate of $99, need not be reported. *Id.* A political committee must

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[3] In its First Amended Verified Complaint, NOM has dropped its contention that the definition of "political committee" is unconstitutionally vague. (D.I. 47, at p. 3).

[4] NOM, in its original Verified Complaint, alleged that its plans to engage in issue advocacy only, (D.I. 1, ¶ 9), and because New York's law expressly excludes from regulation organizations exclusively engaged in issue advocacy, *see* N.Y. Elec. Law § 14-00(1), there is serious doubt as to whether NOM has stated any claim upon which relief can be granted. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); (D.I. 27 at 8-11).

make three periodic filings, two and one after an election, and must promptly report large contributions received and expenditures made during two weeks just prior to an election. *Id.* § 14-108. And, a political committee must have a treasurer who keeps accounts of any receipts, transfers, loans, contributions and expenditures. *Id.* § 14-118(1).

There is, quite simply, no factual evidence that political committee status has any chilling effect on NOM's speech. To start, there is no showing that these requirements have imposed any prior restraint on NOM's speech – nor could there be. To register a new political committee, one must simply designate a treasurer and a bank account, and then file a one-page statement with the New York State Board of Elections. N.Y. Elec. Law § 14-118(1). The effort is minimal. Moreover, NOM simply cannot claim that it lacks the ability to comply with the disclosure requirements – NOM successful registered a political committee in 2009 and spent over $100,000 in a 2009 special election. (*See* D.I. 26, Ex. L. As a result, NOM is left with the threadbare assertion that it just "does not want to bear the burdens of being a political committee," which simply does not rise to the level of constitutional injury. (D.I. 1, at ¶ 20).

Moreover, the timing of this suit belies NOM's contention of actual injury. As noted, NOM has been actively engaged in influencing New York elections since early 2009, but waited until mid-September to file this suit – without any explanation of changed law or factual circumstances. And, it instigated this litigation with several others, all geared to invalidate campaign finance regulations on the eve of Election Day.

For instance, on September 21, 2010, five days after the complaint in this case was filed, NOM filed a nearly identical complaint in Rhode Island – like the Complaint here, NOM alleged that Rhode Island's "political action committee" definition was unconstitutionally vague and overly broad. (Ex. A). The next day, NOM filed another similar complaint in the

United States District Court for the Northern District of Florida, substantially asserting the same claims. (Ex. B). These cases come on the heels of a challenge to Maine's "political action committee" definition, on the grounds of vagueness and overbreadth, and to the disclosure requirements that accompany such designation. (Ex. C).[5] Thus, this suit appears to be part of a legal strategy to eradicate the disclosure laws of several states, rather than a one seeking to redress any actual injury.

2. Granting A Preliminary Injunction Would Severely Harm New York's Interests

As the Supreme Court has repeatedly recognized, the ultimate goal of First Amendment protection is to enable the process of democratic deliberation that is the foundation of this republic:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. 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.

Citizens United, 130 S. Ct. at 898 (citations omitted); *see also Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."). Thus, the asserted constitutional rights of political speakers like NOM are not the only constitutional interests this Court must consider. The Court must also give due regard to the informational interests of voters in determining who is spending to influence the outcome of elections. Accordingly, this case, like all cases concerning the regulation of political spending, is one where "constitutionally protected interests lie on both sides of the legal equation." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S.

[5] After a trial, the District Court of Maine declined to hold that the Maine statute's definition of "political committee" was unconstitutionally vague or overbroad. *National Organization for Marriage v. McKee*, No. 09-538-B-H, 2010 WL 3270092 (D. Maine Aug. 19, 2010).

377, 400 (2000) (Breyer, J., concurring). Here, the public has considerable informational and anti-corruption interests in ensuring the transparency of money in New York state politics.

Election Day is just a few short weeks away, and New York citizens are actively debating the qualifications of their potential representatives. Information about who is funding political advertisements is necessary for New York voters to make informed decisions throughout the electoral process. Voters have a right to consider how high spending by certain organizations may influence candidates' viewpoints – whether, for instance, a candidate begins to favor extensive gun use regulations after a supportive spending blitz by the Brady Campaign. Indeed, political expenditure information "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." *Buckley*, 424 U.S. at 67. Voters are also entitled to consider whether they generally agree with the spenders' viewpoints, or with those who fund an independent expenditure organization. This is necessary "so that the people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 130 S. Ct. at 915 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

To take a recent example, state disclosure laws in California enabled voters to learn that over one-half of the estimated $40 million spent in support of California's anti-gay marriage proposal Proposition 8 was raised by the Mormon Church, much of it from out-of-state donors. (Ex. D). Indeed, NOM spent nearly $1.9 million advocating for the passage of Proposition 8 in California – data which is publicly-available through campaign finance filings.[6] This information, which came to light shortly before the proposition's vote, was of vital importance to California voters seeking to make an informed decision on this controversial

[6] (Ex. H (showing that NOM spent total of $1,856,193 to support Proposition 8)).

referendum. Similarly, news reports confirm that a single religious organization – the Knights of Columbus – gave $1.4 million to NOM to fund its anti-gay marriage ballot initiative advocacy in Maine. (Ex. E). This amount was enough to have funded most of NOM's approximately $2 million effort – which was ultimately successful – to repeal Maine's same sex marriage law in 2009. *See National Organization for Marriage v. McKee*, No. 09-538-B-H, 2010 WL 3270092, *2 (D. Maine Aug. 19, 2010).

While some of NOM's funders are known, its 2008 tax filings list multiple undisclosed donors who gave lump sum donations of hundreds of thousands of dollars. (Ex. F). And, complaints have been filed against NOM for allegedly failing to comply with campaign finance disclosure requirements regarding its fundraising for efforts to pass anti-gay marriage ballot initiatives in California and Maine. (Ex. G). Whether or not these allegations are true, disclosure laws such as the one at issue in this case enable voters to determine whether a particular political organization is being employed as a "front group" to conceal political activity by another entity, whether that entity be a religious organization, a corporation, or another nonprofit. (Ex. I).

Even disclosure of smaller donations by individuals provides valuable information to voters, who can discern patterns in fundraising from individuals of a particular affiliation or industry. In the Proposition 8 campaign, for example, only the aggregation of large numbers of individual donations enabled the press and public to determine the extent of the Mormon Church's involvement in the campaign. Similarly, aggregation of individual donations enables groups such as the Center for Responsive Politics to report on what industries and interest groups – such as banking, labor, and law – are spending money to influence particular elections. (*See generally* Center for Responsive Politics, www.opensecrets.org).

When political actors are allowed to cloak their political spending, as NOM seeks to be able to do, it deprives voters of this crucial information. In doing so, it thwarts the "uninhibited, robust, and wide-open" political debate intended by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In fact, in *McConnell v. FEC*, 540 U.S. 93, 197 (2003), the Supreme Court cited several examples of organizations manipulating disclosure laws to fund advertisements designed to influence elections while concealing their identities from the public.[7] The Court quoted the District Court's wry observation that "Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." And, the Court criticized the *McConnell* plaintiffs for ignoring "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id*. at 197 (citation and quotation marks omitted).

Disclosure of political spending also has key anti-corruption functions. In numerous cases over the decades, the Supreme Court has echoed Justice Louis Brandeis' insight that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933), *quoted in Buckley*, 424 U.S. at 67; *accord Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 223 (1999) ("*Buckley* II"). Specifically, as the *Buckley* Court first articulated, political expenditure disclosure "deter[s] actual corruption and avoid[s] the appearance of corruption by

[7] The record in before the *McConnell* Court was replete with examples of special interests veiling their federal political expenditures with misleading names. For instance, 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 had 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. 2003).

exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67; *accord McConnell*, 540 U.S. at 196. "This exposure may discourage those who would use money for improper purposes either before or after the election." *Buckley*, 424 U.S. at 67. Moreover, 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." *Id*. In addition, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance laws – like contribution limits and prohibitions against foreign spending. *Id*. at 67-68; *accord McConnell*, 540 U.S. at 196.

In recognition of these substantial public interests, a clear and unbroken line of Supreme Court authority has upheld robust campaign finance disclosure regimes at both the federal and state levels. *See, e.g.*, *Citizens United*, 130 S. Ct. at 913-16; *McConnell*, 540 U.S. at 194-202; *Buckley* II, 525 U.S. at 203-04; *Buckley*, 424 U.S. at 60-82. Indeed, while the Court in *Citizens United* struck down substantially all prior restrictions on corporate independent political spending, it expressly upheld federal disclosure requirements pertaining to electioneering communications. 130 S. Ct. at 913-16. Following the Supreme Court's lead, lower federal courts have also consistently upheld disclosure schemes, including those that use political committee designation to effectuate disclosure. *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, No. 2:08-cv-00590-JCC, 2010 U.S. App. LEXIS 21028, at *87-88 (9th Cir. Oct. 12, 2010) (upholding Washington's political committee financial disclosure requirements); *National Organization for Marriage*, 2010 WL 3270092, at *9 (upholding Maine's political committee financial disclosure requirements); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 790-92 (9th Cir. 2006), cert. denied 549 U.S. 886 (2006) (upholding Alaska's registration and financial reporting requirements for all groups, including small nonprofit political organizations)*; Center*

for Individual Freedom v. Carmouche, 449 F.3d 655, 664 (5th Cir. 2006), cert. denied 549 U.S. 1112 (2007) (upholding Louisiana's Campaign Finance Disclosure Act requiring reporting of contributions and expenditures by nonprofit, nonpartisan corporation); *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004) (upholding Indiana's requirement that express advocacy ads identify entity who paid for communication); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1312-15 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose "express advocacy").

In short, the public's interest in upholding New York's disclosure regime for independent expenditures is substantial, especially in this critical time on the eve of the election. Granting NOM' eleventh-hour injunction request would allow NOM and other organizations the ability to cloak their political spending, ushering in a new dark age for New York politics.

B. Even If the Court Holds That Any Portion of the Law Invalid, the Proper Relief Is Either A Narrowing Construction or Severance

Even if this Court suspects that any portion of the definition of "political committee" is constitutionally deficient, it should not strike down the entire "political committee" definition. To do so would entirely contravene principles of comity which are especially applicable with regard to a state's power to regulate its elections. *New Alliance Party v. N.Y. State Board of Elections*, 861 F. Supp. 282, 294 (S.D.N.Y. 1994) ("The states' constitutional power to regulate elections is justified as a way to ensure orderly, rather than chaotic, operation of the democratic process."). As explained above, *supra* Part 2.A.2, New York State and the public have substantial interests in requiring disclosure of political spending, particularly in the final weeks before Election Day. Upending "political committee" requirements now would not only frustrate the state's and the public's interests in disclosure, it would cause considerable chaos. New York has a "compelling interest in structuring elections in

a way that avoids 'confusion, deception, and even frustration of the democratic process,'" *LaRouche v. Kezer*, 990 F.2d 36, 39 (2d Cir. 1993), that would undoubtedly suffer from an eleventh-hour elimination of the entire "political committee" definition.

Instead, if this Court has constitutional concerns with any particular aspects of the definition, a narrower remedy more closely tailored with the offending portion is preferable. Rather than the drastic remedy sought by Plaintiffs, two preferred alternatives are open to this Court in the event that it deems any portion of the statute to be constitutionally infirm. First, following the lead set by the *Buckley* Court in construing a similar provision, this Court could employ a narrowing construction that would remove any constitutional doubt. Second, should the Court deem any particular word or phrase to be constitutionally problematic, and should the Court find that the infirmity cannot be cured through use of a narrowing construction, the Court could excise the problematic word or phrase, leaving the rest of the statute operational.

1. The Most Preferred Remedy Is A Narrowing Construction

Federal courts have long preferred the use of a limiting construction to that of completely striking down a statute as unconstitutional. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2929-30 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); *Buckley v. Valeo*, 424 U.S. 1, 77-78 (1976) ("Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness."); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (finding overbreadth claim improper "when a limiting construction has been or could be placed on the challenged statute"). New York State law has also long favored narrow constructions over declaring a statute invalid. *See, e.g., People v. Barber*, 289 N.Y. 378, 385, 46 N.E.2d 329, 332 (N.Y. 1943) ("[A]n ordinance or statute

should be construed when possible in manner which would remove doubt of its constitutionality."). This is particularly important with election law provisions, which enjoy a "strong presumption of constitutionality." *Kermani v. New York State Board of Elections*, 487 F. Supp. 2d 101, 107 (N.D.N.Y. 2006); *Soleil v. New York*, CV-043247DGT, 2005 WL 662682, *5 (E.D.N.Y. Mar. 22, 2005); *New Alliance Party*, 861 F. Supp. at 292 ("Although the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt.").

In *Buckley*, for instance, the Supreme Court found vagueness problems with a federal law requiring disclosure of expenditures made "for the purpose of . . . influencing" the nomination or election of federal candidates. 424 U.S. at 77-82. Specifically, the Court feared that this language could be interpreted to encompass issue advocacy. *Id*. at 79-80. Accordingly, the Court narrowly construed "influencing" as being synonymous with "express advocacy," thereby preserving the legislature's intent to require robust disclosure of political spending to the extent constitutionally permissible. *Id*.

Similarly, there is no need here to rewrite New York's Election Laws. If necessary, the Court merely needs to apply a constitutional interpretation of the law that it is consistent with its other sections and that it is consistent with the interpretation of New York State courts. Indeed, the New York State appellate division has previously interpreted the definition of "political committee" as including only those organizations engaged in electioneering and excluding those engaged solely in issue advocacy. *Klepper v. Christian Coalition of New York, Inc.*, 259 A.D.2d 926, (N.Y. App. Div. 3rd 1999). The *Klepper* court recognized that the definition of "political committee" contains a savings clause that expressly excludes issue advocacy – "but nothing in this article shall apply to any committee or organization for the discussion or advancement of political questions or principles without

connection with any vote." (*Id.*). Clearly, the definition of "political committee" is readily amenable to a narrowing construction that is consistent with New York's interest in disclosure of money spent to influence elections while ensuring that people may speak freely about pure political issues.

The Supreme Court has made it quite clear that, if the statute is readily susceptible to a narrowing construction that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). For example, if the Court is troubled by the term "principle" (as used in "aiding or promoting . . . the success or defeat of a political party or principle"), it could recognize that the term is limited by its connection to "political party," and thus meant to connote an identifiable partisan political party such as the Republicans or Democrats. Indeed, in *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974), the Second Circuit took a similar approach to interpreting a New York election law that barred corporate political contributions. The law included a phrase that, on its face, prohibited contributions "for any political purpose whatever." According to the *Schwartz* plaintiffs, this phrase rendered the entire law overbroad. The court, however, read "for any political purpose whatever" as limited by a preceding list of "specifically enumerated prohibitions" that, considered together, conveyed an "unmistakable" "partisan flavor." *Id.* at 849. Consequently, the court found that the offending phrase "calls for an interpretation that would restrict [it] . . . to contributions of the type specifically described in the text immediately preceding it" – namely, more narrowly prohibiting only corporate contributions to a candidate or political party. *Id.*

NOM suggests that a federal court wishing to apply a narrowing interpretation of state law is faced with an insurmountable standard. (D.I. 3 at 26). This, however, is not the case.

In truth, federal courts should apply a narrowing interpretation when such an interpretation is reasonable and readily apparent. *See e.g., Collette v. St. Luke's Roosevelt Hosp.*, 132 F. Supp. 2d, 256, 267 (2001) (construing a statute narrowly upon identifying a reasonable and readily apparent construction). Particularly here, where New York state courts have interpreted the law in a manner that is decidedly constitutional, such an interpretation is reasonably and readily apparent. Thus, adopting a narrow interpretation is preferable to striking down the statute in its entirety. *See Frisby v. Schultz*, 487 U.S. 474, 482-83 (1988); *Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 998 (2d Cir. 1997); *Collette*, 132 F. Supp. 2d, at 267 (2001); *Dean v. Byerley*, 354 F.3d 540, 566-67 (6th Cir. 2004). Indeed, it is "axiomatic . . . that when interpreting state statutes federal courts defer to the state court's interpretation of their own statutes." *U.S. v. Fernandez-Antonia*, 278 F.3d 150, 162 (2d Cir. 2002).

NOM claims to cite numerous examples of federal courts refusing to narrowly construe state law. (D.I. 3 at p. 26). But, the cases cited by NOM are readily distinguishable.[8]

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[8] *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (finding a statute that proscribed partial birth abortions unconstitutional because its plain language, which contained no carve-outs or exceptions, impermissibly covered procedures for aborting a pre-viable fetus and other procedures for the preservation of the mother's health); *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (finding that the provision at issue was enacted by Congress and should not be treated as state law); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (declining to address the question of whether a statute was "readily susceptible" to a narrowing construction); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (finding that the language in question was not capable of an interpretation that excluded issue advocacy); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1154-55 (10th Cir. 2007) (finding that where the legislature had explicitly included a limitation elsewhere in the statute that would be parallel to any narrowing interpretation, such a narrowing interpretation was inappropriate as contrary to a manifest legislative intent to omit the limitation); *Am. Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004) (finding that language extending regulation to "information relating to an election, candidate or any question on a ballot" could not be narrowed because it unavoidably covered issue advocacy, and this result appeared to be intentional as the legislature had elsewhere explicitly excluded issue advocacy from regulation) (emphasis added); *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326-27 (11th Cir. 2001) (refusing to narrowly construe the word "contribute" when to do so would either render exceptions in the statute superfluous or lead to an absurd result); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (finding that the language "primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election" could not be narrowed to exclude issue advocacy without excising the word "incidental").

It should be noted that although the *Sorrell* court thought narrowing to be inappropriate, it expressly and *sua sponte* directed the district court, on remand, to consider whether the statute could be made constitutional by severing the language "or implicitly." *Sorrell*, 221 F.3d at 389. It is difficult to understand how NOM can argue

None of the cases on which NOM relies contained a savings provision that excluded issue advocacy. And, none of the federal courts reviewing those statutes had the benefit of a state court's interpretation of the scope and meaning of the disputed language.

Finally, NOM argues that a narrowing construction is inappropriate because narrowing glosses "generally apply ***only*** to facial challenges, not as-applied challenges." (D.I. 3 at 26 (emphasis added)). Again, however, NOM's interpretation of the law is completely unsound. Neither case cited by NOM limits the use of a narrowing gloss ***only*** to facial challenges. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (*Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding that narrowing glosses are often used to cure as-applied constitutional deficiencies).

2. Alternatively, Severance Is Preferable Over Complete Invalidation

As an alternative to a narrowing construction, this Court could narrowly excise the offensive term or phrase, leaving the remainder of the statute operational. While this is a more intrusive approach than a narrowing construction, it is definitively preferred over large-scale invalidation of a statute.

When a portion of a state statute is held unconstitutional, whether the unconstitutional provisions can be severed is a question of state law. *Virginia v. Hicks*, 539 U.S. 113, 121 (2003); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000). And, in fashioning appropriate injunctive relief, the Court must be aware of the important federalism concerns at stake. As the Supreme Court recently emphasized in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006):

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that *Sorrell* is analogous to this case to support its arguments against a narrowing construction, while at the same time arguing that severance is not an option. (D.I. 3 at 27).

> When confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving the other applications in force, or to sever its problematic portions while leaving the remainder in tact.

When the validity of a state statutory scheme is at issue, basic principles of federalism elevate the importance of narrowly tailored relief, lest the federal government unjustifiably thwart the will of the state legislature. *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir.1986) ("[A]ppropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." (quoting *Rizzo v. Goode*, 423 U.S. 362, 379 (1976))); *Ass'n of Surrogates v. New York*, 966 F.2d 75, 79 (2d Cir. 1992) ("Discretion to frame equitable relief is limited by considerations of federalism, and remedies that intrude unnecessarily on a state's governance of its own affairs should be avoided.").

Accordingly, in *Ayotte*, the Supreme Court identified three principles which should inform the Court's approach to fashioning a remedy: "First, we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'…Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course…'" *Id*. at 329 (citations omitted). Second, the Court should refrain from "rewrit[ing] state law to conform it to constitutional requirements." *Id*. (quoting *Virginia v. American Booksellers Ass'n., Inc.*, 484 U.S. 383, 397 (1988). "Third, the touchstone for any decision is legislative intent… [The Court] must ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id*. at 330 (citations omitted); *accord John Doe, Inc. v. Mukasey*, 549 F.3d 861, 873 (2d Cir. 2008).

Here, the legislative intent is clear: The New York State Legislature has expressly provided that all parts of the state's Election Law are severable and that any invalid provisions

should be narrowly severed. N.Y. Election Law § 14-100(8).[9] And, "[t]he preference for severance is particularly strong when the law contains a severability clause." *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 01-CV-556A, 2008 WL 781865, *29 (W.D.N.Y. Feb. 25, 2008) (quoting *Gary P. Peake Excavating Inc. v. Town Board of the Town of Hancock*, 93 F.3d 68, 72 (2d Cir.1996)). Furthermore, New York state courts have long supported severability over whole-scale invalidation, favoring statutory "function" over technical "form." *Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920); *accord Hynes v. Tomei*, 92 N.Y.2d 613, 628, 706 N.E.2d 1201, 1208 (1998). Thus, every indication of legislative intent supports narrowly severing any offensive portion of the "political committee" definition in order to preserve its main purpose – requiring disclosure from organizations spending money to affect New York elections.

Moreover, the definition of "political committee" is drafted in such a way that would allow narrow excises to occur without changing the intent and effect of the rest of the provision. Indeed, many of the words and phrases that NOM contends are unconstitutional could be removed while leaving the statute fully operational. For instance, the word "principle" could easily be severed from the first clause, leaving that clause to read: "'[P]olitical committee' means any corporation aiding or promoting . . . the success or defeat of a political party [], or of any ballot proposal."

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[9] The full text reads:

> If any clause, sentence, paragraph, subdivision, section, article, part of portion of this chapter heretofore, herewith, or hereafter enacted, or any application thereof, shall be adjudged by any court of competent jurisdiction to be invalid, such order or judgment shall not otherwise affect, impair, or invalidate the remainder thereof, or any other clause, sentence, paragraph, subdivision, section, article, part, or portion of this chapter, but shall be construed to affect only such clause, sentence, paragraph, subdivision, section, article, part, or portion thereof, directly involved in the controversy in which such order, decree or judgment shall have been rendered.

Another recent case brought by NOM to challenge state disclosure laws provides a useful example. In *National Organization for Marriage v. McKee*, the District Court of Maine – after largely denying NOM's claims – excised small portions from one of Maine's election law which it found to be unconstitutionally vague. 2010 WL 3270092 at *7. The provision at issue required that an organization register as a "political action committee" if it "(a) has the 'major purpose' of 'initiating, promoting defeating or *influencing*'" an election or "(b) does not have such a 'major purpose' but spends more than $5,000 in a year 'for the purpose of promoting, defeating or *influencing in any way*'" an election. Id. at *4 (emphasis in original). The Maine court found the word "influencing" and the phrase "influencing in any way" to be unconstitutionally vague. *Id.* at *7. But, rather than striking down the entire election law as unconstitutional, the Maine court merely ordered that the invalid word and phrase be severed from the rest of the statute. *Id*. In that way, the court was able to address the constitutional concerns raised, while still allowing the state's disclosure regime for political committees to function.

III. CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that the Court deny NOM's request for a preliminary injunction. Should, however, the Court find that any portion of New York's Election Law to be invalid, the Brennan Center respectfully suggests that the Court employ a narrowing construction or, at the very most, sever those portions from the rest of the statute.

Dated: October 18, 2010

Respectfully submitted,

____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, a copy of the foregoing BRIEF OF AMICUS CURIAE BRENNAN CENTER IN OPPOSITION TO PLAINTIFF'S PRELIMINARY INJUNCTION MOTION and a copy of the DECLARATION OF KEVIN E. STROM IN SUPPORT OF BRIEF OF *AMICUS CURIAE* BRENNAN CENTER IN OPPOSITION TO PLAINTIFF'S PRELIMINARY INJUNCTION MOTION were filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

_____/ s /_____

Kevin E. Strom