STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission

From: Jonathan Wayne, Executive Director

Date: March 20, 2024

Re: Rulemaking on Foreign Government Influence in Maine Elections

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As part of Question 2 on the November 7, 2023 statewide ballot, Maine voters approved 21-A M.R.S. § 1064, which is intended to prevent the influence of foreign governments in Maine elections. At its meeting on January 31, 2024, the Commission decided to invite comments on proposed rule amendments that would implement 21-A M.R.S. § 1064. The Commission held a February 28, 2024 public hearing and written comments were accepted through March 11, 2024.

During the comment period, the Commission received comments from eight sources. Four of the commenters are reform advocates that are generally supportive of the proposed amendments: Campaign Legal Center (two submissions), Maine Citizens for Clean Elections, Protect Maine Elections, and American Promise. Another four commenters oppose § 1064 and filed constitutional challenges to § 1064 in federal court: Versant Power, Central Maine Power Company, Maine Association of Broadcasters (two submissions), and a group of Maine voters. Their challenges have been consolidated under the caption *Central Maine Power Co., et al. v. Maine Comm'n on Governmental Ethics and Election Practices, et al.*, No. 1:23-cv-00450-NT (D. Me. 2023) (hereinafter, "*CMP*").

On February 29, 2024 (the day after the public hearing), the U.S. District Court granted a motion for a preliminary injunction filed by the plaintiffs challenging § 1064. *CMP*, Order on Pls.' Mot. for Prelim. Inj. (Feb. 29, 2024). The order enjoins the Commission and the Attorney General from enforcing § 1064 until final judgment is entered in the litigation. The Commission and the Attorney General have filed an appeal with the U.S. Court of Appeals for the First Circuit.

In their rulemaking comments, Versant Power and other plaintiffs urge the Commission to suspend the rulemaking, characterizing it as imprudent and a waste of agency resources. Versant Power suggests that completing the rulemaking may be illegal because § 1064 is presently unenforceable.

After conferring with Commission counsel, the staff recommends proceeding with the rulemaking and revising the rulemaking to include:

- § 15(9), which provides that § 15 would take effect only if the U.S. District Court removes the injunction against the enforcement of § 1064, and
- § 15(10), which provides that if the federal courts determine that portions of § 1064 are invalid, the corresponding parts of § 15 would be unenforceable.

Commission staff believes the adoption of these two subsections address the concerns raised by plaintiffs. The values of efficiency, agency resources, and providing guidance to regulated constituencies all point to proceeding with the rulemaking but conditioning the effectiveness of § 15 on the outcome of the litigation. If § 1064 is determined by the courts to be valid and enforceable, it would benefit the regulated community to have implementing rules that reasonably interpret § 1064 take effect automatically, rather than wait for the Commission to conduct a second rulemaking.

Commission staff conferred with counsel on all comments received. Only one commenter, the Campaign Legal Center, suggested changes to the rules proposed on January 31, 2024. The other comments were more general and focused on § 1064 rather than the proposed rules. In response to comments by the Campaign Legal Center and the court's injunction against enforcement, Commission staff recommends some revisions to the amendments proposed on January 31, 2024, which are attached directly after this cover memo. The revisions are shown as insertions or deletions to the January amendments:

§ 15(1)(C), (H), & (L)	defining a new term "participate," which is incorporated into the definitions of "direct participation" and "indirect participation"
§ 15(1)(G)	adding a second example in the definition of "indirect beneficial ownership"
§ 15(1)(N)	minor change in the definition of "structur[ing]" a transaction

§ 15(7)	minor change in the disclaimer language for paid communications to influence public policy
§ 15(8)(A)	confirming that media providers may include a campaign advertisement funded by a foreign government in a news story, commentary, or editorial
§ 15(8)(B)(4) & (8)(E)	eliminating the requirement for the Commission to post a list of entities determined by the Commission in enforcement proceedings to be foreign government-influenced entities
§ 15(9) & (10)	providing that the rules will take effect on the date, if any, that the U.S. District Court removes the injunction against enforcement; providing that, in the event any portion of § 1060 is finally determined to be invalid or unenforceable, § 15 is enforceable only to the extent that the corresponding provisions of § 1064 are valid and enforceable

Our counsel has advised that if the Commission is inclined to accept the revised amendments, it probably should invite a second round of written comments. You could hold a public hearing to receive additional comments, if you wish.

The rationales for the staff's recommendations are contained in an attached draft statement of factual and policy basis for the rulemaking. The state Administrative Procedures Act requires that agencies issue a statement in this general format after completing a rulemaking. The statement must include a summary of comments received and the agency's rationales for adopting or declining changes suggested by the commenters.

Even though the rulemaking is not complete, Commission staff has submitted this draft statement for your consideration as a convenient format for us to share our comment summaries and our proposed reasoning for adopting or declining changes suggested by the commenters. We are not assuming that the Commission agrees with everything in the memo, but we thought it would be a helpful way for us to share our reasoning.

The following materials are attached:

Revised amendments recommended by staff	ETH 1-6
21-A M.R.S. § 1064	ETH 7-9
Draft statement of factual and policy basis for rulemaking	ETH 10-25
Comments received	ETH 26-81
Order granting motion for preliminary injunction	ETH 82-121

Thank you for your consideration of the staff's recommendations.

94-270 COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 1: PROCEDURES

SUMMARY: The Maine Ethics Commission proposes a new section 15 to implement 21-A M.R.S. § 1064, which prohibits foreign governments from making contributions or expenditures to influence elections in Maine.

SECTION 15. FOREIGN GOVERNMENT-INFLUENCED ENTITIES

1. **Definitions.** For purposes of this section, the Commission incorporates the definitions in 21-A M.R.S. § 1064(1). In addition, the following terms have the following meanings when used in § 1064 or in this section:

   A. **Campaign Advertisement.** "Campaign advertisement" means a paid public communication to influence the nomination or election of a candidate or to influence the initiation or approval of a referendum.

   B. **Contribution.** "Contribution" has the meaning set forth in 21-A M.R.S. § 1012(2) if the contribution is directed to a candidate or a candidate's political committee. "Contribution" has the meaning set forth in 21-A M.R.S. § 1052(3) if the contribution is directed to any other person or entity.

   C. **Direct participation ~~in a decision-making process.~~** To "directly" participate in ~~the~~ a decision-making process~~"~~ means to participate in ~~communicate a direction or preference concerning the outcome of~~ the decision-making process through a person who is an employee or official of a foreign government or an employee, director, owner, or member of a foreign government-owned entity.

   D. **Donation.** "Donation" means any gift, subscription, loan, advance or deposit of money or anything of value, regardless of whether it satisfies the definition of a contribution.

   E. **Disbursement of funds.** "Disbursement of funds" means any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, regardless of whether it satisfies the definition of an expenditure.

   F. **Expenditure.** "Expenditure" has the meaning set forth in 21-A M.R.S. § 1012(3) if made by a candidate for office or the candidate's political committee. "Expenditure" has the meaning set forth in 21-A M.R.S. § 1052(4) if made by any other person or entity.

   G. **Indirect beneficial ownership.** "Indirect beneficial ownership" means having an ownership interest in an entity as a result of owning an interest in an intermediate entity that either directly owns part or all of the entity or indirectly owns part or all of the entity through other intermediate entities. For example~~,~~ :

(1) if a foreign government wholly owns a firm that has a 10% interest in a Maine corporation, the foreign government indirectly owns 10% of that corporation~~.~~; or

(2) if a foreign government holds a 25% ownership interest in Maine Corporation A and Maine Corporation A, in turn, holds a 40% ownership interest in Maine Corporation B, the foreign government indirectly owns 10% of Maine Corporation B.

H. **Indirect participation ~~in a decision-making process~~.** To "indirectly" participate in ~~the~~a decision-making process" means to ~~knowingly communicate a direction or preference concerning the outcome of~~ participate in the decision-making process using an intermediary, whether or not the intermediary has any formal affiliation with the foreign government or foreign government-owned entity.

I. **Internet platform.** "Internet platform" means an entity that controls any public-facing website, internet application, or mobile application that sells advertising space and:

(1) is also a print news outlet, television or radio broadcasting station, or provider of cable or satellite television; or

(2) publishes content primarily intended for audiences within Maine.

J. **Media provider.** "Media provider" means a television or radio broadcasting station, provider of cable or satellite television, print news outlet or Internet platform, as defined in this section.

K. **Print news outlet.** "Print news outlet" means an entity that publishes physically printed news or news commentary on a periodical basis in which advertisers may purchase advertising space and which distributes at least 25 percent of its copy for one or more publications within the State of Maine.

L. **Participate.** To "participate" in a decision-making process with regard to the activities of a firm, partnership, corporation, association, organization or other entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, means, with the invitation, consent, or acquiescence of the firm, partnership, corporation, association, organization, or other entity, to deliberate or vote on a decision of that firm, partnership, corporation, association, organization or other entity concerning donations and disbursements to influence the nomination or election of a candidate or the initiation or approval of a referendum.

Participation does not include:

(1) making, deliberating on, or voting on a shareholder resolution concerning donations and disbursements to influence the nomination or election of a candidate or the initiation or approval of a referendum if the person making, deliberating on, or voting on the resolution holds, owns, controls or otherwise has direct or indirect beneficial ownership of less

than 5% of the total equity, outstanding voting shares, membership units or other applicable ownership interests;

(2) sending an unsolicited communication regarding a decision-making process; or

(3) participating in an entity's decision-making process for general budget decisions, including setting overall budgets for political donations and disbursements on an annual basis at a "not to exceed" amount, provided that there is no participation in any other decision-making concerning political donations and disbursements or the selection of individuals who will make such decisions.

~~L~~M. **Provider of cable or satellite television.** "Provider of cable or satellite television" means an entity that is engaged in the provision of cable or satellite television service in Maine to a public audience and sells advertising space for transmission through its service.

~~M~~N. **Structure.** "Structure" means to arrange for financial activity to be made by or through a person for the purpose of evading the prohibitions and requirements of 21-A M.R.S. § 1064. Structuring includes, but is not limited to, creating a business entity whose ownership ~~is difficult to ascertain~~cannot be readily ascertained for the purpose of concealing ownership or control by a foreign government.

~~N~~O. **Television or radio broadcasting station.** "Television or radio broadcasting station" means an entity that broadcasts television or radio signals from within the state of Maine to a public audience and sells advertising space for broadcast through those signals.

2. **Ownership or control by a foreign government.** An entity does not qualify as a foreign government-influenced entity pursuant to 21-A M.R.S. § 1064(1)(E)(2)(a) solely because multiple foreign governments or foreign government-owned entities have ownership interests in the entity that, if combined, would exceed 5% of the entity's total equity or other ownership interests.

3. **Campaign spending by foreign governments prohibited.** A foreign government-influenced entity may not make, directly or indirectly, a contribution, expenditure, independent expenditure, electioneering communication or any other donation or disbursement of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum.

4. **Solicitation or acceptance of contributions from foreign governments prohibited.** A person may not knowingly solicit, accept or receive a contribution or donation prohibited by subsection 3.

5. **Substantial assistance prohibited.** A person may not knowingly or recklessly provide substantial assistance, with or without compensation:

A. In the making, solicitation, acceptance or receipt of a contribution or donation prohibited by subsection ~~3~~4; or

B. In the making of an expenditure, independent expenditure, electioneering communication or disbursement prohibited by subsection 3.

6. **Circumvention through structuring financial activity**

A. **Prohibition.** A person may not structure or attempt to structure a solicitation, contribution, expenditure, independent expenditure, electioneering communication, donation, disbursement or other transaction to evade the prohibitions and requirements in 21-A M.R.S. § 1064.

B. **Enforcement.** The Commission shall assess a penalty against a person for illegally structuring a transaction only upon finding that the person intended to evade the prohibitions and requirements in 21-A M.R.S. § 1064.

7. **Disclaimer in paid communications**

A. **Disclaimer required.** A disclaimer is required whenever a foreign government-influenced entity makes a disbursement of funds to finance a public communication not otherwise prohibited by 21-A M.R.S. § 1064 or this section if it meets either of the following criteria:

(1) A reasonable observer would understand the content of the public communication to be seeking to influence the public or any state, county or local official or agency regarding the formulation, adoption or amendment of any state or local government policy; or,

(2) The public communication promotes the political or public interest of or government relations with a foreign country or a foreign political party.

B. **Disclaimer content.** A public communication subject to the disclaimer requirement of this subsection must clearly and conspicuously contain the words "Sponsored by" immediately followed by the name of the foreign government-influenced entity that made the disbursement and a statement identifying that foreign government-influenced entity as a "foreign government" or a "foreign government-influenced entity." The disclaimer may include ~~additional truthful and accurate language describing the entity, including~~ language to indicate that "foreign government" and "foreign government-influenced entity" are defined terms under state law, ~~for example,~~ as follows: "sponsored by [entity], a [foreign government or foreign government-influenced entity, as appropriate] as defined in Maine law."

~~B~~C. **Applicability.** This subsection applies only to public communications purchased from media providers or otherwise intended to be viewed primarily by Maine residents.

8. **Requirements for media providers**

A. **Policies, procedures and controls.** Each media provider must establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a campaign advertisement purchased by a foreign government-influenced entity. Nothing in these rules may be interpreted to prohibit or otherwise restrict a media

provider from reproducing a campaign advertisement prohibited by 21-A M.R.S. § 1064 as part of a news story, commentary, or editorial.

B. **Safe harbor.** A media provider will be deemed to satisfy the requirements of subsection 8(A) if it adopts a policy containing the following features:

(1) The policy prohibits publication of any campaign advertisement that the media provider knows to originate from a foreign government-influenced entity, except that the policy may allow reproduction of a campaign advertisement in a news story to which the campaign advertisement is relevant.

(2) The policy requires a purchaser of a campaign advertisement to certify in writing that it is not a foreign government-influenced entity or acting on behalf of a foreign government-influenced entity. The policy may allow certification via electronic means and may allow the advertiser to certify by checking a box or other similar mechanism, as long as the box or other mechanism is clearly labeled as a certification that the advertiser is not a foreign government-influenced entity or acting on behalf of a foreign government-influenced entity.

(3) The policy requires that such certifications be preserved by the media provider for a period of not less than 2 years.

(4) The policy requires the media provider to decline to publish a campaign advertisement if:

a. the purchaser fails to provide the certification required by subsection (8)(B)(2); or

~~b. the purchaser is listed by the Commission on its website as a foreign government-influenced entity in accordance with subsection (8)(E) below; or,~~

~~e~~b. the media provider has actual knowledge of facts indicating that, notwithstanding the purchaser's written confirmation to the contrary, the purchaser is a foreign government-influenced entity or is acting on behalf of a foreign government-influenced entity.

(5) If the media provider is an Internet platform, its policy provides that, upon discovery that the Internet platform has distributed a campaign advertisement purchased by or on behalf of a foreign government-influenced entity, the Internet platform shall immediately remove the communication and notify the Commission.

C. **Other policies permitted.** Nothing in this section prevents a media provider from adopting a due diligence policy containing provisions other than those described in subsection (8)(B) above, so long as the policy is reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a campaign advertisement purchased by or on behalf of a foreign government-influenced entity.

D. **Investigations not required.** A due diligence policy need not require the media provider to investigate their advertisers or to monitor comment sections or other similar fora that the media provider makes available to subscribers, users, or the general public to post commentary.

~~E. **Public list.** The Commission will maintain a list on its website of all entities that it has determined in enforcement proceedings to meet the definition of a foreign government-influenced entity. An entity may request to be removed from the list by presenting satisfactory evidence to Commission staff that it no longer meets the definition of a foreign government-influenced entity. If Commission staff reject the request, the entity may request a determination by the Commission.~~

~~F~~E. **Takedown requirement.** If an Internet platform discovers that it has distributed a campaign advertisement purchased by a foreign government-influenced entity, the Internet platform shall immediately remove the communication and notify the Commission.

9. **Effective Date.** This section takes effect and becomes enforceable on the date, if any, that the U.S. District Court for the District of Maine removes or modifies the injunction against enforcement of 21-A M.R.S. § 1064 issued in *Central Maine Power, et al. v. Comm'n on Governmental Ethics and Election Practices, et al.*, Docket No. 1:23-cv-00450 (D. Me.), provided that, if the District Court modifies the injunction, this section takes effect and becomes enforceable only to the extent that the District Court permits enforcement of the corresponding provisions of § 1064.

10. **Severability.** In the event any portion of 21-A M.R.S. § 1064 is finally determined by a court of competent jurisdiction to be invalid or unenforceable, these rules are enforceable to the extent that corresponding provisions of 21-A M.R.S. § 1064 are valid and enforceable.

21-A M.R.S. § 1064. Foreign government campaign spending prohibited

(1) Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

(A) "Contribution" has the meanings given in section 1012, subsection 2 and section 1052, subsection 3.

(B) "Electioneering communication" means a communication described in section 1014, subsection 1, 2 or 2-A.

(C) "Expenditure" has the meanings given in section 1012, subsection 3 and section 1052, subsection 4.

(D) "Foreign government" includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country other than the United States or over any part of such country and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. "Foreign government" includes any faction or body of insurgents within a country assuming to exercise governmental authority, whether or not such faction or body of insurgents has been recognized by the United States.

(E) "Foreign government-influenced entity" means:

(1) A foreign government; or

(2) A firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity:

(a) Holds, owns, controls or otherwise has direct or indirect beneficial ownership of 5% or more of the total equity, outstanding voting shares, membership units or other applicable ownership interests; or

(b) Directs, dictates, controls or directly or indirectly participates in the decision-making process with regard to the activities of the firm, partnership, corporation, association, organization or other entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, such as decisions concerning the making of contributions, expenditures, independent expenditures, electioneering communications or disbursements.

(F) "Foreign government-owned entity" means any entity in which a foreign government owns or controls more than 50% of its equity or voting shares.

(G) "Independent expenditure" has the meaning given in section 1019-B, subsection 1.

(H) "Public communication" means a communication to the public through broadcasting stations, cable television systems, satellite, newspapers, magazines, campaign signs or other outdoor advertising facilities, Internet or digital methods, direct mail or other types of general public political advertising, regardless of medium.

(I) "Referendum" means any of the following:

(1) A people's veto referendum under the Constitution of Maine, Article IV, Part Third, Section 17;

(2) A direct initiative of legislation under the Constitution of Maine, Article IV, Part Third, Section 18;

(3) A popular vote on an amendment to the Constitution of Maine under the Constitution of Maine, Article X, Section 4;

(4) A referendum vote on a measure enacted by the Legislature and expressly conditioned upon ratification by a referendum vote under the Constitution of Maine, Article IV, Part Third, Section 19;

(5) The ratification of the issue of bonds by the State or any state agency; and

(6) Any county or municipal referendum.

(2) Campaign spending by foreign governments prohibited. A foreign government-influenced entity may not make, directly or indirectly, a contribution, expenditure, independent expenditure, electioneering communication or any other donation or disbursement of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum.

(3) Solicitation or acceptance of contributions from foreign governments prohibited. A person may not knowingly solicit, accept or receive a contribution or donation prohibited by subsection 2.

(4) Substantial assistance prohibited. A person may not knowingly or recklessly provide substantial assistance, with or without compensation:

(A) In the making, solicitation, acceptance or receipt of a contribution or donation prohibited by subsection 2; or

(B) In the making of an expenditure, independent expenditure, electioneering communication or disbursement prohibited by subsection 2.

(5) Structuring prohibited. A person may not structure or attempt to structure a solicitation, contribution, expenditure, independent expenditure, electioneering communication, donation, disbursement or other transaction to evade the prohibitions and requirements in this section.

(6) Communications by foreign governments to influence policy; required disclosure. Whenever a foreign government-influenced entity disburses funds to finance a public communication not otherwise prohibited by this section to influence the public or any state, county or local official or agency regarding the formulation, adoption or amendment of any state or local government policy or regarding the political or public interest of or government relations with a foreign country or a foreign political party, the public communication must clearly and conspicuously contain the words "Sponsored by" immediately followed by the name of the foreign government-influenced entity that made the disbursement and a statement identifying that foreign government-influenced entity as a "foreign government" or a "foreign government-influenced entity."

(7) Due diligence required. Each television or radio broadcasting station, provider of cable or satellite television, print news outlet and Internet platform shall establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement in violation of this section. If an Internet platform discovers that it has distributed a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement in violation of this section, the Internet platform shall immediately remove the communication and notify the commission.

(8) Penalties. The commission may assess a penalty of not more than $5,000 or double the amount of the contribution, expenditure, independent expenditure, electioneering communication, donation or disbursement involved in the violation, whichever is greater, for a violation of this section. In assessing a penalty under this section, the commission shall consider, among other things, whether the violation was intentional and whether the person that committed the violation attempted to conceal or misrepresent the identity of the relevant foreign government-influenced entity.

(9) Violations. Notwithstanding section 1004, a person that knowingly violates subsections 2 through 5 commits a Class C crime.

(10) Rules. The commission shall adopt rules to administer the provisions of this section. Rules adopted under this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

(11) Applicability. Notwithstanding section 1051, this section applies to all persons, including candidates, their treasurers and authorized committees under section 1013-A, subsection 1; party committees under section 1013-A, subsection 3; and committees under section 1052, subsection 2.

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Administrative Procedure Officer, Office of the Maine Secretary of State

From: Jonathan Wayne, Executive Director
Martha Currier, Assistant Director

Date: March __, 2024

Re: Amendments to Chapter 1 of the Commission's Rules (94-270 C.M.R.)

STATEMENT OF FACTUAL AND POLICY BASIS FOR AMENDMENTS AND SUMMARY AND RESPONSE TO COMMENTS

SUMMARY: On January 31, 2024, the Commission decided to invite comments on a new § 15 of Chapter 1 of the Commission's rules. The new section will implement 21-A M.R.S. § 1064, which prohibits foreign governments and entities controlled or influenced by foreign governments from making contributions or expenditures to influence elections in Maine. Comments were accepted through March 11, 2024.

The Commission carefully considered comments submitted by eight organizations and accepted some changes suggested by one commenter, the Campaign Legal Center. In addition, the Commission made changes to the amendments responsive to constitutional concerns raised by an order by the U.S. District Court for the District of Maine granting a preliminary injunction to plaintiffs in *Central Maine Power Co., et al. v. Maine Comm'n on Governmental Ethics and Election Practices, et al.*, No. 1:23-cv-00450-NT, 2024 U.S. Dist. LEXIS 34853 (D. Me. Feb. 29, 2024).

This statement contains two parts. Part 1 describes the factual and policy basis for each subsection of the amendments. If the Commission received a comment relative to that subsection, the comment is summarized, along with the Commission's response to the comment. Part 2 summarizes more general comments that did not suggest changes to the amendments.

Part 1 – Factual and Policy Basis for Each Subsection of Amendments

Chapter 1, § 15(1) – Definitions

Factual and policy basis for amendment: In § 15(1), the Commission has adopted definitions for terms used but not defined in § 1064. The definitions provide guidance on which entities are considered foreign government-influenced entities ("FGIEs") that are forbidden from spending money to influence Maine elections. The definitions also address which media companies must establish policies to avoid publishing campaign advertisements by FGIEs. The definitions describe certain campaign finance activities that are prohibited under § 1064.

Comments received: The Commission did not receive comments concerning most of the 14 definitions proposed on January 31, 2024. The comments received concerning proposed § 15(1)(C), (G), (H), (I) & (M) are summarized in the following sections.

Chapter 1, § 15(1)(C)&(H) – Definitions of Direct and Indirect Participation in a Decision-Making Process

Factual and policy basis for amendment: The definition of FGIE in § 1064(1)(E) contains three subparts. Under § 1064(1)(E)(2)(b), an entity qualifies as a FGIE if a foreign government directs, controls, or "directly or indirectly participates" in the entity's decisions regarding electoral activities.

In the amendments proposed on January 31, 2024, § 15(1)(C) & (H) defined "direct participation" and "indirect participation" as communicating a direction or preference concerning the outcome of a decision-making process. Participation would be indirect if made through an intermediary.

Comments received: In its March 11, 2024 comments, the Campaign Legal Center suggested that a foreign government's communication of a direction or preference should qualify as participation only if the foreign government is actually involved in the entity's decision-making process. Drawing on concerns expressed by the U.S. District Court in the preliminary injunction

order, the Campaign Legal Center commented that if a foreign government sends an unsolicited communication to an entity making a decision on election spending, that unsolicited communication should not count as participation. The Campaign Legal Center suggested providing examples that illustrate when expressing a direction or preference would or would not constitute participation.

Commission's response to comments: The Commission agrees generally with the concerns raised by the Campaign Legal Center. To address them, in § 15(1)(L) the Commission adopted a definition for a new term, "participate," that is narrower than the definitions proposed on January 31, 2024. In § 15(1)(L), "participate" is defined to mean "to deliberate or vote on a decision" "with the invitation, consent, or acquiescence of" the entity making the decision. As part of the definition, the Commission has provided three examples of situations that do not constitute participation, including two that are variations of examples suggested by the Campaign Legal Center. The Commission has changed the definitions of "direct participation" and "indirect participation" in § 15(1)(C) & (H) to incorporate the new definition of participate in § 15(1)(L).

Chapter 1, § 15(1)(G) – Definition of Indirect Beneficial Ownership

Factual and policy basis for the amendment: Under § 1064(1)(E)(2)(a), a firm, association, or other entity qualifies as a FGIE if a foreign government indirectly owns 5% or more of the total equity of the firm, association, or other entity. In January, the Commission proposed defining "indirect beneficial ownership" to mean "having an ownership interest in an entity as a result of owning an interest in an intermediate entity that either directly owns part or all of the entity or indirectly owns part or all of the entity through other intermediate entities. For example, if a foreign government wholly owns a firm that has a 10% interest in a Maine corporation, the foreign government indirectly owns 10% of that corporation."

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests including a second example to illustrate how a foreign government's partial ownership of an intermediate entity can result in indirect ownership of a firm, association, or entity.

Commission's response to comments: The Commission has included the example in the adopted amendments.

Chapter 1, § 15(1)(I) – Definition of Internet Platform

Factual and policy basis for amendment: Under § 1064(7), internet platforms are among the media providers that must establish a policy and advertising procedures designed to avoid publishing election messages funded by FGIEs. The definition of internet platform proposed on January 31, 2024 was intended to focus on publishers of internet content primarily intended for audiences within Maine.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggested alternative language to cover a wider scope of internet platforms (*e.g.*, national streaming platforms such as Netflix).

Commission's response to comments: Requiring national internet platforms to change their advertising procedures to avoid foreign government influence would be difficult for the Commission to implement. It would result in a large number of unintentional legal violations by national companies that are unaware of Maine's requirement. It would be challenging to effectively educate internet platforms nationally. The Commission would have no way of detecting violations nationwide by companies that failed to adopt the policies and procedures. Also, the Commission has doubts whether requiring national internet platforms to change their advertising procedures will have a significant marginal impact on Maine elections. For these reasons, the Commission has adopted the definition of "internet platform" as originally proposed in January.

Chapter 1, § 15(1)(M) – Structuring a Transaction

Factual and policy basis for amendment: Under § 1064(5), a person may not structure a contribution, expenditure, or other campaign transaction to evade the prohibitions in § 1064. The Commission proposed a definition for the term "structure" that included the example of:

"creating a business entity whose ownership is difficult to ascertain for the purpose of concealing ownership or control by a foreign government."

Comments received: With regard to the example, the Campaign Legal Center suggested in its February 27, 2024 comments changing the standard from "difficult to ascertain" to "cannot be readily ascertained," which would be more clear.

Commission's response to comments: The Commission made the language change suggested by the Campaign Legal Center.

Chapter 1, § 15(2) – Ownership or Control by a Foreign Government

Factual and policy basis for amendment: The language of § 1064(1)(E) defines the term "foreign government-influenced entity." Under § 1064(1)(E)(2)(a), a business entity qualifies as an FGIE if a foreign government owns 5% or more of the business entity. Section 15(2) was proposed to reflect this requirement and to clarify that an entity does not qualify as a FGIE merely because multiple governments, combined, own 5% or more of the entity.

Comments received: American Promise commented favorably on this section as proposed. In its March 11, 2024 comments, the Campaign Legal Center proposed that § 15(2) be modified to be even more explicit that an entity qualifies as a FGIE if it is majority- or wholly owned by a foreign government.

Commission's response to comments: The Commission declines to make the changes proposed by the Campaign Legal Center in the interest of simplicity and because § 1064(1)(E)(2)(a) and § 15(2) are already clear. An entity is a FGIE if a foreign government owns or controls more than 5% of the equity of the entity. By implication, if an entity is majority- or wholly owned by a foreign government, it is a FGIE.

Chapter 1, § 15(3) – Campaign Spending by Foreign Governments Prohibited

Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S. § 1064(2) that prohibits spending of any kind by foreign governments in any Maine election.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(4) – Solicitation or Acceptance of Contributions from Foreign Governments Prohibited

Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S. § 1064(3) stating that a person cannot knowingly solicit, accept, or receive a contribution from a foreign government for any Maine election.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(5) – Substantial Assistance Prohibited

Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S. § 1064(4) that prohibits persons from knowingly or recklessly providing substantial assistance in a contribution or expenditure that violates § 1064(2) or (3).

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(6) – Circumvention through Structuring Financial Activity

Factual and policy basis for amendment: The amendment reflects the language in § 1064(5) that prohibits persons from attempting to structure a campaign finance transaction to evade the prohibitions in § 1064.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(7)(B) – Disclaimers in Paid Communications to Influence Policy

Factual and policy basis for amendment: Section 15(7) reflects the requirement in § 1064(6) that public communications paid for by a FGIE must include a disclaimer if they influence the public, or a state, county or local official/agency, regarding:

- any state or local government policy, or
- the political or public interest of a foreign country/political party, or government relations with a foreign country/political party.

Under § 1064(6), the disclaimer must include "sponsored by [name of FGIE]," and a statement that the FGIE is a "foreign government" or a "foreign government-influenced entity."

The § 15(7)(B) proposed on January 31, 2024 was drafted to allow a FGIE to add "truthful and accurate information" to the disclaimer, such as a statement that foreign government and foreign government-influenced entity are defined terms under state law.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center expressed concern that generally allowing the insertion of "truthful and accurate information" could result in inconsistent disclaimers that would confuse the public and increase the burden on Commission staff in determining whether the additional language was accurate. It suggested limiting the additional language to a statement that "foreign government" or "foreign government-influenced entity" are defined terms under state law.

Commission response to comments: The Commission agrees that it should not be engaged in making determinations about the truthfulness of information in disclaimers and has adopted the language suggested by the Campaign Legal Center.

Chapter 1, § 15(7)(C) – Applicability of Disclaimer Requirement (proposed as § 15(7)(B))

Factual and policy basis for amendment: In January, the Commission proposed that the disclaimer requirement would apply "only to public communications purchased from media providers or otherwise intended to be viewed primarily by Maine residents."

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests broadening the disclaimer requirements to cover public communications "that can be received directly by" residents of Maine.

Commission's response to comments: The Commission is concerned that the language suggested by the Campaign Legal Center would require an advertisement received by a national audience to include the sponsorship disclaimer merely because some residents in Maine received the ad. For example, under the Campaign Legal Center proposal, an advertisement by a FGIE to influence national foreign policy directed at the entire U.S. population during a major sporting event could be required to include the "sponsored by" disclaimer. The Commission questions whether a subsection of Maine campaign finance law should have this nationwide effect on advertising. As another example, a FGIE that purchased a digital ad from the Washington Post to influence Virginia residents regarding legislation in that state would need to include the disclaimer in the ad merely because some Maine residents consume the Washington Post online.

In addition to the issue of overreach, Commission has concerns that the Campaign Legal Center proposal would result in many unintentional legal violations by FGIEs nationwide that have no awareness of the "sponsored by" disclaimer requirement in § 1064. For the above reasons, the Commission declines to make the change proposed by the Campaign Legal Center.

Chapter 1, § 15(8)(A) – Requirements for Media Providers – Policies, Procedures, Controls

Factual and policy basis for amendment: The Commission has adopted § 15(8) to implement the requirement in § 1064(7) that media companies must establish due diligence policies, procedures and controls that are reasonably designed to ensure they do not publish campaign advertising by FGIEs. Subsection 15(8)(A) restates this requirement using terms defined in the adopted rule.

Comments received: American Promise commented that the safe harbor provision is a reasonable set of compliance procedures for media providers. The Campaign Legal Center suggested inserting language in § 15(8)(A) confirming that the Commission's rules do not prohibit a media

provider from reproducing a campaign advertisement prohibited by § 1064 as part of a news story, commentary or editorial.

Commission's response to comments: The Commission has adopted the change suggested by the Campaign Legal Center.

Chapter 1, § 15(8)(B) – Optional Safe Harbor Policy

Factual and policy basis for amendment: This amendment sets out an optional set of procedures that a media provider may adopt to avoid broadcasting or distributing a campaign advertisement by a FGIE. This "safe harbor" policy includes features numbered § 15(B)(1) - (5). If a media provider adopts a policy containing these five features, the Commission will view their policy as compliant (*i.e.*, reasonably designed to avoid broadcasting or publishing campaign ads by FGIEs). The safe harbor policy is intended to provide media companies with a practical set of inexpensive procedures they can use to comply with § 1064(7). The two key elements of the policy are:

- when a media provider or their agent sells a campaign ad, they need to provide the purchaser an opportunity to certify through checkbox or similar means that the purchaser is not an FGIE, and
- the media provider will decline to publish a campaign ad if the purchaser fails to certify that it is not a FGIE or if the media provider has actual knowledge of facts indicating that the purchaser is a FGIE.

The media provider would need to keep the purchasers' certifications for at least two years. The policy must expressly allow the media provider to publish a campaign advertisement by a FGIE in a news story to which the advertisement is relevant. Further, if the media provider is an internet platform, the policy must require the platform to remove any communications that it discovers were funded by a FGIE.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests that the safe harbor policy (§ 15(8)(B)(4)(c)) should contain a provision stating that a media

provider will decline to publish a campaign advertisement if the media provider should have known of facts indicating that the purchaser is a FGIE.

Commission's response to comments received: The Commission views the primary purpose of the statutory requirements in § 1064(7) as serving as an enforcement backstop against FGIE election spending and not as an independent regulation on Maine media. As described below, some media providers in Maine have expressed concern that they may be found "liable" by the State of Maine for unintentionally violating § 1064. In turn, the purpose of § 15(8)(B) is to implement the statute's aims while also supplying media providers a level of certainty that they can adopt minimally burdensome policies and procedures that satisfy the legal requirement in § 1064(7). Section 15(8)(B) accomplishes these goals by establishing a safe harbor regime that would remove nearly all due diligence burdens from media providers and place them on ad-purchasers by requiring entities to self-certify that they are not FGIEs at the time of purchase. The only minimal burden remaining on media providers in such a safe harbor regime would be adopting a policy of not publishing FGIE advertisements in circumstances where the media provider has actual knowledge that such an ad would violate the statute's ban on FGIE political spending. The change suggested by the Campaign Legal Center could erode a potential media provider's certainty that it has complied with the safe harbor provision by introducing a less objective "should have known" standard. Similarly, the Commission should not be engaged in making determinations about whether a media entity "should have known" that any specific advertisement violates the statute. For these reasons, the Commission has not adopted the language suggested by the Campaign Legal Center.

Chapter 1, § 15(8)(C) – Other Policies, Procedures and Controls are Permitted

Factual and policy basis for amendment: The amendment confirms that media companies are not required to adopt the safe harbor provision set out in § 15(8)(B). They may adopt other policies, procedures and controls that are reasonably designed to avoid publishing a campaign advertisement by a FGIE.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(8)(D) – Investigations not Required

Factual and policy basis for amendment: The amendment confirms that a media provider is not required to conduct an investigation of their advertisers and is not required to monitor any comments section or similar forum that the media provider makes available to its users.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(8)(E) – Requirements for Media Providers – Public List

Factual and policy basis for amendment: The proposed § 15(8)(E) required the Commission to maintain a list on its website of all entities the Commission has determined to be FGIEs in enforcement actions. The list was intended as a reference tool to assist media providers in not publishing campaign ads by FGIEs. The optional safe harbor policy set out in proposed § 15(8)(B)(4)(b) contained a provision that media providers must decline to publish a campaign advertisement if the purchaser is on the Commission's list of FGIEs.

Comments received: In its February 27, 2024 submission, the Campaign Legal Center commented that a public list of entities determined by the Commission in enforcement proceedings to be FGIEs could quickly become out of date, causing an entity to be listed as a FGIE when it no longer meets the definition. Rather than posting this type of list, the Campaign Legal Center recommended that the Commission post a repository of materials related to § 1064, such as guides, advisory opinions, and final outcomes of enforcement actions.

Commission response to comments: After considering the comments of the Campaign Legal Center, the Commission has decided to withdraw the public list provision. If the federal courts find that § 1064 is valid and enforceable, the Commission expects that most foreign government-influenced entities will refrain from spending money to influence Maine elections. Consequently, the Commission expects to make relatively few determinations that a FGIE violated § 1064 by spending money to influence a Maine election. Therefore, the Commission has decided to withdraw the public list provision in § 15(8)(E) and the related safe harbor provision in 15(8)(B)(4)(b).

The Commission declines to adopt the suggested provision requiring the Commission to post written guidance concerning § 1064. If the statute is found to be valid by the courts, the Commission intends to issue guidance and publish it on the agency's website, as it regularly does on a variety of campaign finance topics. A legal requirement in the Commission's rules is unnecessary.

Chapter 1, § 15(8)(F) – Requirements for Media Providers – Takedown Requirement

Factual and policy basis for amendment: This subsection reflects the requirement in § 1064(7) that an internet platform must take down any campaign advertisement that it discovers was purchased by a FGIE.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(9) & 10 – Effective Date and Severability

Factual and policy basis for amendment: Subsection 15(9) states that § 15 will take effect on the date, if any, that the U.S. District Court for Maine removes the injunction against enforcement of § 1064. The Commission finds that § 15(9) is advisable due to the February 29, 2024 order granting plaintiffs' motion for a preliminary injunction in *Central Maine Power Company, et al. v. Maine Comm'n on Governmental Ethics and Election Practices, et al.*, Docket No. 1:23-cv-00450-NT, 2024 U.S. Dist. LEXIS 34853 (D. Me. Feb. 29, 2024). The added language makes clear to the public and the regulated community that no enforcement of § 1064 will occur except to the extent the federal courts later permit such enforcement. If the federal courts permit the Commission to enforce § 1064, the § 15 amendments would take effect automatically.

Similarly, in § 15(10) the Commission is adopting a policy that if any portion of § 1064 is finally determined to be invalid or unenforceable, § 15 is enforceable only to the extent that the corresponding provisions of § 1064 are valid and enforceable. The Commission finds that clarification of how the rule would be implemented if only parts of § 1064 are ultimately permitted to go into effect would benefit the public and the regulated community.

Comments received: No comments were received concerning § 15(9) & (10) because these subsections were not part of the amendments proposed for public comment. The general topic, however, was addressed in rulemaking comments submitted by Versant Power and other plaintiffs, summarized below. The plaintiffs urge the Commission to suspend the rulemaking, characterizing it as imprudent and a waste of agency resources. Versant Power suggests that completing the rulemaking may be illegal because § 1064 is currently unenforceable.

Commission's response to comments: The Commission has considered the plaintiff's arguments but finds them unpersuasive. By the terms of § 15(9), section 15 would take effect only if the U.S. District Court removes the injunction against the enforcement of § 1064. If the federal courts determine that portions of § 1064 are invalid, the corresponding parts of § 15 would be unenforceable under § 15(10). Because the effectiveness of the proposed rule would, by the rule's own terms, be entirely contingent upon a lifting or modification of the injunction currently in effect, the Commission is in no sense "enforcing" § 1064 by proceeding with the mandated rulemaking process. The values of efficiency, agency resources, and providing guidance to regulated constituencies all point to proceeding with the rulemaking but conditioning the effectiveness of § 15 on the outcome of the litigation. If § 1064 is determined by the courts to be valid and enforceable, it would benefit the regulated community to have implementing rules that reasonably interpret § 1064 take effect automatically, rather than wait for the Commission to conduct a second rulemaking.

Part 2 – General Comments Received

The Commission received comments from seven other organizations, which are summarized in this section. These comments were more general and did not suggest any changes to specific amendments. The Commission considered the comments and determined they do not require any revisions to the amendments proposed in January.

Maine Citizens for Clean Elections

Anna Kellar, the Executive Director of the Maine Citizens for Clean Elections provided written comments dated February 28, 2024. The organization expresses its appreciation to the Commission for developing the rules and endorses the comments of the Campaign Legal Center.

Protect Maine Elections

Kaitlin LaCasse is the campaign manager for Protect Maine Elections, the ballot question committee that promoted Question 2 on the November 2023 ballot. Ms. LaCasse testified at the February 28, 2024 public hearing and submitted written comments.

Protect Maine Elections states that § 1064 closes a dangerous loophole created by a ruling of the Federal Elections Commission. It argues that § 1064 is necessary because of the volume of recent spending by FGIEs to influence Maine elections. Protect Maine Elections supports the amendments that were proposed on January 31, 2024.

American Promise

The Commission received written comments from Brian Boyle, Chief Program Officer and General Counsel of American Promise, a nonprofit advocacy organization which promotes an amendment to the U.S. Constitution allowing for greater regulation of money in U.S. politics. American Promise supports the proposed amendments. In particular, it views the proposed "safe harbor" policy for media providers as reasonable and it agrees that an entity should not qualify as a FGIE solely because the combined ownership of an entity by two or more foreign governments exceeds 5%.

American Promise also commented on a topic other than the rulemaking. In addition to § 1064, Question 2 required the Commission to receive public comment and issue an annual report on congressional proposals to amend the U.S. Constitution to allow for greater campaign finance regulation. American Promise encourages the Commission to hold public hearings before issuing the report so that the people of Maine can voice their support for this type of amendment. The Commission will address these issues in public meetings during 2024.

Versant Power

Arielle Silver Karsh, the Vice President for Legal and Regulatory Affairs for Versant Power, submitted written comments dated March 11, 2024. Versant Power initiated one of the four constitutional challenges of § 1064. The utility does not comment on any specific provision of the amendments. It believes the proposed amendments share and exacerbate the constitutional flaws in § 1064. In light of the District Court's order enjoining the enforcement of § 1064, Versant Power suggests it would be a waste of administrative resources for the Commission to adopt the proposed rule. It suggests suspending the rulemaking. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by Versant Power and the other plaintiffs.

Central Maine Power Company

Carlisle Tuggey, General Counsel for Central Maine Power Company ("CMP"), submitted written comments dated March 11, 2024. CMP does not comment on any specific provision of the proposed amendments. The utility summarizes the order enjoining enforcement of § 1064. It argues that it is generally unwise to engage in rulemaking while litigation is ongoing and it is indefensible to adopt rules meant to enforce a law that a federal court has found to be facially unconstitutional. If § 1064 is struck down, CMP submits that the Commission's rules would be meaningless. It suggests not adopting any rules until the litigation concludes. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by CMP and the other plaintiffs.

Jane Pringle, Kenneth Fletcher, Bonnie Gould, Brenda Garrand and Lawrence Wold

A group of Maine voters who filed a constitutional challenge to § 1060 also submitted comments on the rulemaking. Similar to Versant Power and CMP, they do not refer to any specific section of the amendments and they urge the Commission not to proceed with the rulemaking. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by the individual and business/association plaintiffs.

Comments by Maine Association of Broadcasters

Mr. Timothy Moore, the Executive Director of the Maine Association of Broadcasters, testified at the Commission's February 28, 2024 public hearing and provided written testimony. The association believes § 1064 is vague, burdensome on media outlets, and unconstitutional because it would silence legitimate political voices. The association encourages the Commission to refrain from taking any action on the rulemaking until the U.S. District Court decides on the association's petition for a permanent injunction. In its February 28 comments, the association did not refer to any specific part of the amendments. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by Maine Association of Broadcasters and the other plaintiffs.

In supplemental written comments submitted February 29, 2024, Mr. Moore posed nine questions "regarding a station's liability in some real-world situations." The Commission has considered the questions and determined they do not need to be addressed in the Commission's rulemaking. Two of the practical questions will be resolved if the Commission agrees with the staff's recommendation to eliminate the public list requirement, discussed above. Some of the questions are apparently based on a misconception that the Commission will punish broadcasters for publishing campaign advertisements that are funded by FGIEs. The text of § 1064 makes this unlikely. Mr. Moore's questions may be more appropriately handled in an advice session if the due diligence provisions in § 1064(7) are found to be valid and enforceable by the courts.

CLC
ADVANCING DEMOCRACY THROUGH LAW

February 27, 2023

Submitted electronically to Julie.Aube@maine.gov

Jonathan Wayne, Director
Maine Ethics Commission
135 State House Station
Augusta, ME 04333

Dear Director Wayne,

Campaign Legal Center (CLC) respectfully submits these comments to the Maine Ethics Commission (Commission) regarding the Invitation to Comment on Proposed Rule Amendments (Proposed Rule) to provide guidance for complying with Maine's ban on election spending by foreign government-influenced entities.[1]

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American's right to an accountable and transparent democratic system.

By passing Question 2 and enacting 21-A M.R.S. § 1064 (the Act), Maine voters joined a growing number of states seeking to protect their elections from foreign influence.[2] CLC commends the Commission's rulemaking to provide guidance for complying with the Act. Adopting rules now will help prevent foreign meddling in Maine's 2024 elections and provide valuable guidance to the regulated

[1] Maine Comm'n on Governmental Ethics and Election Practices, *Invitation to Comment on Proposed Rule Amendments – Political Spending in Maine by Foreign Governments*, (Feb. 5, 2024), https://www.maine.gov/ethics/sites/maine.gov.ethics/files/inline-files/Invitation%20to%20Comment%20on%20Proposed%20Rule%20Amendments_0.pdf.

[2] *See* Alaska Stat. § 15.13.068; Cal. Gov. Code § 85320(a); Colo. Rev. Stat. § 1-45-103.7(5.3); Fla. Stat. § 106.08(12)(b); Haw. Rev. Stat. § 11-356; Idaho Code Ann. § 67-6610d; Ind. Code § 3-9-2-11; Iowa Code § 68A.404(2)(c); La. Stat. Ann. § 18:1505.2(M); Md. Code, Election Law § 13-236.1; Mo. Const. Art. XIII, § 23(3)(16); Minn. Stat. § 211B.15, subd. 4a-4b; Miss. Code Ann. § 23-15-819; Mont. Code Ann. § 13-37-502; Neb. Rev. Stat. § 49-1479.03; Nev. Rev. Stat. § 294A.325; N.H. Rev. Stat. Ann. § 664:5(VI); N.J. Stat. Ann. § 19:44A-8.1(e); N.Y. Elec. Law § 14-107(3); N.D. Cent. Code § 16.1-08.1-03.15; Ohio Rev. Code § 3517.13; S.D. Codified Laws § 12-27-21; Wash. Rev. Code § 42.17A.417; W. Va. Code § 3-8-5g.

community and the public.

CLC's comments and recommendations are intended to assist the Commission in ensuring that the Proposed Rule clearly and effectively implements the Act. Maine Citizens for Clean Elections provided assistance in the development of these comments. First, we recommend revising the Proposed Rule's "Public List" provision and safe harbor to provide more comprehensive guidance to the regulated community and the public. Second, we recommend revising the proposed "internet platform" definition to ensure it comprehensively covers platforms selling political advertising to Maine residents. Third, we recommend simplifying the Proposed Rule's disclaimer provision. Fourth, we recommend that the Proposed Rule emphasize the Act does not prohibit or otherwise restrict a media provider from reproducing prohibited campaign advertising as part of a news story. Finally, we recommend revisions to a series of the Proposed Rule's definitions.

Each part of our comments also includes proposed text for the final rule based on our recommendations. We would be happy to work with the Commission as it considers amendments for the final rule.

I. The Commission should revise its "Public List" provision to include more effective guidance for the regulated community and strengthen the Proposed Rule's safe harbor.

CLC recommends revising the Proposed Rule's "Public List" requirement to broaden the types of guidance it will provide to the public and the regulated community. CLC also recommends strengthening the safe harbor provision by prohibiting a media provider from publishing a campaign advertisement where it knows or should have known that the advertiser is a foreign government-influenced entity.

The Act requires broadcasters, television providers, print news outlets, and internet platforms (defined in the Proposed Rule as "media providers") to "establish due diligence policies, procedures, and controls" that are "reasonably designed" to prevent the media providers from publishing political advertising by foreign government-influenced entities.[3] To implement this requirement, the Proposed Rule provides a safe harbor for media providers whose due diligence policies include certain features, including that a media provider decline to publish campaign advertisements by purchasers "listed by the Commission on its website as a foreign government-influenced entity" or for whom the media provider "has actual knowledge of facts indicating that" the purchaser is a foreign government-influenced entity. In turn, the Proposed Rule provides that the "Commission will maintain a list on its website" of entities determined by the Commission to be foreign government-influenced entities through its enforcement proceedings. The Proposed Rule further provides that an entity may request to be removed from the

[3] 21-A M.R.S. § 1064(7).

list by providing evidence it "no longer meets the definition of a foreign government-influenced entity."

CLC supports the Commission's intent to provide guidance to media providers regarding entities that have been identified as foreign government-influenced entities under the Act. However, the proposed public list of foreign government-influenced entities identified in enforcement proceedings may be of limited use to the regulated community and the public. For example, particularly for publicly traded corporations, the public list could quickly become out-of-date, causing an entity to be identified as foreign government-influenced on the Commission's website after it no longer meets the definition. Such circumstances could result in confusion for both media providers and purchasers of political advertising.

Rather than maintaining the proposed public list or requiring media providers to check the list under the safe harbor provision, CLC recommends the Commission provide broader guidance on compliance with the Act on its website. Creating an online repository—including guides, advisory opinions, final outcomes of enforcement actions, and other materials related to the Act—will provide more effective guidance and education about the Act, while avoiding potential confusion arising from the Proposed Rule's public list.

CLC also recommends strengthening the safe harbor by requiring that a media provider's due diligence policy specify that it will decline to publish campaign advertisements by entities for which the media provider either *knows or should have known* of an entity's status as a foreign government-influenced entity. To ensure the safe harbor fully implements the Act's due diligence policy requirements, a media provider should not be able to ignore circumstances indicating to a reasonable person that a potential advertiser is a foreign government-influenced entity.

Recommended text for final rule:

8. **Requirements for media providers**

…

B. **Safe Harbor.** A media provider will be deemed to satisfy the requirements of subsection 8(A) if it adopts a policy containing the following features:

…

(4) The policy requires the media provider to decline to publish a campaign advertisement if:

a. the purchaser fails to provide the certification required by subsection (8)(B)(2);

~~b. the purchaser is listed by the Commission on its website as a foreign government-influenced entity in accordance with subsection (8)(E) below;~~ or,

~~c~~ b. the media provider ~~has actual knowledge~~ knows or should have known of facts indicating that, notwithstanding the purchaser's written confirmation to the contrary, the purchaser is a foreign government-influenced entity.

…

E. Public ~~list~~ guidance. The Commission will maintain ~~a list~~ on its website ~~of all entities that it has determined in enforcement proceedings to meet the definition of a foreign government-influenced entity~~ public resources regarding compliance with the Act, including, but not limited to, guides and manuals, advisory opinions, and the Commission's enforcement actions related to the Act. ~~An entity may request to be removed from the list by presenting satisfactory evidence to Commission staff that it no longer meets the definition of a foreign government-influenced entity. If Commission staff reject the request, the entity may request a determination by the Commission.~~

II. The Commission should revise the "internet platform" definition to comprehensively include public-facing websites and applications selling political advertisements received by Maine residents.

To ensure the Proposed Rule fully encompasses internet platforms that provide political advertisements to Maine residents, CLC recommends removing the criteria in the Proposed Rule's definition of "internet platform" that specify its application to certain media providers or to platforms that publish content "primarily intended for audiences within Maine." Instead, CLC recommends amending the definition to include any internet platform that sells more than a minimum dollar threshold of political advertisements that are intended to influence a Maine election.

Under the Act, internet platforms, among other media providers, are required to "establish due diligence policies, procedures, and controls" that are "reasonably designed" to prevent the internet platform from publishing political advertising by foreign government-influenced entities.[4] The Act requires an internet platform that discovers it has distributed such political advertisements to remove the advertisements "and notify the commission."[5] In turn, the Proposed Rule defines "internet platform" to mean "an entity that controls any public-facing website, internet application, or mobile application that sells advertising space" and either: 1) "is also" a print news outlet, broadcaster, or cable or satellite television provider; or 2) "publishes content primarily intended for audiences within Maine." The Proposed Rule further defines "print news outlet" to include "an entity that publishes physically printed news" and, in relevant part, "distributes at least 25 percent of its copy…within the State of Maine."

[4] 21-A M.R.S. § 1064(7).
[5] *Id.*

While the Proposed Rule necessarily focuses on Maine political advertising, the Proposed Rule's approach could unintentionally exclude internet platforms providing substantial political advertising to Maine residents. For example, the public-facing website or digital application of a national or regional print news outlet with a minimal physical circulation within the state seemingly would not be covered by the Proposed Rule; despite the entity's minimal print circulation in Maine, the entity's online news website could still provide significant digital political advertising targeted to Maine residents.[6] Similarly, the proposed definition would appear to exclude other internet platforms that publish a substantial amount of political advertisements received by Maine residents, such as streaming television platforms, because those platforms' content is not "*primarily* intended for audiences within Maine."

In the final rule, CLC recommends revising the definition of "internet platform" to include any entity that sells a certain amount of campaign advertisements, regardless of whether the entities "publish content primarily intended for Maine audiences" or meet the proposed definition of "print news outlet." This approach would better comport with the unique nature of digital political advertising while also excluding smaller platforms that do not sell a substantial amount of Maine political advertising. The proposed revisions for the "internet platform" definition suggested below are drawn from equivalent terms used by other states and in the proposed federal Freedom to Vote Act.[7] The proposed revisions also include a proposed threshold of $1,000 for campaign advertising sales; we would be happy to work with the Commission and other stakeholders to identify an appropriate threshold for the final rule.

Recommended text for final rule:

I. Internet platform. "Internet platform" means an entity that controls any public-facing website, internet application, or mobile application that ~~sells advertising space and:~~
~~(1) is also a print news outlet, television or radio broadcasting station, or provider of cable or satellite television; or~~
~~(2) publishes content primarily intended for audiences within Maine~~ displays, or causes to be displayed, campaign advertisements and receives in excess of [$1,000]

[6] *See, e.g.*, Natasha Singer, *This Ad's for You (Not Your Neighbor)*, N.Y. TIMES (Sept. 15, 2022) https://www.nytimes.com/2022/09/15/business/custom-political-ads.html. *See also* Brendan Fischer & Maggie Christ, CAMPAIGN LEGAL CTR., DIGITAL TRANSPARENCY LOOPHOLES IN THE 2020 ELECTIONS (Apr. 8, 2020) https://campaignlegal.org/sites/default/files/2020-04/04-07-20%20Digital%20Loopholes%20515pm%20.pdf.

[7] *See, e.g.*, Or. Admin. R. 165-012-0525(b) (defining "internet or digital platform" to mean "a public-facing website, internet-enabled application, or other digital application, including but not limited to a social network, ad network, or search engine that displays, or causes to be displayed, digital communications"); *see also* H.R. 11, 118th Cong. § 6108(a) (defining "online platform," in relevant part, as "any public-facing website, web application, or digital application (including a social network, ad network, or search engine)").

in aggregate revenue in a calendar year from displaying, or causing to be displayed, campaign advertisements.

III. The Proposed Rule should be revised to ensure that the disclaimer requirements for advertisements purchased by foreign governments to influence state or local policy are consistent.

To ensure consistency regarding the form of the disclaimer required for advertisements purchased by foreign government-influenced entities to influence state or local policy, CLC recommends specifying that the disclaimer may include specific information about state law and requiring the disclaimer be included in such advertisements that can be received directly by Maine residents.

Under the Act, if a foreign government-influenced entity purchases an advertisement to influence state or local policy, or to influence relations with a foreign country or political party, the advertisement must include a disclaimer identifying the purchaser as a "foreign government" or "foreign government-influenced entity." The Proposed Rule provides that the disclaimer may include "additional truthful and accurate language" to describe the purchaser, including language explaining that "'foreign government' and 'foreign government-influenced entity' are defined terms under state law." The Proposed Rule further provides that the disclaimer requirement applies "only to public communications purchased from media providers or otherwise intended to be view primarily by Maine residents."

CLC supports the Commission's guidance regarding optional additional language in the disclaimer permitting advertisers to explain certain terms of art in Maine law. However, the Proposed Rule is open-ended regarding other "truthful and accurate language" an ad purchaser may couch within the disclaimer. An open-ended invitation to ad purchasers to modify the disclaimer may put the Commission in the position of evaluating the truthfulness or accuracy of claims made by advertisers in their disclaimers and result in substantially varying disclaimers from advertiser to advertiser, potentially creating confusion for the public while significantly increasing the burden on Commission staff enforcing the requirement. CLC thus recommends limiting the guidance to permitting additional language in the disclaimer only to reference that "foreign government-influenced entity" and "foreign government" are terms defined in Maine law.

CLC also appreciates the Commission's intent to provide guidance with respect to the application of the disclaimer rules. But the Proposed Rule's application to advertisements "purchased from media providers or otherwise intended to be viewed primarily by Maine residents" may substantially and unnecessarily limit the scope of the disclaimer requirements. Instead, as with other political advertising disclaimers, CLC recommends clarifying the Proposed Rule's application of the disclaimer requirement to include any advertisement that can be received directly by Maine residents.

Recommended text for final rule:

7. **Disclaimer in paid communications**

…

B. **Disclaimer content.** A public communication subject to the disclaimer requirement of this subsection must clearly and conspicuously contain the words "Sponsored by" immediately followed by the name of the foreign government-influenced entity that made the disbursement and a statement identifying that foreign government-influenced entity as a "foreign government" or a "foreign government-influenced entity." The disclaimer may include ~~additional truthful and accurate language describing the entity, including~~ language to indicate that "foreign government" and "foreign government-influenced entity" are defined terms under state law, ~~for example,~~ as follows: "sponsored by [entity], a [foreign government or foreign government-influenced entity, as appropriate] as defined in Maine law."

~~B.~~ C. **Applicability.** This subsection applies ~~only~~ to public communications ~~purchased from media providers or otherwise intended to be viewed primarily~~ that can be received directly by Maine residents.

IV. The Commission should consider revising the Proposed Rule to emphasize that the Act contains no restrictions on media providers reporting on campaign advertisements.

CLC recommends revising the Proposed Rule to emphasize that the Act's requirements impose no duties or restrictions on media providers who reproduce prohibited foreign campaign advertising in the course of reporting news stories.

Under the Proposed Rule, the safe harbor for media providers states, in relevant part, that a media provider's "due diligence policy may allow reproduction of a campaign advertisement in a news story." To ensure this clause in the safe harbor provision does not create confusion regarding the requirements and prohibitions of the Act or the rule, CLC also recommends revising the Proposed Rule to state that no part of the rule may be interpreted to prohibit or restrict media providers from reproducing unlawful campaign advertisements as part of a news story.

Recommended text for final rule:

8. **Requirements for media providers**

…

A. **Policies, procedures and controls.** Each media provider must establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a campaign advertisement purchased by a foreign

government-influenced entity. Nothing in these rules may be interpreted to prohibit or otherwise restrict a media provider from reproducing a campaign advertisement prohibited by 21-A M.R.S. § 1064 as part of a news story, commentary, or editorial.

V. The Commission should consider revising some of the Proposed Rule's definitions to ensure they are comprehensive and provide sufficient guidance.

CLC recommends revisions to the following definitions in the Proposed Rule:

A. Direct participation in a decision-making process.

Under the Proposed Rule, direct participation in a decision-making process means "to communicate a direction or preference" regarding a decision-making process "through a person who is an employee or official of a foreign government or an employee, director, or member of a foreign government-owned entity."

CLC recommends revising the definition to include communications made by an owner of a foreign government-owned entity. Because foreign government-owned entities may have private owners, in addition to their foreign government owners, this definition should also encompass communications by such private owners.

Recommended text for final rule:

C. **Direct participation in a decision-making process.** To "directly participate in the decision-making process" means to communicate a direction or preference concerning the outcome of the decision-making process through a person who is an employee or official of a foreign government or an employee, director, ~~or~~ owner, or member of a foreign government-owned entity.

B. Indirect beneficial ownership.

The Proposed Rule provides an example of "indirect beneficial ownership" that helpfully illustrates how to determine indirect beneficial ownership in an entity by a foreign government. CLC recommends providing an additional example to demonstrate *partial* indirect beneficial ownership of an entity by a foreign government.

Recommended text for final rule:

G. **Indirect beneficial ownership.** "Indirect beneficial ownership" means having an ownership interest in an entity as a result of owning an interest in an intermediate entity that either directly owns part or all of the entity or indirectly owns part or all of the entity through other intermediate entities. For example~~,~~:

(1) if a foreign government wholly owns a firm that has a 10% interest in a Maine corporation, the foreign government indirectly owns 10% of that

corporation.

(2) if a foreign government holds a 25% ownership interest in Maine Corporation A and Maine Corporation A, in turn, holds a 40% ownership interest in Maine Corporation B, the foreign government indirectly owns 10% of Maine Corporation B.

C. Indirect participation in a decision-making process.

Under the Proposed Rule, "indirect participation in a decision-making process" means, in relevant part, to "knowingly communicate a direction or preference … using an intermediary, whether or not the intermediary has any formal affiliation with the foreign government or foreign government-owned entity." CLC recommends revising the definition to include communications by agents of a foreign government or foreign government-owned entity. Including agents will ensure that the definition comprehensively covers any persons who may be acting for or on behalf of a foreign government or foreign government-influenced entity, regardless of their official position.

Recommended text for final rule:

H. **Indirect participation in a decision-making process.** To "indirectly participate in the decision-making process" means to knowingly communicate a direction or preference concerning the outcome of the decision-making process using an intermediary or agent, whether or not the intermediary or agent has any formal affiliation with the foreign government or foreign government-owned entity.

D. Structure.

The Proposed Rule provides that "structure" includes, in relevant part, "creating a business entity whose ownership is difficult to ascertain." While CLC supports including this example of structuring in the Proposed Rule, we recommend providing a clearer standard—"readily ascertainable"—for evaluating whether a person's actions would constitute "structuring" under the Act.

Recommended text for final rule:

M. **Structure.** "Structure" means to arrange for financial activity to be made by or through a person for the purpose of evading the prohibitions and requirements of 21-A M.R.S. § 1064. Structuring includes, but is not limited to, creating a business entity whose ownership ~~is difficult to ascertain~~ cannot be readily ascertained for the purpose of concealing ownership or control by a foreign government.

Conclusion

Thank you for your consideration of CLC's comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Commission in promulgating the final rule to implement Maine's prohibition on foreign government spending in its elections.

Respectfully submitted,

/s/ Aaron McKean
Aaron McKean
Legal Counsel

March 11, 2024

Submitted electronically to Julie.Aube@maine.gov

Jonathan Wayne, Director
Maine Ethics Commission
135 State House Station
Augusta, ME 04333

Dear Director Wayne,

Campaign Legal Center (CLC) respectfully submits this letter to the Maine Ethics Commission (Commission) to supplement our previous comments in support the Commission's rulemaking.[1] These supplemental comments address questions that were recently raised in litigation about the operation of particular provisions of 21-A M.R.S. § 1064 (the Act).[2]

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American's right to an accountable and transparent democratic system.

Our recommendations are intended make certain implications of the Act explicit. First, we recommend further specifying the circumstances under which a foreign government or foreign government-owned entity actually participates in an entity's decision-making process. Second, we recommend revising the Proposed Rule to elaborate on the Act's application to entities that are wholly owned or majority owned by foreign governments. Each part of our comments also includes proposed text for the final rule based on our recommendations. We would be happy to work with the Commission as it considers amendments for the final rule.

[1] Campaign Legal Ctr., *Comments on Maine Ethics Commission's Rulemaking on Foreign Influenced Election Spending* (Feb. 27, 2024), available at https://campaignlegal.org/document/clc-comments-maine-ethics-commissions-rulemaking-foreign-influenced-election-spending.
[2] *See Central Maine Power v. Maine Comm'n on Governmental Ethics and Elections Practices*, No. 1:23CV00450, 2024 WL 866367 (D. Me. Feb. 29, 2024).

I. The Commission should revise the Proposed Rule to further elucidate when a foreign government or foreign government-owned entity participates in electoral spending decisions by another entity.

The Proposed Rule defines "direct participation in a decision-making process" and "indirect participation in a decision-making process," for which we suggested revisions in our previous comments.[3] In addition to those recommendations, CLC recommends the Commission provide additional guidance regarding participation in a decision-making process by incorporating the Act's requirements into the rule and providing examples illustrating the Act's application.

First, the Commission should consider explicitly incorporating the Act's requirement that a foreign government or foreign government-owned entity actually participate in the decision-making process regarding another entity's election-related spending for that entity to be considered a foreign government-influenced entity, itself. The Proposed Rule currently provides guidance as to the actions a person must take to directly or indirectly participate in a decision-making process—generally, communicate a direction or preference regarding that decision—and our proposed language would reiterate that the expression of such a communication or preference must occur as part of the other entity's decision-making process. In other words, a person expressing a direction or preference for the outcome of another entity's decision-making process *outside of* that entity's actual decision-making process will not cause the entity to become a foreign government-influenced entity.

Second, the Commission should consider providing examples that illustrate the circumstances under which the Commission may—or may not—find that a foreign government or foreign government-owned entity actually participates in another entity's electoral spending decisions. The Federal Election Commission (FEC), for example, has long enforced its own rule regarding foreign national participation in electoral decision-making—mirroring the Act's restriction on foreign participation in decisions involving election-related activities[4]—in a variety of different contexts, demonstrating the fact-specific nature of the determination.[5] As such, the Commission could provide fuller guidance to the regulated community and the public by providing examples to illustrate that not every communication by or involvement of a foreign government or foreign government-owned entity with

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[3] Campaign Legal Ctr., *supra* note 1, at 8-9.

[4] *See* 11 C.F.R. § 110.20(i).

[5] *See, e.g.*, FEC Adv. Op. 2004-26 (Aug. 20, 2004) (concluding federal law permits the foreign national spouse of a candidate to participate as a volunteer in certain campaign-related activities but prohibits the candidate's foreign national spouse from participating in the candidate's "decisions regarding his campaign activities" and "managing or participating in the decisions" of the candidate's political committees) https://www.fec.gov/files/legal/aos/2004-26/2004-26.pdf; *see also*, Conciliation Agreement, MUR 7122 (Dec. 19, 2018) (finding that foreign national owners of a U.S. corporation participated in the electoral spending decision-making process of the corporation by directing the corporation's U.S. citizen executive director to make contributions to a federal super PAC from the corporation) https://www.fec.gov/files/legal/murs/7122/19044461675.pdf.

another entity would be considered participating in that entity's electoral decision-making process.

Recommended text for final rule:

9. **Direct or indirect participation in a decision-making process.**

A. **Actual participation required.** For the purposes of 21-A M.R.S. § 1064(1)(E)(2)(b), an entity is a foreign government-influenced entity only if a foreign government or foreign government-owned entity actually participates directly or indirectly in the decision-making process, as defined by this rule, with regard to the activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum.

B. **Acts not constituting actual participation.** Unless shown to actually influence an entity's decision-making process with regard to the activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, the following actions do not constitute direct or indirect participation by a foreign government or foreign government-owned entity in the decision-making process of another entity:

(1) The receipt of an unsolicited communication regarding the decision-making process from an employee, official, owner, or agent of a foreign government or foreign government-owned entity.

(2) Participation in the entity's decision-making process for the entity's general budget, without participating in the decision-making process with respect to either total spending on activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum or specific contributions, expenditures, or other donations or disbursements of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum.

II. The Commission should revise the Proposed Rule to delineate different entities covered by the Act's restrictions on foreign government-influenced entities.

The Act establishes restrictions on electoral spending by foreign government-influenced entities.[6] In turn, the Act defines a foreign government-influenced entity to include, in relevant part, "a foreign government" and a "firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity…has direct or indirect beneficial

[6] 21-A M.R.S. § 1064(2).

ownership of 5% or more of the…applicable ownership interests."[7] The Act defines a foreign government-owned entity to be majority owned by a foreign government: "an entity in which a foreign government owns or controls more than 50% of its equity or voting shares."[8] Plainly, all foreign government-owned entities are entirely included within the definition of foreign government-influenced entity, because any entity that is more than 50% owned by a foreign government is necessarily 5% or more owned by a foreign government. Additionally, although not separately defined by the Act, any entity entirely owned by a foreign government would also necessarily qualify as a foreign government-influenced entity.

Because the Act applies to all foreign government-influenced entities, there was no need for the Act to separately note that its restrictions apply to all wholly foreign government-owned entities and foreign government-owned entities. However, to ensure the Act is given its fullest application, the Commission should consider revising the Proposed Rule to specify that the Act's requirements applicable to foreign government-influenced entities apply equally to foreign government-owned entities and entities that are wholly owned by foreign governments. Although "foreign government-influenced entity" under the Act necessarily includes entities majority or wholly owned by foreign governments, explicitly incorporating these entities into the final rule will ensure the rule comprehensively addresses the full scope of the Act, providing fuller guidance to the regulated community and the public.

Recommended text for final rule:

2. Ownership or control by a foreign government.

A. An entity qualifies as a foreign government-influenced entity subject to the requirements of 21-A M.R.S. § 1064 if it is any of the following:

(1) A foreign government under 21-A M.R.S. § 1064(1)(D).

(2) An entity that is wholly owned by a foreign government.

(3) A foreign government-owned entity under 21-A M.R.S. § 1064(1)(F).

(4) A foreign government-influenced entity under 21-A M.R.S. § 1064(1)(E)(2).

B. An entity does not qualify as a foreign government-influenced entity pursuant to 21-A M.R.S. § 1064(1)(E)(2)(a) solely because multiple foreign governments or foreign government-owned entities have ownership interests in the entity that, if combined, would exceed 5% of the entity's total equity or other ownership interests.

[7] 21-A M.R.S. § 1064(1)(E)(1) and (2)(a).
[8] 21-A M.R.S. § 1064(1)(F).

Conclusion

Thank you for your consideration of our supplemental comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Commission in promulgating the final rule to implement Maine's prohibition on foreign government spending in its elections.

Respectfully submitted,

/s/ Aaron McKean
Aaron McKean
Senior Legal Counsel

February 28, 2024

Jonathan Wayne
Executive Director
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333-0135

Re: Proposed Amendments to the Commission's Rules; New Section 15 (foreign government contributions or expenditures) (Agenda Item #1)

Dear Director Wayne:

Agenda Item #1 is the public hearing regarding proposed rules to implement the foreign government contribution and expenditure ban enacted by citizen initiative in November 2023.

As you know, Maine Citizens for Clean Elections and MCCE Action have long been strong advocates for campaign finance laws, elections, and government that serve the public interest – both in principle and in practice here in Maine. We support measures that increase fairness, inclusion, and opportunity in our politics and promote robust participation by Maine people in their government.

We appreciate the work of the Commission developing these rules. Rather than providing substantive comments, we endorse the comments filed yesterday by the Campaign Legal Center. We consulted with CLC in the development of their comments, and we believe they cover the subject thoroughly.

Sincerely,

Anna Kellar

Executive Director

P.O. Box 18187, Portland, ME 04112 • info@mainecleanelections.org

Comments of Kaitlin LaCasse on Behalf of Protect Maine Elections
before the Maine Ethics Commission
February 28, 2024

Good Morning to the members of the Maine Ethics Commission. My name is Kaitlin LaCasse and I am the campaign manager for Protect Maine Elections.

Thank you for the opportunity to submit comments concerning the Commission's proposed amendments to its rules to implement 21-A M.R.S. § 1064, which prohibits foreign governments from making contributions and expenditures to influence elections in Maine.

Protect Maine Elections is the ballot question committee formed by Maine voters in response to the Federal Elections Commission ruling that it has no jurisdiction over state referendum campaigns. This ruling created a dangerous loophole that allows corporations owned and controlled by foreign governments to spend in referendum campaigns unless explicitly prohibited by state law. This initiative closes that loophole and puts elections back in the hands of Maine people — and out of reach from foreign government-owned entities.

On behalf of Protect Maine Elections and the 86% of Maine voters who supported this law on election day, thank you to the Ethics Commission staff for their careful drafting of these amendments, and to the Commission members for the thoughtful conversation during the last meeting.

Protect Maine Elections supports the amendments as drafted.

And, this law is more important than ever. According to Maine Citizens for Clean Elections, entities that are owned, controlled, and/or influenced by foreign governments spent more than $100 million on Maine ballot initiatives between 2020 - 2023. Last election cycle alone, such entities were responsible for 83% of spending.

Alarmed with this trend of out of control spending by foreign entities, a record breaking 86% of Maine voters voted in support of this initiative. This is the largest margin of victory on a Maine statewide ballot initiative in the state's history, ever.

The only opponents to this initiative are the very foreign entities that are seeking to preserve their power and multinational media corporations that are the biggest benefactors in the political spending arms race each cycle. Maine voters delivered the clearest of messages on election day, telling the monied interests and the political class that we are taking our government back. And, we are outraged that these entities are currently challenging the law in court in an effort to overturn the will of the Maine people, who spoke with a near singular voice on Nov. 7th in support of protecting our elections from foreign government interference.

Thank you again to the Ethics Commission for continuing to move forward with the rulemaking process.

AMERICAN PROMISE

To: Members of the Maine Ethics Commission
From: Brian Boyle, Chief Program Officer
& General Counsel at American Promise
Re: Proposed Rule Amendments:
Political Spending in Maine by Foreign Governments
Date: February 28, 2024

American Promise's Comments Concerning Proposed Amendments to the Commission's Rules to Implement 21-A M.R.S. § 1064

Introduction

My name is Brian Boyle and I currently serve as Chief Program Officer & General Counsel at American Promise. Thank you for the opportunity to submit comments concerning the Commission's proposed amendments to its rules to implement 21-A M.R.S. § 1064, which prohibits foreign governments from making contributions and expenditures to influence elections in Maine.

American Promise is a nationwide nonprofit organization that mobilizes broad, cross-partisan support for an amendment to the United States Constitution that would empower the States and Congress to set reasonable guardrails on money in our political system. We are proud to have nearly 6,000 supporters in the State of Maine, including several volunteer leaders who dedicate countless hours to educating their fellow citizens about a workable and enduring constitutional solution to the vexing problem of money in politics.

As explained more fully below, the Commission's proposed amendments to its rules are reasonably and appropriately designed to implement the substantive policy contained in

Section 1 of Ballot Question 2, which received the overwhelming support of 86% of Maine voters in the November 2023 election. I offer comments today both in support of the proposed amendments, and to urge the Commission to hold future hearings to implement the accountability provisions in Section 2 of Ballot Question 2.

Comments on Proposed Amendments

Foreign interests understand that America's existing campaign finance system presents many opportunities to exert influence over policy in the United States.[1] In recent years, they have not been shy in their attempts to influence ballot elections across the country. As the Commission is aware, foreign government-influenced entities have reportedly spent more than $100 million in Maine's ballot elections over the past three years.[2] In response to this threat, last November 86% of Maine's voters passed Question 2 to prevent foreign government-influenced entities from spending money in the state's elections. This was the largest margin of victory in the 115-year history of ballot questions in Maine, and it sent an unequivocal message: Maine voters want to safeguard the integrity of self-government by protecting their elections from foreign interference.

The Commission's proposed amendments are carefully drafted to implement the statutory framework contained in Question 2 and to provide workable guidance to those subject to its provisions. In particular, the following features of the proposed amendments are worth highlighting:

1. ***The proposed amendments clearly identify the types of public communications for which due diligence is required by media providers.***

Section 7 of 21-A M.R.S. § 1064 requires a covered media provider to "establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement in violation of this section." Section 15(8)(A) of the proposed amendments makes clear

[1] American Promise provides more context on this vulnerability in our November 2023 report, *The Problem of Foreign Money in Politics*.

[2] *See* Utility parent companies spend millions opposing public power amid foreign electioneering concerns.

that due diligence procedures are required only for public communications that qualify as a "campaign advertisement," which Section 15(1)(A) reasonably defines as "a paid public communication to influence the nomination or election of a candidate or to influence the initiation or approval of a referendum."

2. ***The proposed amendments contain a reasonable "safe harbor" for media providers.***

For media providers subject to the due diligence requirements of 21-A M.R.S. § 1064(7), the proposed amendments create a safe harbor. A media provider will be deemed compliant if it adopts a policy with five reasonable components. First, the policy must prohibit publication of a campaign advertisement if the media provider knows that it comes from a foreign government-influenced entity. *See* Section 15(8)(B)(1). Second, the policy must require any purchaser of a campaign advertisement to certify that it is not a foreign government-influenced entity or acting on behalf of one. That requirement can be satisfied in writing or by clicking a box online. *See* Section 15(8)(B)(2). Third, the policy must require preservation of those certifications for at least 2 years. *See* Section 15(8)(B)(3). Fourth, the policy must prohibit the media provider from publishing campaign advertisements that lack a certification or that have a certification which the media provider actually knows to be false. *See* Section 15(8)(B)(4). And fifth, if the media provider is an Internet platform, its policy must require immediate removal of prohibited campaign advertisements. *See* Section 15(8)(B)(5).

Taken together, these safe harbor provisions amount to a reasonable set of compliance measures for media providers.

3. ***The proposed amendments clarify that individual entities below the 5% threshold do not qualify as foreign government-influenced entities.***

The language in 21-A M.R.S. § 1064(1)(E)(2)(a) includes within the definition of "foreign government-influence entity" an entity "with respect to which a foreign government or foreign government-owned entity . . . has direct or indirect beneficial ownership of 5% or more of the total . . . applicable ownership interests." The proposed amendments make clear that you can't combine the ownership stakes of multiple entities to reach that 5% threshold. Per Section 15(2) of the proposed amendments, an individual entity

will only qualify as a foreign government-influenced entity if its own ownership interests meet the 5% threshold.

Future Public Hearings Concerning Accountability for Support of a Constitutional Amendment

Section 2 of Ballot Question 2 (entitled "Accountability of Maine's Congressional Delegation to the people of Maine with respect to federal anticorruption constitutional amendment") contains important measures designed to ensure that Maine's federal representatives in Congress are heeding the citizens' call for a constitutional amendment to address money in politics. As set forth in Section 2(1)(C) of Question 2, the State of Maine has officially called upon Congress to propose an amendment to the United States Constitution that would "reaffirm the power of citizens through their government to regulate the raising and spending of money in elections."

The need for such a constitutional amendment has never been clearer. Not long after Maine voters overwhelmingly approved Question 2, its underlying policy was challenged in federal court by foreign government-influenced plaintiffs that would be subject to its provisions.[3] Unhappy with the decisive policy choice of Maine's voters, those plaintiffs have turned to the judiciary for relief because decisions by the United States Supreme Court over the past five decades have emboldened such foreign entities to claim that they have a right—*under the United States Constitution*—to spend money in American elections, regardless of state or federal laws to the contrary.

For anyone who hasn't been closely following the Supreme Court's campaign finance decisions, it might sound absurd that foreign entities are asserting a constitutional right to spend money in our elections. How did we get to this point? Over a number of years, the Supreme Court has made itself the nation's chief regulator of money-in-politics, and along the way it has decided cases that take most options off the table for policymakers in the States and Congress.

[3] *See Central Maine Power Co. (CMP) v. Maine Commission on Governmental Ethics and Election Practices*, No. 1:23-cv-00450-NT (D. Me. 2023) and *Versant Power, et al. v. Schneider*, No. 1:23-cv-00451-NT (D. Me. 2023).

The crucial first step came in 1976 in *Buckley v. Valeo*.[4] Although the First Amendment had been in existence for 185 years at that point, *Buckley* held for the first time that spending money in elections is a form of political expression and association that is protected by the First Amendment.[5] Over the past five decades, the *Buckley* doctrine has created a system where the judiciary—and ultimately the Supreme Court—gets to have the final say on all issues of campaign finance. This has created a "legacy of inflexible central mandates (irrevocable even by Congress)" imposed by the Court over the electoral process. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

Regrettably, the Supreme Court has not created a workable and enduring framework for dealing with money in politics, but a new constitutional amendment would do just that. I look forward to future Commission hearings, pursuant to Section 2(3) of Question 2, regarding "anticorruption amendment proposals introduced in Congress, and the members of Maine's Congressional Delegation sponsoring such proposals." Now more than ever it is critically important for the people of Maine to have an opportunity to voice their support for such an amendment to the United States Constitution.

Thank you for your consideration.

Brian Boyle
Chief Program Officer & General Counsel
American Promise

[4] 424 U.S. 1 (1976).

[5] *Id.* at 25.

March 11, 2024

By E-mail

Maine Commission on Governmental Ethics and Election Practices
c/o Julie Aube
135 State House Station
Augusta, ME 04333-0135

Julie.Aube@maine.gov

Re: Comments on Proposed Amendments to Chapter 1, § 15: Rules Regarding Foreign Government-Influenced Entities

Dear Commission:

I write to provide comments on behalf of Versant Power ("Versant") regarding the Commission's proposed amendments to the Rules regarding Foreign Government-Influenced Entities, 94-270 C.M.R. ch. 1, § 15 (the "Proposed Rule"). The Proposed Rule purports to implement "An Act to Prohibit Campaign Spending by Foreign Governments," to be codified at 21-A M.R.S. § 1064 (the "Act"). Versant appreciates the Commission's consideration of these comments.

Versant's comments are twofold. First, Versant believes that the Proposed Rule shares and exacerbates the constitutional flaws contained in the Act, including the first amendment, pre-emption clause, and dormant commerce clause concerns set forth in its briefing in *Central Maine Power Co., et al. v. Maine Comm'n on Gov't Ethics and Election Practices, et al.,* Docket No. 1:23-cv-00450 (D. Me.).

Primarily, however, as the Commission is aware, in the consolidated lawsuit involving the constitutionality of the Act (the "Lawsuit"), the United States District Court for the District of Maine just issued a Preliminary Injunction Order enjoining enforcement of the Act.[1] The Order – relying in part on language in the Proposed Rule – concluded that the Act is likely unconstitutional under both the Supremacy Clause and the First Amendment.[2] In light of the Order, it would be a waste of administrative resources for the Commission to adopt the Proposed Rule. The Court suspended the enforcement of the Act "until final judgment is entered" in the Lawsuit.[3] Because any rules promulgated before a resolution of the Lawsuit would be unenforceable, the Commission should suspend this rulemaking proceeding.

[1] *See Central Maine Power Co., et al. v. Maine Comm'n on Gov't Ethics and Election Practices, et al.,* Docket No. 1:23-cv-00450, Order on Plaintiffs' Motion for Preliminary Injunction at 37-38 (D. Me. Feb. 29, 2024) (the "Order").
[2] *See* Order at 37-38 (citing to 94-270 C.M.R., ch. 1 § 15(1)(C) of the Proposed Rule); *see also* Order at 40 ("The Act is enjoined while this litigation proceeds.").
[3] Order at 40.

There is no reason for the Commission to act now: the Act's requirement that the Commission adopt rules does not set a specific timeline in which the Commission must promulgate those rules.[4] And more fundamentally, because the is Act enjoined and presently unenforceable, the Commission is arguably not subject to the Act's mandate that the Commission "adopt rules to administer the provisions of" the Act.[5] No administration of the Act is currently allowed. It logically follows that the Commission's rulemaking proceeding should be suspended as well.

Finally, the Administrative Procedures Act ("APA") itself presents another roadblock for the adoption of the Proposed Rule for as long as the lawsuit remains pending. The APA provides that, to be enforceable, a rule cannot take effect unless it "is approved by the Attorney General as to form and legality."[6] Here, the Order concluded that the Proposed Rule and the Act are likely unconstitutional.[7] Moreover, the Governor – a former Attorney General herself – vetoed the Act because she thought it was likely unconstitutional.[8] For these reasons, even if the Commission proceeds through this rulemaking, the Attorney General should be hard pressed to approve the Proposed Rule "as to form and legality."[9] Any rulemaking before resolution of the Lawsuit would likely be futile and a waste of time and resources.

Rather than expend additional administrative resources in the face of this level of uncertainty, the Commission should suspend this rulemaking until the completion of the Lawsuit.

Versant thanks the Commission for considering these comments.

Sincerely,

Arielle Silver Karsh
Arielle Silver Karsh
Vice President, Legal and Regulatory Affairs

[4] *See* 21-A M.R.S. § 1064(10).
[5] *See* 21-A M.R.S. § 1064(10).
[6] 5 M.R.S. § 8052(7)(B).
[7] *See* Order at 37-38.
[8] *See* Order at 4-5.
[9] 5 M.R.S. § 8052(7)(B).

CENTRAL MAINE POWER

March 11, 2024

July Aube
Commission Assistant
Maine Commission on Governmental
Ethics & Elections Practices
135 State House Station
Augusta, ME 04333

Dear Members of the Commission:

Central Maine Power Company (CMP) respectfully submits the following comments regarding the proposed rules implementing 21-A M.R.S. § 1064, which prohibits U.S. companies from making campaign-related contributions and expenditures in Maine. CMP appreciates the Commission's time and attention to these comments. CMP, a 125-year-old Maine company, is Maine's largest electric utility and serves more than 600,000 retail electric customers in central, western, and southern Maine. As a Maine transmission and distribution utility, CMP is governed by executive officers and a board of directors that are all U.S. citizens. As a public utility, CMP is pervasively regulated under Maine law, and its activities are routinely the subject of proposed legislation. Because of the intimate connection between its operations and Maine public policy, CMP has long participated actively in Maine's public affairs through political advocacy. Most recently, CMP has been targeted by multiple referenda that would have deprived it of its property. As a result of these referenda, brought by political opponents and funded by competing fossil fuel energy companies, CMP has engaged in political speech to defend its business interests. Section 1064 purports to impose a gag on CMP (and many other American companies), thereby ensuring that Maine voters can only hear one side of a political debate in the future. Egregiously, Section 1064 would impose criminal penalties for engaging in political speech.

83 Edison Drive; Augusta, ME 04336
Telephone 207-329-5775
www.cmpco.com, email: Carlisle.tuggey@avangrid.com

AVANGRID

As the Commission is aware, CMP—together with other plaintiffs, including a coalition of Maine legislators and voters, the Maine Press Association, and the Maine Association of Broadcasters—has brought a First Amendment challenge to Section 1064 in federal court. As CMP has argued, Section 1064 infringes on the constitutional right to engage in free speech because it purports to silence numerous American companies because of passive investments by sovereign wealth funds or public pension funds. The sweeping provisions of Section 1064 have no relationship to any actual foreign government influence or control over campaign spending by American companies.

On February 29, 2024, the U.S. District Court for the District of Maine issued an injunction barring enforcement of Section 1064 because "a substantial number of the Act's applications are likely unconstitutional." Because of the extraordinary burden on speech imposed by Section 1064, the court applied strict scrutiny—the most stringent standard possible—which requires the state law to be "narrowly tailored" to serve a compelling government interest. The court concluded that Section 1064 was not narrowly tailored, but would instead "prohibit a substantial amount of protected speech." Specifically, it would deprive U.S. citizens "of their First Amendment right to engage in campaign spending." The court concluded that Section 1064's thresholds were "arbitrarily chosen," and observed that it could "not see how it can survive" under Supreme Court precedent. The court went on to note that Section 1064 "is likely to stifle the speech of domestic corporations regardless of whether a foreign government or foreign government-owned entity has any actual influence over their decision-making on campaign spending." Accordingly, the court enjoined enforcement of all aspects of the law.

In light of the federal court's clear ruling, CMP respectfully requests that the Commission suspend its rulemaking process. It is unwise, as a general matter, to engage in rulemaking while litigation is ongoing. It is certainly indefensible to adopt rules meant to enforce a law that a federal court has found to be facially unconstitutional. There is no reason, nor any benefit, to adopting rules until litigation is finally resolved. If Section 1064 is ultimately struck down as unconstitutional, as the court found to be

the most likely outcome of the litigation, then the rules would be meaningless. In the unlikely event some narrow aspect of the law survives, the court's final ruling in the matter will provide the Commission with guidance regarding the nature and scope of any permissible aspects of Section 1064, and in turn any future rulemaking efforts by the Commission. Until such time as the litigation concludes, however, no proposed rules should be adopted.

Sincerely,

Carlisle Tuggey, General Counsel

March 8, 2024

Chairman William J. Schneider
Maine Commission on Governmental Ethics and Election Practices
45 Memorial Circle
Augusta, ME 04330

Re: Written comments on proposed rulemaking to amend and implement 21-A M.R.S. § 1064

Dear Mr. Chairman and Members of the Commission,

We are Jane Pringle, Kenneth Fletcher, Bonnie Gould, Brenda Garrand, and Lawrence Wold. We are all registered Maine voters and Electors under Article II and Article IV, Part Third of the Maine Constitution. We are also plaintiffs in *Central Maine Power, et al. v. Commission on Governmental Ethics and Election Practices*, Docket No. 1:23-cv-00450-NT, now pending in the federal district court in Maine. In our complaint we challenge the Foreign Government-Influenced Entity Act, 21-A M.R.S. § 1064, as it applies to Ballot Measures on the grounds that it violates our First Amendment rights as citizens and as Maine voters. We must emphasize that our challenge to the FGIE Act is not based solely on its violation of our Freedom of Speech but also because it violates the Right to Petition the Government, the Right to Freedom of Assembly, and Freedom of the Press. We respectfully submit the following comments regarding the Commission's proposed rules in the FGIE Act.

As you know, on February 29, the federal district court issued an order in which it granted our motion for a preliminary injunction barring the Commission from enforcing the FGIE Act. The Court also granted the preliminary injunction motions of all other plaintiffs in this litigation, including Central Maine Power, Versant, and the Maine Press Association and Maine Broadcasters. In granting all these motions, the federal court concluded that we are likely to succeed in our First Amendment challenge to the FGIE Act, meaning that the Act is likely unconstitutional.

The FGIE Act is intended to silence certain voices regarding the initiation and approval of constitutional amendments, direct initiatives, people's vetoes, conditionally-enacted legislation, and, bond issues. For each of these Ballot Measures, we, the voters of Maine, exercise the sovereign lawmaking power. We reject the FGIE Act's attempt to prevent us from hearing from all sides on these public policy issues and from deciding for ourselves what we will rely on and what we will not. We also reject the FGIE Act's attempt to subject us to civil sanction and criminal prosecution for seeking to fulfill our duties as citizens and as Electors.

The constitutionality of the FGIE is the subject of ongoing litigation. A federal court has already made the preliminary determination that the FGIE Act is likely unconstitutional and, indeed, that it likely violates the most fundamental of constitutional rights—those First Amendment rights that are foundational to our rights as voters and, where Ballot Measures are concerned, lawmakers.

Under these circumstances, the Commission should not proceed with rulemaking. We ask that the Commission suspend rulemaking and await a final determination from the Court on the FGIE's Act's constitutionality. Following this course would respect the litigation process itself, and allow the Commission to wait until it has a final court decision which can inform and guide its rulemaking in this most sensitive area of citizens' rights.

Sincerely,

_____

Jane Pringle
Kenneth Fletcher
Bonnie Gould
Brenda Garrand
Lawrence Wold

cc: Jonathan Wayne, Executive Director

maine association of broadcasters

Testimony of Tim Moore-President/CEO
Maine Association of Broadcasters
February 28, 2024

To the distinguished members of the Commission on Governmental Ethics and Election Practices, I appreciate the opportunity to comment on the proposed amendments to the Commission's rules to implement 21-A.M.R.S. 1064—which prohibits certain entities from making contributions and expenditures regarding Maine elections.

My name is Tim Moore and I am the President/CEO of the Maine Association of Broadcasters, a non-profit organization representing the interests of over 150 Radio and Television stations throughout the State of Maine.

As you are aware, the MAB has joined with the Maine Press Association to seek permanent injunction against the implementation of this law—arguing that it is both unconstitutional—a clear violation of the First Amendment—and also that is both vague and unreasonably burdensome to media outlets, tasking them with the responsibility—under the threat of fines and penalties—of somehow investigating and documenting the specific source of funding for any and all entities wishing to place legitimate political speech on our outlets. Such a requirement would be close to impossible for Maine's broadcast stations, many of which are small family-owned operations.

While Maine broadcasters share the concerns of election interference from foreign influences—and clearly the public as well given the margin that Question 2 passed, this law does nothing to address what we believe are the true concerns of Maine voters—the barrage of social media infiltration by foreign governments with sinister intentions, millions of bots—and now, the prospect of deep-fakes and Artificial Generative Intelligence designed to deceive.

No, this simplistic Referendum question---the goals of which---prohibiting foreign election interference—everyone could agree on in principle—was actually a thinly-veiled attempt to silence Maine's electric utilities from participating in a political forum that would impact hundreds of thousands of Maine residents, the thousands of Maine people who are employed by these companies---and the tax burden each Maine citizen could be saddled with. Because these American companies have a degree of foreign ownership, this fact was seized upon as a means of eliminating one entire side of the debate over whether the state should take over the Maine's electric utilities.

To be clear, the MAB took no position then—nor do we now—regarding what was Question 3 last November. We do find it interesting that the very same electorate which resoundingly voted in favor of

Question 2 on Foreign Election interference---also voted overwhelmingly against Question 3—a government takeover of Maine's electric utilities---which are at least partially foreign-owned.

In the legal arguments, there have been interpretations of case law, of statutes, of precedents and many other scenarios used by both sides in making their case. Unless you are a lawyer, much of this is "in the weeds". But laws can dictate outcomes—and sometimes unintended consequences. Regardless of where one stands on this issue, one thing is for certain:

Had this law been in effect before the last election cycle, it would have been ILLEGAL for Maine broadcast stations to air any political ad against the state takeover of the electric utilities. Illegal for the utilities to make their position known. Illegal for broadcasters and newspapers to accept these ads. Those in favor of such a takeover would have been the ONLY voice allowed to be heard. Proponents of Question 3—who cried foul for being outspent by the utilities-(a situation they could have addressed with more robust fundraising)---instead apparently believe that the remedy to being outspent is to completely silence their opposition, making it illegal for these companies to participate in a public policy debate upon which their very survival was at stake.

Had only the Pro-Question 3 voices been heard, Maine people would be forced to make their decision without hearing both sides---just one side—which we believe is contrary to the ideal of robust American political discourse. Without both sides being heard, the outcome could have been completely different.

Does the State have the right to silence a legitimate political voice—citing the possibility of foreign influence—without a shred of evidence to back it up--- and by selecting a percentage of ownership out of thin air as the threshold for eliminating those voices? We believe they do not.

The MAB position has been mischaracterized as to be advocating for foreign advertisers. Maine broadcasters are not advocating for advertisers, foreign or otherwise. We are advocating for our audiences, the people of Maine, whom we believe are entitled to hear ALL political voices in a public debate—and we are adamantly opposed to any government-imposed ban on these voices.

Governor Mills also cited her concerns about the constitutionality of what was LD1610 when she vetoed the legislation---at which point proponents placed on the ballot . We wholeheartedly agree with her decision—and have included her letter to the Legislature last July explaining her reasoning in our submitted documents, along with our Declarations.

Since as of this writing, Judge Torresen has yet to rule on our petition for permanent injunction, we respectfully ask the Commission to refrain from taking any action with regard to rulemaking until that decision is handed down.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

MAINE PRESS ASSOCIATION and MAINE ASSOCIATION OF BROADCASTERS, **Plaintiffs,** v. MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, et al. **Defendants.**	)	Civil Action No. _____

DECLARATION OF DAVID ABEL IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 1746, I, David Abel, declare and state as follows:

1. For over fourteen years, I have been President and General Manager of WMTW-TV (Channel 8), an ABC network affiliate, and WPXT-TV (Channel 51) a CW network affiliate, both owned by Hearst Television Inc. and serving southern Maine viewers as broadcast television stations assigned to the Portland-Auburn, Maine designated market area. I have been in the broadcast television industry for over thirty years.

2. Our stations' primary mission is to keep viewers informed, educated, safe, and entertained. We also engage in many community service activities (e.g., food drives, telethons, awareness events, etc.) and frequently work with non-profit community service organizations throughout the State of Maine.

3. As of July 2023, the Portland-Auburn, Maine designated market area we serve includes a total of about 429,000 households.

4. For close to four years, I have been the Board Chair of the Maine Association of Broadcasters ("MAB"). I have been active on the Board of Directors for MAB for most of the time I have been President and General Manager of WMTW and WPXT.

5. I respectfully submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order/Preliminary Injunction regarding An Act to Prohibit Campaign Spending by Foreign Governments and Promote an Anticorruption Amendment to the United States Constitution (the "Act").

6. WMTW-TV, WPXT-TV, and MAB members would be subject to Section 7 of the Act and its due diligence requirements. Specifically, the Act mandates that each media outlet "shall establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a public communication for which a foreign government-influenced entity has made an expenditure ... in violation of this section."

7. "Foreign government-influenced entity," in turn, is defined under Section 1 of the Act as (a) a foreign government or (b) an organization in which a foreign government or foreign government-owned entity: (1) has a 5% or more beneficial ownership in that organization; or (2) "directs, dictates, controls or directly or indirectly participates in the decision-making process" of that organization with regard to that organization placing political advertising.

8. These provisions impose on the media, including broadcast television stations like WMTW-TV and WPXT-TV, requirements that no broadcaster would be able to satisfy in the vast majority of political advertisement placements to the best of my knowledge.

9. In rare cases, media would be able to comply with the requirements where a political advertiser is a self-identified foreign government or a public entity has disclosed

publicly its complete ownership structure, including any foreign ownership interests. But those instances are few and far between. The vast majority of political advertisers are private entities (such as, political action committees) for which there is no information available regarding ownership interests, let alone whether there is a foreign government-influenced entity that "directly or indirectly participates in the decision-making process" of that advertiser. To the best of my knowledge, there are no means available to ascertain what the Act mandates the media to "ensure" and subjects the media to significant penalties for failure to ensure what is in most cases impossible to ensure.

10. To further complicate the matter and adding another layer of complexity to complying with the mandate, political advertising on broadcast television stations like WMTW-TV and WPXT-TV is almost always placed by and through advertising agencies who act as intermediaries, managing the direct relationships with advertisers. In the overwhelming majority of instances, our sales teams never directly interact with or work with an advertiser or its staff.

11. For the reasons explained above, I respectfully urge the Court to enjoin enforcement of section 7 of the Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th date of December, 2023.

DAVID ABEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

MAINE PRESS ASSOCIATION **and** **MAINE ASSOCIATION OF BROADCASTERS,** **Plaintiffs,** **v.** **MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, et al.** **Defendants.**	Civil Action No. 2:21-cv-00107-NT

DECLARATION OF TIMOTHY MOORE IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 1746, I, Timothy Moore, declare and state as follows:

1. I am President/CEO of The Maine Association of Broadcasters ("**MAB**").

2. MAB is a non-profit organization representing over 130 Radio and Television Stations in the State of Maine. MAB advocates for broadcasters statewide on issues of importance to FCC-regulated licensees/operators and by extension to all citizens of Maine they serve.

3. With over 30 years of experience in Maine, I am in constant contact with owners, station managers and rank-and-file workers in the broadcast industry, seeking their input on concerns they have regarding their economic interests and their never-ending dedication to serving Maine communities. I also have decades of experience managing commercial radio stations.

4. I respectfully submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order/Preliminary Injunction. I describe my objections to the portion of An Act to Prohibit Campaign Spending by Foreign Governments and Promote an Anticorruption Amendment to the United States Constitution (the "**Act**") applicable to Maine broadcasters, including their stations and their websites.

5. On July 12, 2023, following a unanimous vote of the MAB Board of Directors, we submitted a letter urging Governor Janet Mills to veto L.D. 1610, which became Question 2 on the November 2023 ballot; our letter is attached as **Exhibit 1**.

6. Maine Radio & TV stations are expressly targeted for regulation in Section 7 of the Act. In addition, some Maine Radio & TV stations operate websites which run political advertisements and thus MAB members are also subject to regulation under section 7 of the Act because they operate what the Act describes as "Internet Platforms."

7. Maine Radio & TV stations broadcast paid content from both individuals and businesses advertising products and services as well as from political, advocacy and non-profit organizations and entities communicating views about the issues of the day, including the nomination or election of a candidate or the initiation or approval of a referendum.

8. MAB objects to Section 7 of the Act because it (A) imposes vague and ambiguous standards on Maine Radio & TV stations making it impossible for our members to know what they are legally allowed to do; (B) requires Maine Radio & TV stations to institute burdensome due diligence regulations that will cause them to delay or not run at all some significant amount of truthful political speech that MAB members would have broadcast in the past; and (C) requires Maine Radio & TV stations to remove truthful political speech thus taking away their right to exercise their own independent judgment about what their audiences should be able to

see and hear. The Act threatens Maine Radio & TV stations with substantial financial penalties if they do not comply.

Vague and Confusing Standards

9. The provisions of Section 7 of the Act are unclear and confusing.

10. I do not know what "due diligence policies, procedures and controls" are meant to require, but I understand that the use of the word "and" means that we are required to have all of three of them and that each of them means something different. I do not know and believe that no one knows what any of these terms mean in the context of the Act. What "due diligence policies" would be required to comply with the Act? I am unaware of any relevant policy that we might look to as a model. I do not know and believe that no one knows what "procedures" are meant to be in this context. I also do not know what "controls" means here. I gather that "due diligence policies, procedures and controls" must mean something serious and substantial because they must be "reasonably designed to ensure" (per the Act) that Maine Radio & TV stations do not make available to the public a public communication that would violate the Act, but I can only guess at what these provisions actually require of our members.

11. The "reasonably designed to ensure" standard is also vague. The statute does not say who decides what is "reasonable" and puts us at risk of being second-guessed after-the-fact about what was "reasonable." What is "reasonable" appears to be a discretionary call inviting different Maine Radio & TV stations to draw different lines between what is reasonable and unreasonable, depending on their time and resources.

12. Section 7 of the Act applies to "a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement." The Act does not say whether it applies only to payments

made to our members. The "has made" phrasing suggests to me that it may apply whenever payments or disbursements are made to anyone in connection with a "public communication." Does the Act apply to guest editorials, and other types of content for which a foreign government-influenced entity may have made a "disbursement" to someone other than our members in connection with the content? Does the Act apply even where a "public communication" is part of a news story? We are left to speculate.

13. This ambiguity is a problem because Maine Radio & TV stations do not know what they are required to do to comply with the Act. To avoid legal risk, I expect that they will end up refusing to accept some political advertisements because the Act is vague and confusing. I expect that if they cannot tell if an advertiser qualifies as a "foreign government-influenced entity" they may not accept advertisements from that advertiser. Because of ambiguity in the Act, I expect that Maine Radio & TV stations will end up not broadcasting some political advertisements that actually comply with the Act. Because the Act is ambiguous, it will cause Maine Radio & TV stations to delay or reject some political advertisements and that will hurt broadcasters' revenue.

14. As mentioned, advertisers ask MAB members to broadcast and post to their websites advertisements within hours of order placement. The Act's ambiguity and due diligence requirements (as described below) will be time consuming and costly as MAB members attempt to determine whether an advertiser complies with the Act. Audiences will not see or hear some advertisements as quickly as would be true but for the Act, and some will miss seeing some advertisements altogether. People who listen to or watch our members' broadcasts one day may not do so the next day.

Due Diligence Policies, Procedures and Controls

15. As stated in the MAB Letter to the Governor, the Act would essentially require all Maine broadcast outlets to become "detective agencies"—tasked with determining the source of all political funding and applying some (unknown) means of obtaining the ownership structure with regard to foreign government ownership, control, or participation. The short lead time between the broadcast order and on-air placement make this task impossible.

16. Those radio and television stations that are affiliated with a network have no local ability to control, alter or remove advertising and content that is fed through the network and passed on to be broadcast on the local outlet. Advertisements that violate the Act could be delivered via a network, thus making local stations potentially liable for content not within their control.

17. Requirements for due diligence policies betray a basic lack of understanding regarding the manner in which broadcast time is placed. Often, an order is received electronically—usually from an advertising agency. The turnaround time from order received to broadcast can sometimes be a matter of hours. The advertising agency—or political organization (if an advertisement is received by a station directly) does not divulge the ownership structure of the entity placing the advertising—and ad agencies probably do not possess this information, especially to the degree of percentages owned or controlled and by what entities. And Maine Radio & TV stations typically have no way of knowing who "indirectly participates in the decision-making process" at an advertiser.

18. Our members' current advertising workflow does not include due diligence policies, procedures and controls to identify "foreign government-influenced entities." To develop due diligence policies, procedures and controls reasonably designed to ensure that they

do not broadcast, distribute, or otherwise make available to the public a communication for which a foreign government influenced entity has made an expenditure—as required by the Act—would require that Maine broadcasters hire and train staff and incur burdensome legal fees and other costs without ensuring that even internally "cleared" advertisements are in fact, allowable under the Act.

19. This type of detective work to attempt to screen out certain types of advertisers would impose a significant administrative burden and strain already limited resources at Maine Radio & TV stations. Contrary to perception, most broadcast outlets in Maine are small businesses that struggle to meet ever-rising costs, FCC fees and requirements, all while serving the communities of Maine.

20. Broadcast outlets are dealing with significant financial challenges with the ever-changing media landscape. These financial hardships have affected our members and the administrative burdens imposed by the Act impose considerable additional burdens on our members when their resources are already very strained. The Act forces MAB members to divert resources from editorial and news reporting functions to perform government-mandated due diligence that has the additional downside of forcing them to screen out a source of revenue (paid advertisements) that supports their businesses. For some broadcasters, this would become an existential situation. Maine Radio & TV stations face three unsatisfactory scenarios: (a) reject political advertisements altogether and lose significant revenue; (b) accept advertisements which pass whatever due diligence procedures are employed—at a cost that may neutralize the revenue itself; or (c) accept the advertisements and revenue (with the costs of vetting the advertiser) but still risk a large fine if the station's due diligence fails to uncover evidence of foreign

government ownership exceeding 5%. None of these options are attractive. The Act discourages Maine Radio and TV stations accepting political advertisements.

21. To the best of my knowledge, information and belief, there is no list of "foreign government-influenced entities." MAB members would not be left to conduct their own investigations, which would likely vary from one broadcaster to the next depending on resources, time, and risk tolerance for potential violations of the Act.

22. To the best of my knowledge, there is no way for MAB members to reasonably identify many "foreign government influenced entities." If an entity self-identifies as a foreign government, that much would be obvious. And a few entities that have engaged in political speech in Maine are well-known to be owned in part by foreign governments. But the term "foreign government-influenced entities" (as defined by the Act) also includes several other categories of entities that our members would have no practical way to identify. To even attempt such identification would be a substantial research project.

23. I am also concerned that despite attempting to engage in burdensome due diligence, the Act's requirements could be easily evaded. Some entities may not know if they qualify as foreign government-influenced given the broad and ambiguous definition in the Act. And whether an entity qualifies may change depending on changes in ownership over time. Those entities willing to violate the Act could easily hide ownership using shell entities, making it impossible for MAB members to ferret out whether an entity is actually subject to the Act's prohibitions.

Objection to Government Censorship

24. Maine Radio & TV stations have a proud heritage of exercising independent editorial judgment regarding the news, opinion, and advertising content they broadcast. Our

members may decide not to broadcast certain material that in their judgment does not belong on the air or on their websites. Whether it is misleading consumer advertising, profanity or violates acceptable community standards, our members are obligated under FCC regulations—and their own judgement—to reject advertising that they deem unacceptable. Our members are proud of this track record and we guard this independence vigorously. MAB believes that maintaining freedom to broadcast political speech is an integral part of the service its members provide to the public.

25. To my understanding section 7 of the Act requires that if a Maine Radio & TV stations discovers that a public communication has been published on its website in violation of the Act it "shall immediately remove the communication" and submit some form of mandatory notification to a state government agency even if the content otherwise is accurate and meets editorial standards and FCC requirements.

26. MAB strongly objects to government telling our members that they cannot broadcast truthful political advertisements of a type that they have run for many years. Separate and apart from whatever rights our advertisers themselves may have, we believe that our members have their own independent rights as operators of radio and TV stations and websites to decide what political speech to broadcast and that those rights are protected by the First Amendment.

27. MAB strongly objects to government imposing due diligence requirements and telling MAB's members to immediately remove truthful political advertisements, but exempting other businesses that make available public communications for which foreign government-influenced entities have made an expenditure, independent expenditure, electioneering communication or disbursement, including persons who engage in political speech using

billboards, signs, pamphlets, books, and websites. As for websites in particular, Maine cannot possibly expect to regulate all websites around the globe. This is a loophole for anyone wishing to influence Maine voters or elections.

28. MAB strongly objects to government dictating to us that we immediately remove truthful political advertisements when, on information and belief, foreign government-influenced entities are able to pay for content intended to influence elections on social media websites like Facebook, Instagram, Tik-Tok, YouTube, and similar online platforms but they are, on information and belief, exempt from complying with the Act because of Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230).

29. MAB strongly objects to the threat of substantial financial penalties if our members do not comply with the Act.

30. Because of the substantial compliance burdens, threat of liability, and precedent that would be set by acceding to a government regulation of our political advertising content, broadcasters in Maine would necessarily have to reexamine whether to accept political issue advertising. They would not take such a decision lightly. The loss of political advertising would have a meaningful financial impact on them and would likely reduce the resources available to newsrooms, which are supported by advertising revenue. Each station's investment in news, public affairs and community service is directly impacted by the overall economic health of that local operation. Significant revenue declines resulting from this Act will compel stations to cut back operational costs, with expensive news operations often the first budget item to suffer. This is not a good outcome for Maine communities.

Our Mission

31. The loss of political advertising would be a loss to audiences and would undermine MAB's mission and the missions of our members. Protecting our members right to engage in political discourse is central to our mission. Maine Radio & TV stations are one of the primary forums for discussion of local candidates and political issues in Maine, including referenda. Maine broadcasters devote significant airtime to referenda issues, including objective news reporting about, for example, ballot questions. Advocacy for one side or another takes place largely in advertisements, where each side has the opportunity to state their case. An informed electorate should hear all points of view, but the Act would effectively silence some points of view because the speaker is tainted with as little as 5% foreign government ownership regardless of whether a foreign government has any influence or role in the advertisement.

32. Also of concern to me is that the Act applies to friendly allies of the United States like Canada, with which Maine shares close historic ties, and which to the best of my knowledge, information and belief, has not engaged in fraudulent schemes to influence Maine elections.

33. The loss of the political speech barred by the Act would undermine the democratic process in the communities we serve. While foreign entities with more than 5% foreign government ownership are present in Maine—and are stakeholders in referenda issues (as in this fall's campaign for Question 3, which proposed a publicly owned power company)—these entities are legal, they employ thousands of Maine people, and pay Maine income and property tax. To silence them in what may be an existential (for them) political debate is unfair and contrary to the First Amendment.

34. I share concern about fake social media activity and advertisements by foreign governments hostile to the United States through automated social media platforms like

Facebook or Tik Tok. But I am unaware of any effort by a foreign government to use of fake accounts or deliberately false speech to manipulate advertising or other content broadcast on air or published on websites of Maine Radio & TV stations.

35. I do not believe the Act's provisions regarding news and broadcast organizations effectively address the issue of fake social media activity because there are too many loopholes. The Act does not control fake accounts on social media or offshore websites. Nefarious actors could easily hide their ownership making it impossible for Maine Radio & TV stations to distinguish between advertisers that are permitted to broadcast political speech in Maine and those that are prohibited by the Act from doing so. Maine citizens are exposed to these social media messages constantly. Imposing due diligence and censorship obligations on Maine broadcasters is not going to put a dent in that activity.

36. For the reasons explained above, I respectfully urge the Court to enjoin enforcement of section 7 of the Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 date of December, 2023.

Signed: _____

Printed Name Timothy G Moore

Janet T. Mills
Governor

State of Maine
Office of the Governor
1 State House Station
Augusta, Maine
04333-0001

July 19, 2023

The 131st Legislature of the State of Maine
State House
Augusta, Maine

Dear Honorable Members of the 131st Legislature:

By the authority vested in me by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing L.D. 1610, *An Act To Prohibit Campaign Spending by Foreign Governments and Promote An Anti-Corruption Amendment to the United States Constitution.*

L.D. 1610 attempts to prohibit businesses and other entities with foreign government "influence" – a term that is poorly defined in the bill – from participating in both candidate elections and the citizen-initiated referendum process through monetary expenditures. On this point, the bill is similar to L.D. 194, *An Act to Prohibit Contributions, Expenditures, and Participation by Foreign Government-owned Entities to Influence Referenda* (130th Legis. 2021), a bill I vetoed last session due to potential Constitutional issues.

My concerns about the Constitutionality of the bill remain. But more broadly, while I strongly support and share the desire to find ways to prevent foreign influence in our elections, the language of the bill is too broad and would likely result in the unintended consequence of effectively silencing legitimate voices, including Maine-based businesses, in debates that would impact their interests.

On top of this concern, L.D. 1610 also attempts to regulate the activities of the press and other media outlets, which I believe runs afoul of the First Amendment and is counter to the longstanding tradition and cornerstone of a free press in America.

L.D. 1610's Regulation of Political Speech

The core of the bill restricts who may participate in political debate, but the First Amendment provides its strongest protections to such political speech (*Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)), with the Supreme Court generally rejecting restrictions on speech in political campaigns other than to prevent *quid pro quo* style corruption (*Fed. Election Comm'n v. Cruz*, 132 S. Ct. 1638, 1652 (2022)).

L.D. 1610's proponents point to a Federal District Court decision in *Blumen v. FEC*, 800 F. Supp. 281 (D.D.C. 2012), as support for the constitutionality of the bill's prohibition on expenditures by foreign government-influenced entities. But *Blumen* involved the review of a very different law. At issue in that case was a prohibition only on contributions by *foreign nationals*, whereas this bill would also apply to Maine-based businesses that have, for example, investment from a public pension fund of a foreign city or province that has no interest in influencing a referendum. And importantly, *Blumen* only addressed a prohibition on contributions to candidates, political action committees, and political parties, all of which create the potential for *quid pro quo* corruption. This bill, however, also prohibits expenditures on citizen referenda; but the Supreme Court has explained that the risk of *quid pro quo* corruption "simply is not present in a popular vote on a public issue." *First Nat'l. Bank of Boston v. Bellotti*, 98 S. Ct. 1407, 1423 (1978).

While some states have restrictions on foreign nationals and foreign corporations from participating in ballot initiatives, L.D. 1610 is different from those statutes in ways that are problematic:

1. L.D. 1610 does nothing to prohibit a foreign national from contributing to or making expenditures in a ballot initiative campaign;

2. The definition of a foreign entity as one that has 5 percent investment by a foreign government is so broad that it could theoretically incorporate businesses that are 95 percent owned and operated by citizens of Maine. Moreover, most states that bar foreign entities from contributing to a ballot initiative focus on where the business is incorporated or has its principal place of business. If the entity is a domestic subsidiary of a foreign business, they require United States citizens to determine how to make campaign donations. Here, however, the definition of a "foreign-influenced entity" requires one to know the level of foreign government investment in a privately held or publicly traded business – a much more in depth and difficult question to answer.

3. Under L.D. 1610, the same business that is barred from influencing the electorate as they consider a statute at referendum may retain a paid lobbyist to influence legislators as they consider enacting a statute – an odd and somewhat contradictory distinction to make that, in essence, says lawmakers are due certain information from certain messengers but not the people of Maine.

L.D. 1610's Regulation of the Press and Media Outlets

Most troubling, however, is that L.D. 1610 attempts to regulate the activities of the press in two primary ways.

First, it requires internet platforms to "immediately remove" communications paid for by a foreign government-influenced entity, which is likely in violation of the First Amendment, and penalizes media outlets if they do not do so. But the Supreme Court has consistently protected the right of the press to carry truthful information of public concern, even when a third party violated the law

in providing that information. *Bartnicki v. Voper*, 532 U.S. 514, 535 (2001). And paid advertising is entitled to the same First Amendment protection as editorial content. *New York Times v. Sullivan,* 376 U.S. 254, 265-66 (1964).

Second, L.D. 1610 also contains a "due diligence" provision that would require media outlets to ensure they do not publish communications "directly or indirectly" paid for – something that is, again, very difficult to discern – by a "foreign government-influenced entity," under threat of significant financial penalties.

The Maine Association of Broadcasters, in urging me to veto this bill, wrote that this provision will "essentially require broadcast outlets to become detective agencies, tasked with investigating the source of funding for any and all campaigns." Similarly, the Maine Press Association wrote that the provision "would restrict and burden speech about public issues in Maine by forcing news outlets to create an oppressive, time-consuming, and costly self-censorship regime." I share these concerns and have enclosed their letters for the Legislature's review and consideration.

Conclusion

While L.D. 1610 is flawed, I agree that we should, and we can, take a stand against dark money in our elections by reaffirming the Legislature's support for an amendment to the U.S. Constitution, as described in Section 2 of L.D. 1610. And we can find a way to prevent foreign influence in our elections by enacting a more narrowly tailored and easily understood statute. Foreign actors have, and will, attempt to influence elections in America, but in attempting to protect our citizens from such nefarious actors, we should not create a bureaucratic morass that will entrap and silence otherwise legitimate voices and undermine the fundamental American cornerstones of free speech and free press. For the reasons set forth above, I return L.D. 1610 unsigned and vetoed, and I urge the Legislature to sustain this veto.

Sincerely,

Janet T. Mills
Governor

PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC

Sigmund D. Schutz
sschutz@preti.com
207.791.3247

July 13, 2023

Governor Janet T. Mills
Office of the Governor
1 State House Station
Augusta, ME 04333-0001

RE: LD 1610 - An Act to Prohibit Campaign Spending by Foreign Governments and Promote an Anticorruption Amendment to the United States Constitution

Dear Governor Mills:

The Maine Press Association strongly opposes and urges you to veto LD 1610 because it violates the Article I, Section 4 of the Maine State Constitution[1] and the First Amendment of the United States Constitution[2]. It violates their members' constitutional right to be free from laws "regulating or restraining the freedom of the press" and from freely speaking, writing, and publishing sentiments on any subject. Me. Const. art. I, § 4. Of particular concern to their members—and something that appears to have received scant attention before now—is that LD 1610 would impose a burdensome self-censorship regime on news outlets by requiring the creation of "due diligence procedures, policies, and controls" to screen communications for violations of the political spending limitations imposed by Section 2 of LD 1610. This is enforceable by onerous civil penalties and an obligation to remove any content discovered to violate the legislation. These sections of LD 1610 stand out as they directly impose an onerous censorship mandate directly on news outlets.

[1] **"Section 4. Freedom of speech and publication; libel; truth given in evidence; jury determines law and fact.** Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of people in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact." Me. Const. art. I, § 4.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

It is one thing to burden direct political participants with campaign spending restrictions,[3] but quite another to impose burdensome, vague, and costly compliance requirements that threaten neutral third-party news outlets with penalties and injunctions for publishing political speech.[4] The latter is plainly unconstitutional. The due diligence and penalty provisions of LD 1610 are Sections 7 and 8, as follows:

> **7. Due diligence required.** Each television or radio broadcasting station, provider of cable or satellite television, print news outlet and Internet platform shall establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement in violation of this section. If an Internet platform discovers that it has distributed a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication or disbursement in violation of this section, the Internet platform shall immediately remove the communication and notify the commission.
>
> **8. Penalties.** The commission may assess a penalty of not more than $5,000 or double the amount of the contribution, expenditure, independent expenditure, electioneering communication, donation or disbursement involved in the violation, whichever is greater, for a violation of this section. In assessing a penalty under this section, the commission shall consider, among other things, whether the violation was intentional and whether the person that committed the violation attempted to conceal or misrepresent the identity of the relevant foreign government-influenced entity.

This legislation constitutes a prior restraint on speech because it purports to tell news outlets what they can and cannot publish. We are unaware of any legal precedent upholding this kind of prior restraint on publication of political speech by independent news outlets.

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[3] The MPA does not take a position here about whether election spending restrictions only on "foreign government-influenced entities" (a defined term in LD 1610) may be unconstitutional, but notes that Justice Stevens considered such restrictions to violate the majority's rationale in *Citizens United v. Fed. Election Comm'n.* 558 U.S. 310, 424 (Stevens, J., dissenting) ("If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech . . . would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "'enhance the relative voice'" of some (*i.e.,* humans) over others (*i.e.,* nonhumans).") The *Citizens United* majority specifically did "not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *Id.* at 362.

[4] *See Washington Post v. McManus,* 944 F.3d 506, 515 (4th Cir. 2019) (distinguishing between customary campaign finance regulations burdening political actors from "platform-oriented" legislation posing "First Amendment problems of its own" and upholding injunction against Maryland's Online Electioneering Transparency and Accountability Act).

We are also unaware of any precedent upholding laws imposing any sort of mandatory "due diligence" process on news outlets before they can publish political speech. LD 1610 would restrict and burden speech about public issues in Maine by forcing news outlets to create an oppressive, time-consuming, and costly self-censorship regime. The "due diligence" process is not something that news outlets can be required to do. And the content limitations imposed by LD 1610 would infringe newspaper's right to editorial control over their published content.[5] Will the government periodically investigate the sufficiency of whatever "due diligence" regime news outlets might adopt? News outlets can only guess at what acceptable due diligence might entail. LD 1610 also has an unconstitutional chilling effect on speech by deterring newspapers from publishing any content that *may* violate the prohibition in LD 1610.[6] None of this comports with the First Amendment.

The compliance costs associated with LD 1610's mandated "due diligence policies, procedures and controls" itself gives rise to constitutional problems. The expense of compliance "makes certain political speech more expensive to host than other speech because compliance costs attach to the former and not to the latter."[7] This result is to discourage news outlets from accepting political advertisements. This is yet another constitutional problem. LD 1610 would be subject to strict scrutiny constitutional review and would fail such review.

Although we are writing this letter urging you to veto LD 1610 for the purpose of protecting the freedom of speech and the press, we cannot ignore the implications that it will have on entities with a legitimate interest in the Maine economy and political process. LD 1610 applies to any "foreign government-influenced entity" which is defined as any entity that is just 5% or more owned by any entity that is 50% or more owned or controlled by a foreign government. It appears that an entity that is 95% owned by Maine residents, for example, could still be subject to LD 1610. It also appears that LD 1610 would apply regardless of whether a foreign government-owned entity participates in any decision related to election spending; a purely passive minority ownership stake in a multinational enterprise with a domestic subsidiary operating independently in Maine could be prohibited from participating in the political process in Maine. As an advocate for freedom of speech generally, the MPA would have serious objections to LD 1610 even if all of the requirements targeting news outlets were removed.

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[5] *Id.* at 258 ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.[24] The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.")

[6] *See Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 257 (1974) ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.")

[7] *Washington Post v. McManus*, 944 F.3d 506, 516 (4th Cir. 2019).

In the 130th Legislature, Governor Mills, you *vetoed* LD 194 – An Act to Prohibit Contributions, Expenditures, and Participation by Foreign Government-owned Entities to Influence Referenda. LD 194, (130th Legis. 2021). Although LD 1610 made some changes, overall, it is even more objectionable because it now imposes a burdensome new censorship regime on news outlets. In that veto letter you recognized the First Amendment problems posed by barring companies from "any form of participation in a referendum is offensive to the democratic process, which depends on a free and unfettered exchange of ideas, information, and opinion." And that limitations on core political speech "are highly suspect as a constitutional matter."

You ended your LD 194 veto letter by recognizing that the legislation would "deprive voters of information and opinion" from certain companies and that the voters should be able "to sort through competing views as they consider how to cast their vote in any referendum." Our country is built on the pillar of a free speech and press, and LD 1610 attempts to put restrictions on the work of the press in disseminating information to the public. Supporters of this bill might dislike certain companies that lawfully operate in this State, but that is not justification to impose unprecedented—and unconstitutional—burdens on news outlets.

Please veto LD 1610 to show the people of Maine that you recognize the First Amendment infirmities with this legislation and the unacceptable burdens it would impose on Maine's news outlets. Thank you for your consideration.

Very truly yours,

Sigmund D. Schutz, Esq.

SDS:apl
cc: Maine Press Association Legislative Committee
Jeremy Kennedy, Chief of Staff
Anne E. Sedlack, Esq.

MAB
maine association of broadcasters

July 12, 2023

The Honorable Janet T. Mills
Governor of Maine
1 State House Station
Augusta, ME 04333

Dear Governor Mills,

On behalf of Maine broadcasters, this letter formalizes our strong opposition to LD 1610- An Act to Prohibit Campaign Spending by Foreign Governments and Promote an Anticorruption Amendment to the United States Constitution.

One of the primary functions of the Maine Association of Broadcasters is to be a watchdog regarding proposed legislation that violates the First Amendment or would cause harm to Maine Radio and Television stations, operating 365 days a year in the public interest.

We believe that this bill achieves both negative consequences.

Of particular concern are Sections 7 and 8:

7. "Due diligence required. Each television or radio broadcasting station, provider of cable or satellite television, print news outlet and Internet platform shall establish due diligence policies and controls that are reasonable designed to ensure that it does not broadcast, distribute or otherwise make available to the public a public communication for which a foreign government-influenced entity has made an expenditure, independent expenditure, electioneering communication, donation or disbursement in violation of this section."

This requirement places an almost impossible burden on Maine broadcasters, operating on fast-turnaround deadlines for placing advertising and often with a skeleton staff. This law would essentially require broadcast outlets to become detective agencies, tasked with investigating the source of funding for any and all campaigns. Most definitely not reasonable and of prohibitive cost. We believe there are also potential violations of the First Amendment with this broad scope of requirement, particularly since several parameters used (such as "electioneering communication" and "independent expenditure") are not expressly defined.

8. "Penalties. The commission may assess a penalty of not more than $5,000 or double the amount of the contribution, expenditure, independent expenditure, electioneering communication, donation or disbursement involved in the violation, whichever is greater, for a violation of this section."

Again, the parameters of defining what constitutes a violation is ambiguous at best—and the penalties are excessive and left up to the discretion of the "commission".

The MAB won't speculate on what motives lay at the heart of this proposed legislation, but our association can definitively promise that Maine broadcasters will suffer significant harm should this become law, a scenario that will surely invite a legal challenge.

On behalf of Maine Television and Radio stations, we ask that you veto this flawed legislation-and thank you in advance for your consideration.

Sincerely,

Tim Moore
President/CEO
Maine Association of Broadcasters

cc: Tim Feely-Deputy Legal Council
Tom Abello-Legislative Director
David Abel-Hearst Television, Board Chair MAB
Corey Garrison-Bennett Radio Group, MAB Board
Jeff Pierce-Wreaths Across America, MAB Board
Paul Dupuis- Stony Creek Broadcasting, MAB Board
Herb Ivy-Townsquare Media, MAB Board
Kim Lee, Gray Television, MAB Board
Stan Bennett, Bennett Radio Group, MAB Board
Kelly Landeen, Gray Television, MAB Board
Matt Barnard, Portland Radio Group, MAB Board

maine association of broadcasters

TO: Commission on Governmental Ethics and Election Practices
FROM: Tim Moore
RE: Additional comments/questions
DATE: 2/29/24

Thank you for the opportunity yesterday to testify with regard to the Commission's Rules should the court decide to implement 21-A.M.R.S. 1064.

In the brief Q&A following my testimony, I was asked to comment on behalf of the so-called "safe harbor" definition in the amended rules. I declined to comment on behalf of the MAB and its members pending full review of those changes by our Board and our attorneys.

The Chairman suggested on more than one occasion his conclusion that I had not read the Rules, a declarative statement that was both false and inappropriate given that I stated otherwise.

I would like to pose a few questions regarding a station's liability in some real-world situations. I understand that the Commission may not be obligated to answer these questions in this forum, but they will nonetheless be posed by broadcasters should this law be implemented.

1) According to 8(C), stations may adopt "due diligence policies, procedures and controls" as required "other than" those in Subsection 8(B)---does this mean they are not required to check some state website for a list of prohibited providers?

2) If a foreign-influenced entity falsely "checks the box" on a form and proceeds to purchase advertising, is the station liable for broadcasting those advertisements?

3) Is a station liable if a non-foreign-influenced entity places advertising after receiving funding from a foreign-influenced entity? In this case, the "box" is checked—and the legitimate entity has not falsely misrepresented their ownership (even if they have received funding illegally) Language in 8(B)(2) addresses this with respect to "or acting on behalf of a foreign-influenced entity", but the entity placing the advertising will not be on any State-produced list of prohibited entities.

4) Advertising for political campaigns/referendum are most often placed by advertising agencies—and the turnaround time from order to broadcast can be literally a matter of hours. Does the advertising agency bear any burden regarding checking a State website or providing the documentation or is the station the sole source of liability?

5) Does the documentation and inquiry into a website for a "list" need to occur with every purchase of advertising? Typically, there are multiple orders made for each station/company for each campaign.

6) Is the station liable if a foreign-influenced entity fails to appear on the State website "list"?

7) For internet platforms, does this law pertain to Facebook, Google and all websites that would be available in Maine and are able to geo-target Maine residents for advertising or would this law merely target Maine media businesses for fines and penalties?

8) Many websites have agreements with third party providers—who sell ads. The local stations see some percentage of the revenue, but do not sell or directly control what appears in the display. This makes pre-certification impossible before a violation has occurred. Is a station liable if that out-of-state third party provider sells advertising to a foreign-influenced entity that appears on the website of a Maine radio or TV station? Is the third party provider also liable?

9) If a station finds that it has aired advertising for a foreign-influenced entity or one appears on the website, 8(F) stipulates a takedown requirement. In such a case, may the Commission impose a fine? What is the criteria for issuing a fine or penalty? What is the procedure and due process for deciding whether a station should be fined? Is there an appeal process?

That's certainly enough for now. As Ross Perot once said, "the devil is in the details". Many details left unanswered.

Thank you for your consideration of the above.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CENTRAL MAINE POWER COMPANY, et al.,	)	
Plaintiffs,	)	
v.	)	Docket No. 1:23-cv-00450-NT
MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, et al.,	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Before me are preliminary injunction motions by Plaintiffs Central Maine Power Company (ECF No. 4), Versant Power and ENMAX Corporation (ECF No. 22), the Maine Press Association and the Maine Association of Broadcasters (ECF No. 25), and a group of Maine voters and electors (ECF No. 27), seeking to enjoin the Defendants from implementing and enforcing "An Act to Prohibit Campaign Spending by Foreign Governments" (the "**Act**") until a final judgment is entered in this matter. For the reasons stated below, the motions are **GRANTED**. Because I am granting the preliminary injunction on the issues that Central Maine Power Company's motion and Versant Power and ENMAX Corporation's motion raise, and because time is limited given that the Act is slated to go into effect on March 1, 2024, I do not address the arguments put forth by the remaining Plaintiffs.

FACTUAL BACKGROUND

A. Central Maine Power Company and Versant Power

There are two large electric transmission and distribution utility companies operating in the State of Maine. Verified Compl. ("**CMP Compl.**") ¶ 26 (ECF No. 1).[1] The largest, Central Maine Power Company ("**CMP**"), was incorporated in Maine in 1905 and has remained a Maine company, operating and deriving its revenue from Maine customers. CMP Compl. ¶¶ 16–17, 26. It is run by a board of directors and its executive officers, all of whom are United States citizens. CMP Compl. ¶ 18. Currently, CMP's shares are 100% owned by another Maine corporation, CMP Group, Inc., which in turn is wholly owned by Avangrid Networks, Inc., another Maine corporation. CMP Compl. ¶¶ 20–21. Avangrid Networks, Inc. is 100% owned by Avangrid, Inc., a New York corporation whose shares of common stock are listed on the New York Stock Exchange and are publicly traded so anyone can buy them. CMP Compl. ¶¶ 22–23. Iberdrola, S.A., a publicly traded corporation headquartered in Spain, currently owns over 80% of Avangrid, Inc.'s shares. CMP Compl. ¶ 23. Other owners of Avangrid, Inc. stock are:

- The Qatar Investment Authority (the State of Qatar's sovereign wealth fund) – owning approximately 3.7% of outstanding Avangrid, Inc. shares; and
- Norges Bank (the central bank of the Kingdom of Norway) – owning approximately 0.4% of outstanding Avangrid, Inc. shares.

CMP Compl. ¶ 24. In addition, the Qatar Investment Authority holds approximately 8.7% and Norges Bank holds approximately 3.6% of outstanding Iberdrola, S.A.

[1] Unless otherwise indicated, cites to ECF entries refer to Docket No. 1:23-cv-00450-NT.

shares. CMP Compl. ¶ 24. No one from the Qatar Investment Authority or Norges Bank serves as an officer or director of CMP (or CMP Group, Avangrid Networks, Inc., or Avangrid, Inc.). CMP Compl. ¶ 25. Nor is any officer or director of CMP, CMP Group, Avangrid Networks, Inc., or Avangrid, Inc. a Qatari or Norwegian national. CMP Compl. ¶ 25.

The other significant electric transmission and distribution utility company in Maine is Versant Power ("**Versant**"). Verified Compl. for Declaratory and Injunctive Relief ("**Versant Compl.**") ¶ 62 (ECF No. 1), Docket No. 1:23-cv-00451-NT. Versant is incorporated in Maine and (with its predecessors) has operated exclusively in Maine for more than ninety-nine years. Versant Compl. ¶¶ 15, 62. Versant's common stock is 100% owned by ENMAX US Holdco, Inc., which in turn is wholly owned by ENMAX Corporation. Versant Compl. ¶¶ 63–65. The City of Calgary in Alberta, Canada is the sole shareholder of ENMAX Corporation. Versant Compl. ¶ 58. Notwithstanding its ownership of the stock of ENMAX Corporation, the City of Calgary does not have any decision-making authority over, or the ability to participate in, the operations or management of ENMAX Corporation or the operations, management, or governance of Versant. Versant Compl. ¶ 66. It is expressly prohibited from such participation by orders of the Maine Public Utilities Commission ("**PUC**") and a stipulation that Versant entered with the PUC. Versant Compl. ¶¶ 66–87. No representative of the City of Calgary has ever served as an officer or director of Versant and no representative of ENMAX Corporation has ever served as an officer of Versant. Versant Compl. ¶ 88.

B. The Corridor Referendum

In 2021, Maine voters faced a ballot initiative question seeking to prohibit the construction of an electric transmission line that was proposed to run through Maine from Canada and was frequently referred to as the "CMP Corridor." CMP Compl. ¶ 28. CMP engaged in political advocacy to oppose the CMP Corridor initiative. CMP Compl. ¶ 28. In addition, a corporate entity named H.Q. Energy Services (U.S.) Inc. ("**HQUS**"), a subsidiary of Hydro-Québec, made contributions, totaling over $22 million, to encourage Maine voters to reject the corridor referendum. Decl. of Jonathan Wayne ("**Wayne Decl.**") ¶¶ 13–14 (ECF No. 47-1). HQUS's massive election spending on the corridor referendum caused concern. For example, during the corridor referendum campaign, a bipartisan group of current and former Maine legislators sent a letter to the Premier of Québec and the CEO of Hydro-Québec demanding that Hydro-Québec "cease all further campaign activities in Maine and let the people of Maine vote without further meddling in our elections." Decl. of Jonathan Bolton ("**Bolton Decl.**"), Ex. B (ECF No. 47-6). And following the corridor referendum campaign, elected leaders from both major parties publicly criticized HQUS's election spending. *See* State Defs.' Combined Opp'n to the Mots. for Prelim. Relief ("**State Opp'n**") 6 (ECF No. 47) (collecting articles). This concern provoked a legislative response. In January 2021, a group of legislators introduced L.D. 194, "An Act to Prohibit Contributions, Expenditures, and Participation by Foreign Government-owned Entities to Influence Referenda." CMP Compl. ¶ 38. L.D. 194 passed by a significant margin, but the Governor vetoed it, citing concerns about L.D.

194's constitutionality. CMP Compl. ¶ 39; *see also* Bolton Decl., Ex. E (ECF No. 47-9).

C. The Act

Undaunted, supporters of L.D. 194 then gathered enough signatures to seek enactment of a similar law—the Act—under the direct democracy provision of the Maine Constitution. Versant Compl. ¶¶ 29–30. As required by the Maine Constitution, the Act was presented to the Legislature as L.D. 1610 for additional proceedings, and it passed, but it was again vetoed by the Governor who reiterated her constitutional concerns. Versant Compl. ¶¶ 26, 31–33. As a result, the Act was placed on the November 2023 ballot as Question 2. Versant Compl. ¶ 35.

Maine voters enacted the Act by a vote of 348,781 to 55,226—the biggest win for a citizens' initiative in either percentage or absolute terms in Maine's history. Bolton Decl., Ex. F (ECF No. 10); Maine State Legislature, Legislative History Collection, Citizen Initiated Legislation, 1911–Present, https://www.maine.gov/legis/lawlib/lldl/citizeninitiated/. The Governor proclaimed the results of the election on December 6, 2023. Bolton Decl., Ex. F. As explained in greater detail below, the Act bars foreign governments and "foreign government-influenced" entities from spending on Maine's elections. 21-A M.R.S. § 1064(1)(E), (2).[2] It bolsters that ban with additional provisions, including prohibitions on solicitation or assistance activities, disclosure requirements, and affirmative duties on the media to ensure they do not

[2] For ease of reference, I use the proposed statutory citation. The Act was attached to CMP's complaint as Exhibit A (ECF No. 1-1).

publish otherwise-barred communications. *Id.* § 1064(3), (4), (6), (7). Violations of the Act are punishable by monetary penalty or imprisonment. *Id.* § 1064(8), (9).

The Act was scheduled to take effect in early January of this year and is intended to be codified at Title 21-A, Section 1064 of the Maine Revised Statutes. CMP Compl. ¶¶ 46, 48. The central provision of the Act, subsection 2, provides:

> **Campaign spending by foreign governments prohibited**. A foreign government-influenced entity may not make, directly or indirectly, a contribution, expenditure, independent expenditure, electioneering communication or any other donation or disbursement of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum.

21-A M.R.S. § 1064(2). Under the Act, a "foreign government-influenced entity" is:

> (1) A foreign government; or
> (2) A firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity:
>
> > (a) Holds, owns, controls or otherwise has direct or indirect beneficial ownership of 5% or more of the total equity, outstanding voting shares, membership units or other applicable ownership interests; or
> > (b) Directs, dictates, controls or directly or indirectly participates in the decision-making process with regard to the activities of the firm, partnership, corporation, association, organization or other entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, such as decisions concerning the making of contributions, expenditures, independent expenditures, electioneering communications or disbursements.

Id. § 1064(1)(E). A "foreign government-owned entity" means "any entity in which a foreign government owns or controls more than 50% of its equity or voting shares." *Id.* § 1064(1)(F). The Act also includes a disclosure provision that would require any public communication made by a foreign government-influenced entity—that is not otherwise prohibited—to "clearly and conspicuously contain the words 'Sponsored

by' " immediately followed by the name of the foreign government-influenced entity and a statement identifying it as a "foreign government" or a "foreign government-influenced entity." *Id.* § 1064(6).

In addition to the subsections aimed at foreign government-influenced entities, the Act contains a provision directed to "television [and] radio broadcasting station[s], provider[s] of cable or satellite television, print news outlet[s] and Internet platform[s]." *Id.* § 1064(7). Each such media-related entity must "establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public" any public communication that violates the Act. *Id.* § 1064(7). And, "[i]f an Internet platform discovers that it has distributed a public communication" that does violate the Act, it must "immediately remove the communication and notify the commission." *Id.* § 1064(7).

The Act imposes monetary penalties of up to $5,000 or up to double the amount expended in the prohibited action, whichever is greater, for each violation. *Id.* § 1064(8). Anyone who knowingly violates subsection 2 commits a Class C crime, *Id.* § 1064(8), which may subject the person to a term of incarceration of up to five years. 17-A M.R.S. § 1604(1)(C).

CMP and the Versant Plaintiffs have stated that they plan to engage in political speech again, but that such spending and communications are now barred under the Act. CMP Compl. ¶¶ 32–35; Versant Compl. ¶ 6.

PROCEDURAL BACKGROUND

In mid-December 2023, four complaints were filed seeking declaratory and injunctive relief relating to the Act. CMP brought the first case against the Maine Commission on Governmental Ethics and Election Practices (the "**Commission**"), the Chairman and the four other members of the Commission, and the Attorney General of the State of Maine (collectively, the "**State**"). CMP Compl., Docket No. 1:23-cv-00450-NT. CMP alleged six counts: (1) that the Act's ban on referenda spending violates the First Amendment; (2) that the Act's ban on candidate campaigns violates the First Amendment; (3) that the Act's disclaimer requirement violates the First Amendment; (4) that the Act violates the Due Process Clause of the Fourteenth Amendment; (5) that the Act violates the free speech rights guaranteed by the Maine Constitution; and (6) that the remaining provisions in subsection 1 of the Act cannot be severed from the offending provisions. CMP Compl. ¶¶ 66–95. Along with its complaint, CMP also filed a motion for a temporary restraining order and preliminary injunction seeking to enjoin enforcement of the Act. Pl.'s Mot. for TRO and Prelim. Inj. ("**CMP PI Mot.**") (ECF No. 4).

Versant and ENMAX Corporation (together hereinafter, the "**Versant Plaintiffs**" or "**Versant**") also filed a complaint against the same Defendants. Versant Compl., Docket No. 1:23-cv-00451-NT. The Versant Plaintiffs alleged four counts: (1) that the Act violates the Supremacy Clause because it is preempted by federal election law; (2) that the Act violates the First and Fourteenth Amendments; (3) that the Act violates Article I, Section 4 of the Maine Constitution; and (4) that the Act violates the Foreign Commerce Clause. Versant Compl. ¶¶ 104–141. Like

CMP, Versant filed a motion for a temporary restraining order and preliminary injunction along with their complaint. Pls.' Mot. for TRO and Prelim. Inj. ("**Versant PI Mot.**") (ECF No. 22), *see* Docket No. 1:23-cv-00451-NT (ECF No. 4).

Plaintiffs Maine Press Association and Maine Association of Broadcasters (together, the "**Media Plaintiffs**") filed the third Act-related complaint against the Defendants. Compl. for Declaratory and Injunctive Relief ("**Media Compl.**") (ECF No. 1), Docket No. 1:23-cv-00452-NT. The Media Plaintiffs' complaint focuses on subsection 7 of the Act and alleges four counts: (1) that the Act is void for vagueness under the First and Fourteenth Amendments; (2) that the Act violates the First Amendment because it places an unconstitutional burden on news outlets; (3) that the Act violates the First Amendment because it constitutes a prior restraint; and (4) that the Act violates the First Amendment by imposing strict liability on the publication of political speech. Media Compl. ¶¶ 46–66. The Media Plaintiffs assert that they rely on revenue from advertisements, including political advertisements, but may have to stop running political advertisements they would otherwise accept to avoid "legal risk." Media Compl. ¶¶ 40, 43. With their complaint, the Media Plaintiffs filed a motion for preliminary injunction. Pls.' Mot. for Prelim. Inj. (ECF No. 25), *see* Docket No. 1:23-cv-00452-NT (ECF No. 3).

The last case was brought by Plaintiffs Jane Pringle, Kenneth Fletcher, Bonnie Gould, Brenda Garrand, and Lawrence Wold in their capacities as registered voters and electors (collectively, the "**Electors**"). Verified Compl. ("**Electors Compl.**") (ECF No. 1), Docket No. 1:23-cv-00453-NT. The Electors' complaint alleges eleven counts:

(1) that the Act violates their constitutional right to petition the government; (2) that the Act violates their First Amendment right to free speech by limiting the sources of information available to the Electors; (3) that the Act violates the Electors' constitutional right to freedom of assembly; (4) that the Act violates the constitutional right to freedom of the press; (5) that the Act violates Due Process Clause notice standards; (6) that the Act violates the Maine Constitution's right to petition the government; (7) that the Act violates the Maine Constitution's protection of freedom of speech; (8) that the Act violates the Maine Constitution's right of freedom of assembly; (9) that the Act violates the Maine Constitution's protection of freedom of the press; (10) that the Act violates the separation of powers set forth in the Maine Constitution; and (11) that the Act violates the due process rights guaranteed by the Maine Constitution. Electors Compl. ¶¶ 79–167. The Electors intend to continue to seek, acquire, consider, and share information covered by the Act. Electors Compl. ¶¶ 93–94. The Electors also filed a motion for a temporary restraining order and preliminary injunction. Pls.' Mot. for TRO and Prelim. Inj. (ECF No. 27), *see* Docket No. 1:23-cv-00453-NT (ECF No. 8).

On December 13, 2023, I held a teleconference, in which counsel in all four cases participated, to discuss the tight timing of the Plaintiffs' motions for a temporary restraining order given that the Act was to go into effect on January 5, 2024. Minute Entry (ECF No. 8). Following the conference, the State agreed to voluntarily refrain from enforcing the Act until February 29, 2024 to give the parties time to fully brief the issues. Following the conference, I entered an agreed-upon

scheduling order for the briefing. Order Granting Mot. to Amend Scheduling Order to Set New Briefing Schedule for Mots. for Prelim. Relief (ECF No. 13). At the joint request of the parties, the four cases were consolidated on January 9, 2024. Order to Consolidate Cases (ECF No. 20). The State filed their omnibus opposition to the motions for preliminary injunctions on January 12, 2024. State Opp'n (ECF No. 47). On January 31, 2024, the Plaintiffs all filed their replies. *See* ECF Nos. 51–54.[3] The matter came before me for oral argument on February 23, 2024.

LEGAL STANDARD

In deciding whether to grant a preliminary injunction, district courts "must consider: (i) the movant's likelihood of success on the merits of its claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013). "In the First Amendment context, likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam).

[3] In January, I also granted permission for three groups to participate as amicus curiae. An organization called Free Speech for People filed an amicus brief in support of the State's position. Amicus Curiae Br. of Free Speech for People in Supp. of Defs.' Opp'n to Pls.' Mots. for Prelim. Inj. and TROs (ECF No. 45). Another organization called Protect Maine Elections also filed an amicus brief in support of the State. Br. of Amicus Curiae Protect Maine Elections in Supp. of Defs. (ECF No. 46). And the Reporters Committee for Freedom of the Press filed an amicus brief supporting the Media Plaintiffs' position. Amicus Curiae Br. of the Reporters Committee for Freedom of the Press (ECF No. 50).

DISCUSSION

I. Preemption

In their motion for a preliminary injunction, the Versant Plaintiffs assert that the Act violates the Supremacy Clause of the United States Constitution. Versant PI Mot. 9. Versant argues that the Act is expressly preempted by the Federal Election Campaign Act ("**FECA**"), 52 U.S.C. § 30101 *et seq.*, and is also impliedly preempted by FECA because the Act conflicts with Congress's framework for regulating foreign influences in United States elections. Versant PI Mot. 9–13.

A. General Preemption Principles

The Supremacy Clause of the United States Constitution provides, in relevant part, that: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, because federal law is the supreme law of the land, Congress "has the power to pre-empt state law." *Me. Forest Prods. Council v. Cormier*, 51 F.4th 1, 6 (1st Cir. 2022) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

Preemption may be either express or implied depending on "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Implied preemption then consists of two types, conflict and field. *Capron v. Off. of Att'y Gen. of Mass.*, 944 F.3d 9, 21 (1st Cir. 2019); *see Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 52 (1st Cir. 2024) ("There are three types of preemption:

conflict, express, and field."). The Versant Plaintiffs maintain that all three types of preemption—express, conflict, and field—apply here.

The party asserting preemption bears the burden of proving it. *Me. Forest Prods. Council*, 51 F.4th at 6. The "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *Gade*, 505 U.S. at 98.

B. Express Preemption

"Where a federal statute contains a clause expressly purporting to preempt state law" courts must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Medicaid and Medicare Advantage Prods. Ass'n of P.R., Inc. v. Hernández*, 58 F.4th 5, 11 (1st Cir. 2023) (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (same).

FECA's express preemption provision states: "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a); *see also* 11 C.F.R. § 108.7. FECA defines the term "Federal office" to mean "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 30101(3). The Act's funding prohibition applies to "the nomination or *election of a candidate* or the initiation or approval of a referendum," 21-A M.R.S. § 1064(2) (emphasis added). It does not exclude federal elections, so on its face the Act would apply to the election of a candidate to federal office.

Despite the fact that the Act does not expressly carve out elections for federal office, the State contends that the Act falls outside FECA's preemption provision. The State contends that the Act "cannot reasonably be read—and is not read by the enforcing agencies—to regulate federal elections in any way." State's Opp'n 53 (citation omitted). In support of its claim that the Act cannot reasonably be read to encompass federal elections, the State notes that, if allowed to go into effect, the Act will be housed in the Maine Revised Statutes in a chapter and subchapter that contain definitions that would limit the scope of the Act to just state and local elections. *See* State Opp'n 53 (quoting 21-A M.R.S. §§ 1011, 1051); s*ee also* 21-A M.R.S. § 1001(2) (defining "election" as "any primary, general or special election for state, county or municipal offices"). But at oral argument, the Versant Plaintiffs pointed to other Maine statutory provisions that could lead to the opposite conclusion. *See, e.g.*, 21-A M.R.S. §§ 335, 354.

In support of the claim that the State's enforcing agencies do not read the Act to regulate federal elections, the State offers a declaration from the current executive director of the Commission to that effect. *See* Wayne Decl. ¶¶ 5–10. But courts "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction," and courts will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480–81 (2010) (citations omitted).

I conclude that FECA likely expressly preempts the Act insofar as the Act covers foreign spending in elections for federal office.

C. Implied Preemption

The next question is whether FECA impliedly preempts the Act. The Versant Plaintiffs contend that the Act is preempted by FECA under both conflict and field preemption. The State, arguing that the Act is not preempted, claims that two presumptions against preemption apply here. I consider the presumption arguments first and then go on to analyze the merits of Versant's preemption argument.

1. Presumptions

First, the State argues that a presumption against preemption applies because state elections are a traditional area of state regulation. "In all pre-emption cases, and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Me. Forest Prods. Council*, 51 F.4th at 6 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "The presumption does not apply, though, 'when the State regulates in an area where there has been a history of significant federal presence.' " *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). The Versant Plaintiffs maintain that the presumption does not apply because the Act addresses issues of foreign affairs, which is an area the federal government typically reserves for itself.

Although the Act does touch upon an aspect of foreign affairs—how foreign governments may spend money in Maine campaigns—the Act's main focus is the

regulation of Maine elections,[4] and "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543 (2013); *see Minn. Chamber of Com. v. Choi*, No. 23-CV-2015 (ECT/JFD), --- F. Supp. 3d ----, 2023 WL 8803357, at *12 (D. Minn. Dec. 20, 2023) ("[S]tate elections are a traditional area of state regulation, and states' historical authority to exclude aliens from participating in their democratic political institutions includes prohibiting foreign nationals from spending money in their elections."). Accordingly, this presumption against preemption likely applies.

Second, the State maintains that, because FECA contains an express preemption clause, that provision provides a "reliable indicium of congressional intent" as to the scope of FECA's preemption and therefore shows that Congress did not intend to preempt laws regulating state and local elections. State Opp'n 54 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)). In *Cipollone*, the Supreme Court stated that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517. But a few years later, in *Freightliner Corporation v. Myrick*, 514 U.S. 280 (1995), the Supreme Court explained that *Cipollone* did "not establish a rule" that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute." *Freightliner*, 514 U.S. at 287–

[4] As discussed above, the State asserts that it does not interpret the Act to apply to federal elections, and I have concluded in any event that the Act is likely expressly preempted as to federal elections.

89. Instead, "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies'—*i.e.,* supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Id.* at 288. "At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption." *Id.* at 289.

The *Cipollone* inference against implied preemption likely applies here. The Act contains an express preemption provision that states that FECA supersedes and preempts state law only "with respect to election to Federal office." 52 U.S.C. § 30143(1). That express language does not entirely foreclose the possibility that Congress intended FECA's exclusive reach to go beyond federal candidate elections to cover state and local elections too, but there is at least an inference that that was not Congress's intent. With the presumption and inference in mind, I turn to whether FECA impliedly preempts state regulation of foreign spending in candidate elections for state and local office and state referendum elections. Neither the Supreme Court nor the First Circuit has addressed this issue.

2. Conflict Preemption

Conflict preemption is "where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98 (internal citations and quotations omitted). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Me. Forest Prods. Council*,

51 F.4th at 6 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Thus, in order to decide the preemptive effect of FECA on the Act, I have to "juxtapose the state and federal laws, demarcate their respective scopes, and evaluate the extent to which they are in tension." *See Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996).

a. Juxtaposition of Federal and State Provisions on Foreign Involvement in Elections

Under FECA, a foreign national is prohibited from making, directly or indirectly, "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a). FECA defines "foreign national" as either an individual who is not a United States citizen or national, and who is not lawfully admitted for permanent residence, or "a foreign principal." 52 U.S.C. § 30121(b). The term "foreign principal" includes "the government of a foreign country" and "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b).

The Maine Act provides that "[a] foreign government-influenced entity may not make, directly or indirectly, a contribution, expenditure, independent expenditure, electioneering communication or any other donation or disbursement of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum." 21-A M.R.S. § 1064(2). A "foreign government-influenced entity" means:

(1) A foreign government; or

> (2) A firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity[5]:
>
> > (a) Holds, owns, controls or otherwise has direct or indirect beneficial ownership of 5% or more of the total equity, outstanding voting shares, membership units or other applicable ownership interests; or
> >
> > (b) Directs, dictates, controls or directly or indirectly participates in the decision-making process with regard to the activities of the firm, partnership, corporation, association, organization or other entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, such as decisions concerning the making of contributions, expenditures, independent expenditures, electioneering communications or disbursements.

21-A M.R.S. § 1064(1)(E).

I have already found that FECA preempts regulation of foreign spending in federal candidate elections. That leaves referenda and state and local candidate elections to review for conflict preemption. Because FECA's intended scope and the rationale for regulating these two categories of elections differ, I consider them separately.

b. Referenda

FECA prohibits any foreign national (which includes a foreign government or a foreign corporation) from contributing or donating money "in connection with a Federal, State, or local election." 52 U.S.C. § 30121(a). Under FECA, the term "election" means "a general, special, primary, or runoff election" or "a convention or caucus of a political party which has authority to nominate a candidate." 52 U.S.C.

5 A "foreign government-owned entity" is "any entity in which a foreign government owns or controls more than 50% of its equity or voting shares." 21-A M.R.S. § 1064(1)(F).

§ 30101(1). The Supreme Court has said that FECA "regulates only candidate elections, not referenda or other issue-based ballot measures." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995); *see also FEC v. Bluman*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (then-Judge Kavanaugh, interpreting Section 30121's identically-worded predecessor, stated "[t]his statute . . . does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."). And the Federal Election Commission ("**FEC**")[6] interprets FECA as excluding referenda. *See* MUR 7523 (Stop I-186 to Protect Mining and Jobs, et al.), at 5 n.18 (FEC Oct. 4, 2021), *available at* https://www.fec.gov/files/legal/murs/7523/7523_23.pdf (noting that there has been a "longstanding distinction between elections and ballot initiative activity" and that the FEC has advised "that ballot measure activity was 'nonelection activity' that foreign nationals may lawfully engage in so long as it is not connected to a candidate's campaign"). In fact, the FEC recently recommended "that Congress amend FECA's foreign national prohibition to include ballot initiatives, referenda and any recall elections not covered by the current version of FECA." Legis. Recommendations of the FEC 2023, at 7, *available at* https://www.fec.gov/resources/cms-content/

[6] Congress created the Federal Election Commission ("**FEC**") to "administer[ ] and enforc[e]" the Federal Election Campaign Act ("**FECA**") and it delegated to the FEC "extensive rulemaking and adjudicative powers." *See Buckley v. Valeo*, 424 U.S. 1, 109–10 (1976). The Supreme Court has instructed that the FEC "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *see also Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000) (affording *Chevron* deference to the FEC's interpretation of several FECA statutory provisions because "[t]he FEC is the type of agency which is entitled to such deference where congressional intent is ambiguous"). *Cf. Teper v. Miller*, 82 F.3d 989, 997–98 (11th Cir. 1996) (noting tension inherent in deferring to the FEC in cases involving preemption).

documents/legrec2023.pdf.[7] Because FECA does not currently cover referenda, I conclude that it likely does not preempt the Act with respect to regulation of foreign spending on a referendum.

c. State and Local Candidate Elections

By contrast, FECA's prohibition on contributions by foreign nationals does extend to State and local candidate elections. FECA prohibits "foreign principals"—including foreign governments and foreign-based corporations—from "directly or indirectly" spending "in connection with a Federal, State, or local election" of a candidate. 52 U.S.C. § 30121(a). But FECA does not on its face prohibit domestic subsidiaries of foreign corporations from making donations or contributions to such elections. The Versant Plaintiffs argue that this omission "should be viewed as Congress's considered choice, not an inadvertent hole meant to be filled by state regulation." Versant PI Mot. 12. The Versant Plaintiffs assert that, because the failure to regulate domestic subsidiaries of foreign corporations was by design, the Act's prohibition on spending by United States companies with foreign ownership conflicts with Congress's intention. Versant PI Mot. 12. The State counters that the fact that FECA does not go as far as the Act in regulating foreign influence in elections is insufficient to overcome the presumption against preemption. State Opp'n 57.

[7] In its recommendation, the FEC explained that it considered foreign national donations made in opposition to a Montana ballot initiative and "determined that FECA's foreign national prohibition does not reach ballot initiatives that do not appear to be linked to an office-seeking candidate at the federal, state or local level." Legis. Recommendations at 7; *see also* MUR 7523 (Stop I-186 to Protect Mining and Jobs, et al.), at 3–4, *available at* https://www.fec.gov/files/legal/murs/7523/7523_23.pdf.

The history of the foreign prohibition on spending shows that Congress has been active in this area over the last fifty years. Even before FECA was introduced in 1971, Congress had, in 1966, "amended the Foreign Agents Registration Act to prohibit foreign governments and entities from contributing to American political candidates." *United States v. Singh*, 979 F.3d 697, 709 (9th Cir. 2020) (citing Pub. L. No. 89-486, § 8, 80 Stat. 244, 248–49). When Congress amended FECA in 1974, it expanded on the existing bans by prohibiting any "foreign national"—defined as a foreign principal under the Foreign Agents Registration Act or an individual who is not a United States citizen or lawful permanent resident—from making contributions to candidates. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263.

"But those restrictions did not eliminate the possibility of foreign citizens influencing American elections," *Bluman*, 800 F. Supp. 2d at 283, and "suspicions of foreign influence in American elections remained a pervasive concern." *Singh*, 979 F.3d at 709. The 1996 election cycle prompted the Senate Committee on Governmental Affairs to investigate foreign campaign contributions. *Id.* "The Committee found that foreign citizens had used soft-money contributions to political parties to essentially buy access to American political officials." *Bluman*, 800 F. Supp. 2d at 283. In response to the Committee's report, Congress (eventually) passed the Bipartisan Campaign Reform Act of 2002 ("**BCRA**"), which amended FECA and further limited foreign nationals' ability to participate in elections. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96; *see Singh*,

979 F.3d at 709. FECA, now with the BCRA amendments, bans foreign nationals from directly or indirectly making contributions or donations to a committee of a political party or "in connection with a Federal, State, or local election." 52 U.S.C. § 30121 (formerly cited as 2 U.S.C. § 441e but editorially reclassified as 52 U.S.C. § 30121).

In support of its argument that Congress intended not to regulate certain foreign-related entities that the Act encompasses, the Versant Plaintiffs point to FEC rulemaking after BCRA amended FECA. Versant PI Mot. 10–12. The FEC had sought comments on whether FECA's use of the word " 'indirectly' should be interpreted to cover U.S. subsidiaries of foreign corporations that make non-Federal donations with corporate funds or that have a separate segregated fund that makes Federal contributions." 67 Fed. Reg. 69928, 69943 (Nov. 19, 2002). BCRA's sponsors commented that "Congress in this legislation did not address 'contributions by foreign-owned U.S. corporations, including U.S. subsidiaries of foreign corporations.' " *Id*.

At this preliminary stage, Versant has not met its burden of showing that Congress's silence on the issue of contributions made by American subsidiaries of corporations with foreign ownership in non-federal elections means that Congress intended to preempt state efforts to regulate such contributions at both the state and local level. In enacting BCRA, Congress intended to include candidate elections for state and local office in FECA's prohibitive sweep. *See Singh*, 979 F.3d at 709. And the FEC recently noted that Section 30121's reach to state and local elections is

"exceptional" given that FECA "otherwise is limited to federal elections." Legis. Recommendations at 7. But the fact that FECA covers state and local elections does not mean that the Act is in conflict.

It is true that "the United States has a compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Bluman*, 800 F. Supp. 2d at 288. The State, however, has an equally strong interest in regulating its own state and local elections. And allowing the State of Maine to continue to exercise its traditional powers in the area of state and local candidate elections likely will not hinder Congress's intentions as set forth in FECA.

Further, when Congress added the Section 30121 prohibition preventing foreign nationals from contributing in federal, state, and local elections, it could also have amended the express preemption provision in Section 30143 to include state and local candidate elections along with those for federal office. But it did not.

Ultimately, whether the Act is in conflict with FECA's prohibition on foreign participation in state and local candidate elections is a close question, but I believe it is likely that Congress intended FECA's prohibition as a floor, and it did not intend to prohibit states from doing more to regulate foreign government influence on state and local elections. The Versant Plaintiffs' arguments to the contrary do not overcome the presumption and inference against preemption. Accordingly, I find that the Act is likely not impliedly preempted because it conflicts with FECA.

3. Field Preemption[8]

Field preemption occurs when states try to "regulat[e] conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, 567 U.S. at 399. "Where Congress occupies an entire field, . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id.* at 401. Thus, the critical question in field preemption is whether the "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 505 U.S. at 517 (quotation omitted).

The same reasons discussed above with respect to conflict preemption apply to the field preemption analysis.[9] Versant points to the fact that Section 30121 prohibits foreign spending in federal, state, and local elections in support of its field preemption argument, and it suggests that, under the federal scheme, Congress made a deliberate choice to not include domestic corporations with foreign shareholders in FECA's ban on foreign principals' spending. But, as the *Choi* court recently explained in a similar case, "Congress does not preempt state law every time it considers

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[8] Although the field preemption argument was not developed in Versant's motion for preliminary injunction, I address it briefly here because they alleged field preemption in their complaint and maintained at oral argument that Congress through FECA's federal scheme has occupied the field of foreign nationals' campaign spending. *See* Versant Compl. ¶¶ 107, 110.

[9] "Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990).

regulating a topic but ultimately declines to do so." 2023 WL 8803357, at *12; *see P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (explaining that "deliberate federal inaction" does not "always imply pre-emption"). And I agree with the *Choi* court's observation that "when Congress regulates, it just as often creates a floor rather than a uniform rule preempting stricter state laws." 2023 WL 8803357, at *12. On the preliminary injunction record before me, that appears to be the case, and the Versant Plaintiffs have not met their burden of showing "that Congress intended federal law to occupy [the] field exclusively." *Freightliner*, 514 U.S. at 287. Therefore, Versant is not likely to succeed on their field preemption argument.

Having concluded that FECA likely preempts the Act insofar as it regulates elections for federal office, I move on to consider the First Amendment arguments only in the context of referenda and state and local candidate elections.

II. First Amendment

Under *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010), corporations have a First Amendment right to engage in political speech, which includes certain types of campaign-related spending. Among other questions, this case asks whether domestic corporations with some foreign government ownership also have this right.[10]

[10] The *Citizens United* decision dealt with the First Amendment rights of corporations generally, but it did not resolve whether these rights also apply to domestic corporations with foreign shareholders. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010). The Supreme Court has since held that "foreign organizations operating abroad have no First Amendment rights." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020). This subsequent authority provides some guidance, but it does not address or resolve the open questions this case presents.

A. Facial Challenge

CMP and Versant (collectively, the "**Corporate Plaintiffs**") assert that subsection 2 of the Act is facially unconstitutional because it violates the First Amendment. In general, "facial challenges leave no room for particularized considerations and must fail as long as the challenged regulation has any legitimate application." *Gaspee Project v. Mederos*, 13 F.4th 79, 92 (1st Cir. 2021). However, First Amendment facial challenges based on overbreadth are different. They succeed if "a 'substantial number' of [the law's] applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.' " *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)).

B. Level of Scrutiny

The Corporate Plaintiffs maintain that subsection 2 of the Act is subject to strict scrutiny. Versant PI Mot. 14–15; Central Maine Power Company's Reply in Supp. of its Mot. for Prelim. Inj. ("**CMP Reply**") 1–2 (ECF No. 52). The State advocates for more lenient "closely drawn" scrutiny. State Opp'n 13–15. Based on my review of the parties' authorities, including *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1 (1st Cir. 2012), I conclude that strict scrutiny is the appropriate standard of review. Strict scrutiny requires that the State show that the Act (1) furthers a compelling interest; and (2) is narrowly tailored to achieve that interest. *Citizens United*, 558 U.S. at 340.

C. Compelling Interest

The first step of strict scrutiny analysis is to assess whether the State has articulated a compelling governmental interest. The State identifies an interest in "limiting foreign-government influence in its elections" and an interest in "limiting the appearance of such influence." State Opp'n 23. The Corporate Plaintiffs respond that the State's identified interests cannot support restrictions on spending on elections or referenda by domestic corporations with foreign government shareholders. Versant PI Mot. 16–17; CMP Reply 4–5.

Neither the Supreme Court nor the First Circuit has weighed in on the First Amendment rights of domestic corporations with some foreign government ownership to spend money on elections and referenda. The closest case on point is *Bluman v. Federal Election Commission*. The plaintiffs in *Bluman* were two foreign citizens temporarily living in the United States on work visas. 800 F. Supp. 2d at 282. They wanted to make financial contributions to candidates in federal and state elections, print flyers supporting a presidential candidate to distribute in a park, and contribute money to national political parties and political groups. *Id.* at 285. But FECA's prohibition on foreign national involvement in elections barred these activities. *Id.* at 282–83 (citing 2 U.S.C. § 441e(a)). In upholding the law, then-Judge Kavanaugh wrote that the United States "has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Id.* at 288. This interest was based on the "straightforward principle" that "foreign citizens do not have a constitutional right to

participate in, and thus may be excluded from, activities of democratic self-government." *Id.* The *Bluman* court noted that its holding would extend to foreign corporations, but it did not address "the circumstances under which a corporation may be considered a foreign corporation for purposes of First Amendment analysis." *Id.* at 292 n.4. The Supreme Court summarily affirmed, 565 U.S. 1104 (2012), which makes the *Bluman* decision binding precedent. *See Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975).

1. Interest in Limiting Foreign Government Influence in Candidate Elections

Bluman supports the State's claim that it has a compelling interest when it comes to limiting foreign government influence in candidate elections. *Bluman* approved limiting the participation of foreign citizens and foreign corporations "in activities of American democratic self-government" for the purpose of "preventing foreign influence over the U.S. political process." *Bluman*, 800 F. Supp. 2d at 288; *see also Bluman*, 800 F. Supp. 2d at 292 n.4 ("Our holding means, of course, that foreign corporations are likewise barred from making contributions and expenditures prohibited by 2 U.S.C. § 441e(a)."). This interest extends to the State interest here in limiting foreign government influence in candidate elections.

CMP argues that this interest is not compelling when it comes to corporations with just some foreign government ownership,[11] because, unlike the foreign nationals in *Bluman*, such entities could be Maine companies (like CMP itself) led by United

[11] I use foreign government "ownership" as a shorthand for the full definition in 21-A M.R.S. § 1064(1)(E)(2)(a).

States citizens with long-term stakes in issues decided by Maine's elections. CMP PI Mot. 12. This argument essentially takes aim at the Act's 5% foreign government ownership threshold. *See* 21-A M.R.S. § 1064(1)(E)(2)(A). The argument is that 5% foreign government ownership is not foreign enough to sustain an interest in limiting the First Amendment rights of domestic corporations to participate in election activities. But whether this amount of foreign government ownership is sufficient to justify the Act is better tested on narrow tailoring, not whether a compelling interest exists in the first place.[12] *Bluman* thus likely extends to the State's articulated interest here with respect to state and local candidate elections.

2. Interest in Limiting Foreign Government Influence in Referenda Elections

A much closer question is whether *Bluman* can support the State's compelling interest when it comes to referenda elections. *Bluman* "does not address" and "should not be read to support" bans on "issue advocacy" or "speaking out on issues of public policy" by foreign individuals. 800 F. Supp. 2d at 292. But *Bluman* does support excluding those who are not "members of the American political community" from participating in "activities of American democratic self-government" in the interest of "preventing foreign influence over the U.S. political process." 800 F. Supp. 2d at 288, 290. When Maine citizens vote on referenda they are certainly participating in an activity of democratic self-government. *See* Me. Const. art. IV, pt. 3, § 18 (Maine

[12] I recognize that the court in *Minnesota Chamber of Commerce v. Choi*, --- F. Supp. 3d ----, 2023 WL 8803357, at *6 (D. Minn. Dec. 20, 2023) evaluated "[t]he scope of the compelling interest" on prong one of the strict scrutiny test. But I will save this analysis for prong two.

citizens have the right to enact legislation directly by popular vote). At this initial stage of the case, and based on the reasoning that follows on narrow tailoring, I assume without deciding that limiting foreign government influence in referenda elections is a compelling interest.

3. Interest in Limiting the Appearance of Foreign Government Influence in Elections

In addition to the interest in limiting foreign government influence in candidate and referenda elections, the State also asserts an independent interest in limiting the *appearance* of such influence. State Opp'n 20–21. For support, the State cites cases that endorse avoiding the appearance of corruption as a compelling government interest. State. Resp. 20 (citing *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)). In addition, the State points to the historic margin of victory for the Act as evidence that Maine voters do indeed perceive that foreign government influence in elections is an urgent problem. State Opp'n 21. The Corporate Plaintiffs maintain that this interest does not make sense in the context of referenda, and moreover, that the "appearance of" justification has been strictly confined to cases involving quid pro quo corruption. CMP PI Mot. 7–8; Versant PI Mot. 16–17; CMP Reply 8–9.

Bluman, the authority for the compelling interest in limiting foreign government influence in candidate elections, says nothing about an independent "appearance" interest. And I am not convinced that the interest in avoiding the appearance of quid pro quo corruption also means there is an interest in avoiding the

appearance of foreign government influence. Ultimately I agree with the Corporate Plaintiffs that the appearance interest is likely not compelling.

D. Narrow Tailoring

The Corporate Plaintiffs contend that even if there is a compelling state interest, the Act is not narrowly tailored. CMP PI Mot. 9–13; Versant PI Mot. 17–20. They primarily focus their tailoring analysis on the inclusion of entities that are 5% or more owned by foreign governments or foreign government-owned entities in the Act's definition of "foreign government-influenced entit[ies]." Versant PI Mot. 19–21; CMP PI Mot. 13; Versant Reply 8–9; CMP Reply 3–5. In the context of their facial challenge, the Corporate Plaintiffs' overbreadth argument is that too many of the Act's applications are unconstitutional as compared to the applications that are constitutionally permissible.

As explained above, subsection 2 of the Act bars campaign spending by any "foreign government-influenced entity," of which there are three types. 21-A M.R.S. § 1064(1)(E). In broad strokes they are: (1) foreign governments[13]; (2) entities that are 5% or more foreign government-owned[14]; and (3) entities with actual foreign government influence.[15]

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13 21-A M.R.S. § 1064(1)(E)(1).

14 21-A M.R.S. § 1064(1)(E)(2)(a).

15 21-A M.R.S. § 1064(1)(E)(2)(b).

1. Foreign Governments

Subsection 2 of the Act is likely narrowly tailored when it comes to foreign governments (the 21-A M.R.S. § 1064(1)(E)(1) category). Foreign governments are obviously not members of the American political community, and like the foreign citizens in *Bluman*, they likely can be barred from election spending in Maine. *See Bluman,* 800 F. Supp. 2d at 288. FECA already bars foreign governments from spending on candidate elections, 52 U.S.C. § 30121, but it provides no protection to Maine on its referenda elections. *See McIntyre*, 514 U.S. at 356; MUR 7523 (In re Stop I-186 to Protect Mining and Jobs et al.) at *3–4. Thus, this part of the Act is necessary to further Maine's interest in limiting foreign government influence in its elections.

2. 5% or More Foreign Government Owned

I reach, however, a different conclusion on the narrow tailoring question when it comes to entities with 5% or more foreign government ownership (the 21-A M.R.S. § 1064(1)(E)(2)(a) category). The Act provides that: a "foreign government-influenced entity" means: "[a] firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity: [h]olds, owns, controls or otherwise has direct or indirect beneficial ownership of 5% or more of the total equity, outstanding voting shares, membership units or other applicable ownership interests." 21-A M.R.S. § 1064(1)(E)(2)(a).

CMP's main argument is that this subsection of the Act shuts domestic corporations out of the political process based on too small a percentage of foreign government ownership, which they maintain is a faulty proxy for actual foreign government influence. CMP PI Mot. 13; *see also* Versant PI Mot. 20–21. They further

contend that this ban cannot be squared with *Citizens United*, which held that corporations have a First Amendment right to spend on campaigns. CMP PI Mot. 6.

I agree that a 5% foreign ownership threshold would prohibit a substantial amount of protected speech. I cannot reconcile the Supreme Court's holding in *Citizens United* with a law that would bar a company like CMP—incorporated in Maine, governed by a Board of Directors comprised of United States citizens and run by United States citizen executive officers who reside in Maine—from campaign spending. *See Citizens United*, 558 U.S. at 362; CMP Compl. ¶¶ 16, 18. The 5% threshold would deprive the United States citizen shareholders—potentially as much as 95% of an entity's shareholders—of their First Amendment right to engage in campaign spending. Simply put, it would be overinclusive.

The State defends the 5% threshold by pointing out that it is not random; rather, in the federal securities context, "it is the amount of ownership that federal securities law recognizes as so significant as to require a special disclosure if it occurs in a publicly traded company." State Opp'n 24; *see* 15 U.S.C. § 78m(d)(1)–(3). CMP counters that the 5% figure used by the securities laws is not a proxy for control, but rather a signal to the marketplace that a hostile takeover may be in the offing. CMP Reply at 11. *See also Morales v. Quintel Ent., Inc.*, 249 F.3d 115, 123 (2d Cir. 2001) ("By requiring the disclosure of information by a potential takeover bidder, the [Williams] Act strikes a careful balance among the interests of the bidder, the incumbent management in defending against such bid by explaining its position, and the shareholders so that they can evaluate the bidders' intentions in deciding whether

to throw in their lot with them."). It strikes me that the 5% foreign government ownership found in Maine's Act was arbitrarily chosen.[16] Moreover, I do not see how it can survive the observation in *Citizens United* that a restriction "not limited to corporations or associations that were created in foreign countries or funded *predominantly* by foreign shareholders" would be overbroad. 558 U.S. at 362 (emphasis added); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 140 S. Ct. 2082, 2087 (2020) (foreign organizations operating abroad have no First Amendment rights, notwithstanding their affiliations with United States organizations).

Nor, at this stage, has the State offered any evidence that a foreign government or foreign government-owned entity with less than full ownership of a domestic entity has exerted influence over that entity's election spending in Maine. This evidence may come with discovery, but without it, I cannot say that this part of the law is narrowly tailored.[17]

3. Actual Foreign Government Influence

Unlike the other two categories, the third category of foreign government influence—found at 21-A M.R.S. § 1064(1)(E)(2)(b)—targets entities based on

[16] I note that the legislative history provided by the State shows that an earlier bill (Representative Ackley's bill from the 129th Legislature) had restricted spending only for contributors who were "at least half foreign-based." Test. of Sen. Richard Bennett Before the Joint Standing Committee on Veterans & Legal Affairs, March 15, 2021 (ECF No. 47-8 at 17). And L.D. 194, which passed but was vetoed by the Governor, set the percentage for foreign ownership at 10%. (ECF No. 47-8 at 4).

[17] I note that simply pointing to outsized spending by entities that are 5% or more owned by a foreign government or foreign government-owned entity is not sufficient. *See Citizens United*, 558 U.S. at 349–50 (rejecting the "antidistortion rationale" for restricting corporate campaign spending).

conduct, rather than identity or ownership. It provides that a "foreign government-influenced entity" means:

> A firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity: . . . [d]irects, dictates, controls or directly or indirectly participates in the decision-making process with regard to the activities of the firm, partnership, corporation, association, organization or other entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, such as decisions concerning the making of contributions, expenditures, independent expenditures, electioneering communications or disbursements.

21-A M.R.S. § 1064(1)(E)(2)(b).

At first blush, the conduct that subsection (E)(2)(b) targets—participation by foreign governments or foreign government-owned entities in decision-making on election spending—fits the state's interest in limiting foreign government influence in its elections more closely than the second category. The (E)(2)(b) subsection also bears a close resemblance to a definition found in a FECA regulation, 11 C.F.R. § 110.20(i),[18] which has been in effect for over twenty years without any significant challenge.

The Corporate Plaintiffs argue that the subsection (E)(2)(b) category is overly broad and too unclear to follow. *See* CMP PI Mot. 10–11, 13, 17; Versant PI Mot. 24–25. CMP claims, for example, that under the State's interpretation of "directly or

[18] "Participation by foreign nationals in decisions involving election-related activities. A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee." 11 C.F.R. § 110.20(i).

indirectly participates in the decision-making process" a foreign government-owned entity could send an unsolicited email to a domestic corporation with *no* foreign ownership about an election-related issue and the domestic corporation would lose its First Amendment right to spend on elections or referenda. CMP Reply 15.

At oral argument, the State rejected that broad reading of subsection (E)(2)(b), but the State referred to definitions contained in its proposed rules. The Maine Commission on Governmental Ethics and Election Practices has proposed definitions of direct and indirect "participation in a decision-making process." *See* 94-270, § 15(1)(C).[19] Besides being difficult to follow, these proposed definitions would appear to read out the requirement that the foreign government or foreign government-owned entity participate in the actual decision-making process. Instead, they make the communication of a preference sufficient to "influence" another entity. Thus, a domestic corporation could be barred from engaging in otherwise-protected speech not based on its own conduct, but based on unsolicited communications from a foreign government-owned entity even when no actual influence is shown. This category casts an overly broad net, and it is likely to stifle the speech of domestic corporations regardless of whether a member of a foreign government or foreign government-

[19] The proposed rules state that "To 'directly participate in a decision-making process' means to communicate a direction or preference concerning the outcome of the decision-making process through a person who is an employee or official of a foreign government or an employee, director or member of a foreign government-owned entity." "To 'indirectly participate in the decision-making process' means to knowingly communicate a direction or preference concerning the outcome of the decision-making process using an intermediary, whether or not the intermediary has any formal affiliation with the foreign government or foreign government-owned entity." Notice/Correspondence re: Proposed Rules Implementing 21-A MRSA § 1064 (ECF No. 60).

owned entity has any actual influence over their decision-making on campaign spending.[20] This category is likely unconstitutional.[21]

E. Severability

Based on this analysis, I find that a substantial number of the Act's applications are likely unconstitutional judged against the Act's plainly legitimate sweep. It is therefore likely facially invalid. Because the 5% or more foreign ownership category cannot be squared with Supreme Court precedent, and because the State's proposed interpretation of direct and indirect participation is likely overbroad, a substantial portion of the Act—two of the three foreign government-influenced entity categories—are likely unconstitutional.

Perhaps anticipating that the Act was on shaky First Amendment grounds, the State invites me to sever the Act. It maintains that I have the authority to enjoin only the unconstitutional portions or applications of the Act, while letting the constitutionally permissible portions and applications go into effect. State Opp'n 69–70. Under Maine law, if a provision or application of a law is invalid, but its "invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application," the law is severable. 1 M.R.S. § 71(8); *see also Nat'l Fire Adjustment Co. v. Cioppa*, 357 F. Supp. 3d 38, 49 n.13 (D. Me. 2019). However,

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[20] Moreover, this definition is likely overly broad to the extent a domestic corporation would lose its First Amendment rights by discussing a topic of mutual interest with a foreign government-owned entity if that topic was the subject of a referendum.

[21] My conclusion may change, however, if the State adopts a rule that clarifies that the foreign government or foreign government-owned entity must actually participate *in the decision-making process* regarding election spending. *Cf. OneAmerica Votes v. State*, 23 Wash. App. 2d 951, 983–84 (Wash. App. Ct. 2022) (distinguishing between debate on issue advocacy on the one hand, and decision-making on financial support to specific candidates or ballot measures on the other).

if "the provisions of a statute 'are so related in substance and object that it is impossible to determine that the legislation would have been enacted except as an entirety, if one portion offends the Constitution, the whole must fall.' " *Op. of the Justs.*, 2004 ME 54, ¶ 25, 850 A.2d 1145 (quoting *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (1973)).

Given the expedited and preliminary nature of this proceeding, I decline to sever the Act at this stage. I will reserve those questions until I have the benefit of further briefing from all parties on how these changes would affect the Act's remaining provisions.

F. Remaining Preliminary Injunction Factors

"In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Fortuño*, 699 F.3d at 10. Resolution of the remaining factors in a First Amendment case necessarily flow from the initial likelihood assessment, particularly where plaintiffs are likely to succeed on their claim. The loss of First Amendment rights, even briefly, constitutes irreparable injury. *Id.* at 10–11. On the balance of hardships, the Plaintiffs' "interest in avoiding interference with their rights to free speech outweighs the [State's] interest in enforcing an unconstitutional [law]." *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 WL 580155, at *10 (D. Me. Feb. 12, 2014). And finally, the public interest could not be served by allowing enforcement of an unconstitutional bar on First Amendment-protected political speech. *Fortuño*, 699 F.3d at 15.

Accordingly, a preliminary injunction is required here. Because this is the relief sought by each Plaintiff, and preliminary resolution of Versant's preemption

claim and the Corporate Plaintiffs' First Amendment facial challenge requires an injunction, I need not reach the Corporate Plaintiffs' remaining arguments or address the arguments of the Electors or the Media Plaintiffs at this time. The Act is enjoined while this litigation proceeds.

CONCLUSION

For the reasons stated above, I **GRANT** the Plaintiffs' motions for preliminary injunction (ECF Nos. 4, 22, 25, 27) and **ENJOIN** enforcement of 21-A M.R.S. § 1064 until final judgment is entered in this case.

SO ORDERED.

/s/ Nancy Torresen
United States District Judge

Dated this 29th day of February, 2024.