**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MAINE**

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| CENTRAL MAINE POWER COMPANY, VERSANT POWER and ENMAX CORP., MAINE PRESS ASSOCIATION and MAINE ASSOCIATION OF BROADCASTERS, AND JANE P. PRINGLE, KENNETH FLETCHER, BONNIE S. GOULD, BRENDA GARRAND and LAWRENCE WOLD,<br><br>Plaintiffs,<br><br>v.<br><br>MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES, ET AL.,<br><br>Defendants. | Civil No. 1:23-cv-00450-NT |

**MAINE PRESS ASSOCIATION AND MAINE ASSOCIATION OF BROADCASTERS' MOTION FOR JUDGMENT ON THE PLEADINGS AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs Maine Press Association and Maine Association of Broadcasters (the "Media Plaintiffs")[1] move for judgment on the pleadings in accordance with the procedure the parties jointly requested, and the Court approved. *See* ECF No. 94 (Order on Motion to Stay Discovery to Amend Scheduling Order). Based on the pleadings, the Court should rule that the Act to Prohibit Campaign Spending by Foreign Governments and Promote an Anticorruption

[1] The Maine Press Association is the Maine non-profit trade association that represents Maine newspapers and digital publications. *See* https://mainepressassociation.org/about/. The Maine Association of Broadcasters is the Maine non-profit trade association that represents Maine radio and television stations. *See* https://www.mab.org/.

Amendment to the United States Constitution, 21-A M.R.S. § 1064 (the "Act"), violates the Media Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

## INTRODUCTION

This case, with respect to the Media Plaintiffs, is about whether it violates the First Amendment for the State of Maine to commandeer the services of news outlets to enforce a law against a "foreign government-influenced entity" spending money to influence a Maine election. The Act purports to do so by requiring news outlets to "establish due diligence policies, procedures and controls that are reasonably designed to ensure" that they don't run ads placed by foreign government-influenced entities. That requirement is unconstitutional for three independent reasons. First, the key terms "due diligence policies, procedures and controls" and "foreign government-influenced entity" are unconstitutionally vague. Second, to the extent that it is intelligible, the due diligence requirement is unconstitutional because it burdens First Amendment activities and is not narrowly tailored to a compelling governmental interest, a problem the rule promulgated by the Commission on Governmental Ethics and Election Practices purporting to lessen the burden on free expression does not solve. Third, the Act amounts to an unconstitutional prior restraint on free speech. Because the facts are not in dispute, the Court should enter judgment on the pleadings.

The First Circuit has determined that the Act's restrictions on political speech by news outlets are subject to strict scrutiny, which means the State must establish that the restriction is narrowly tailored to a compelling governmental interest. *Cent. Maine Power Co. v. Maine Comm'n on Governmental Ethics & Election Pracs*., 144 F.4th 9, 22 (1st Cir. 2025). To be

narrowly tailored to a compelling governmental interest a restriction on speech must be the least restrictive means of achieving that interest. *Rideout v. Gardner*, 838 F.3d 65, 70 (1st Cir. 2016). There is no basis to contend that the restrictions the Act places on news outlets are necessary, or even important or material, to achieving the State's goal of preventing foreign government-influenced entities from spending money to influence Maine elections. If the State believes it has a compelling interest in restricting this spending it should enact and enforce laws that regulate that spending directly, as the Act does; it does not need to further enlist news outlets to police campaign expenditures on its behalf. Because the Act's restrictions on news outlets cannot survive strict scrutiny, the Court should grant judgment on the pleadings for the Media Plaintiffs.

## BACKGROUND

Under the Act, a foreign government or "foreign government-influenced entity" may not spend money to influence a Maine election. A "foreign government-influenced entity" is an entity with respect to which a foreign government (or another foreign government-influenced entity) either (1) has an ownership stake of five percent or more, or (2) directly or indirectly participates in decision-making about the entity's efforts to influence Maine elections and referenda. *Id.* § 1064(1)(E). In addition to regulating political advertisers, the Act enlists news outlets that run political ads to enforce its prohibition against campaign expenditures by foreign government-influenced entities. This is done in subsection 7, which requires that news outlets that publish political ads "establish due diligence policies, procedures and controls that are reasonably designed to ensure" that they do not run ads that were paid for by a foreign government-influenced entity. *Id.* § 1064(7). The Act does not explain what "due diligence policies, procedures and controls" means.

The Commission on Governmental Ethics and Election Practices has promulgated a rule that restates the requirement that every news outlet "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." 94-270 CMR Ch. 1, § 16(8)(A). The rule then purports to create a "[s]afe harbor" for a news outlet that "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 . . . .
>
> (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 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.

94-270 Code Me. R. ch.1, § 16(8)(B). The rule is not currently in effect, and does not become effective unless the statute is held to be constitutional. *See* 94-270 Code Me. R. ch.1, § 16(9).

Returning to the statute, in addition to due diligence policies, procedures and controls, subsection 7 further requires that if "an Internet platform discovers" that it has run a political ad in violation of the Act it "shall immediately remove the communication and notify the [Commission on Governmental Ethics and Election Practices]." 21-A M.R.S. § 1064(7). Under subsection 8, in the event of a violation the Commission may assess penalties of up to $5,000 or double the amount of the expenditures, whichever is greater. 21-A M.R.S. § 1064(8).

## ARGUMENT

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The First Amendment applies to the publication of political advertisements. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) ("[T]he simple selection of a paid noncommercial advertisement for inclusion in a daily paper" is "squarely within the core of First Amendment security . . . ."). The First Circuit has made clear, in this case, that, "[b]ecause the Act applies to domestic actors as well as foreign actors, the First Amendment's protections apply." *Cent. Maine Power*, 144 F.4th at 22.

### I. Subsection 7 is unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

standards for those who apply them." *Id*. "In prohibiting overly vague laws, the doctrine seeks to ensure that persons of ordinary intelligence have fair warning of what a law prohibits" and to "prevent arbitrary and discriminatory enforcement of laws by requiring that they provide explicit standards for those who apply them . . . ." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (quotation marks omitted). "Where First Amendment rights are involved, an even greater degree of specificity is required." *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (quotation marks omitted). That is because "where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms." *Grayned*, 408 U.S. at 109 (quotation marks and footnote omitted). "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id*. (quotation marks omitted, omission in original). Key provisions of subsection 7 are unconstitutionally vague. These terms include "due diligence policies, procedures and controls," "foreign government," and "foreign government-influenced entity."

The statute does not define "due diligence policies, procedures and controls." That leaves the Media Plaintiffs to guess at its meaning, or how they would go about complying with the statute or ascertaining whether they had succeeded in doing so. Are news outlets required to hire investigators and attorneys to determine who owns and influences every prospective political advertiser? How extensive must their investigation be? What standards should guide it? What investigative steps should be taken? What are "policies, procedures and controls," and what is the difference between these things? The Act makes none of this at all clear. Because the Media Plaintiffs have never used due diligence policies, procedures, or controls to determine whether advertisers are "foreign government-influenced," and are unaware of any news outlets anywhere

that have ever done so, there is no precedent to look to in construing subsection 7. "[D]ue diligence policies, procedures and controls" is not a term of art in the news business or in First Amendment law, and in the absence of a definition the Media Plaintiffs have no idea what it means. That forces the Media Plaintiffs to guess at what they are required to do to avoid breaking the law. The Act therefore incentivizes news outlets to "steer far wide[] of the unlawful zone," *Grayned*, 408 U.S. at 109, by ceasing to run political ads altogether. Because subsection 7 does not establish intelligible standards for ascertaining what the "due diligences policies, procedures, and controls" requirement means, it is unconstitutional.

The State may argue that the rule promulgated by the Commission on Governmental Ethics and Election Practices solves the problem of "due diligence policies, procedures and controls" being unconstitutionally vague. It does not. The rule purports to create a "safe harbor" that is available if a news outlet sets up a system that lets advertisers self-certify that they are not foreign government-influenced entities. If the rule stopped there, the vagueness problem might be moot. Instead, to qualify for the safe harbor, a news outlet must also have a policy that "prohibits publication of any campaign advertisement that th*e media provider knows to originate from a foreign government-influenced entity*," and requires that a political ad not be published if "the media provider has actual knowledge of *facts indicating that . . . the purchaser is a foreign government-influenced* entity or is acting on behalf of a foreign government-influenced entity." This means that to enjoy the benefit of the safe harbor, a news outlet must be able to determine whether or not it "knows" that a political ad "originate[s] from a foreign government-influenced entity." And that makes the safe harbor inhospitable, because the definition of "foreign government-influenced entity" is based on the definition of "foreign government," and the

definition of "foreign government" is unconstitutionally vague. *See Cent. Maine Power*, 144 F.4th at 35 (Aframe, J. concurring) ("Each method by which an American company becomes a 'foreign government-influenced entity' leads back to the law's definition of 'foreign government.'").

While it might at first glance seem obvious what is and is not a "foreign government," the statute's definition is anything but straightforward:

> "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.

*Id*. § 1064(1)(D). Judge Aframe's concurrence describes the problem with this definition:

> The definition of "foreign government," the fulcrum on which the law pivots, is exceedingly broad. It covers "de facto ... political jurisdiction" exercised by a "group" or "any subdivision of any such group" over "any part of [any] country" other than the United States. Tit. 21-A, § 1064(1)(D). It also reaches "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." *Id.*
>
> We live in a complex world. Are the Houthis a "foreign government" in Yemen under Maine's foreign government definition? How about MS-13 in El Salvador? Boko Haram in Nigeria? Or even kibbutzim in Israel? The hard calls are everywhere and endless.
>
> That Maine requires each company to monitor what groups or people may be purchasing its shares is difficult enough. But the law also requires each company to make granular judgments about the power that each "group," "subdivision of ... such group," or "body of insurgents" has within any part of any country at any time. *Id*. It would be a tall task for our State Department to make these determinations. It seems to me it would be almost impossible for a business or media group confidently to make such judgments in constantly changing political environments.

*Id*. at 35.

Subsection 7 is unconstitutionally vague, even with the rule, because the "safe harbor" the rule creates is unavailable if a news outlet "knows" an advertisement "to originate from a foreign government-influenced entity" (94-270 CMR Ch. 1, § 16(8)(B)(1)), or if it "has actual knowledge of facts indicating that . . . the purchaser is a foreign government-influenced entity or is acting on behalf of a foreign government-influenced entity." *Id*. § 16(8)(B)(4)(b). But if the definition of "foreign government-influenced entity" is unconstitutionally vague, how is a news outlet supposed to determine whether or not it *knows* that the purchaser of a political ad is a foreign government-influenced entity?

"Because of the Maine law's First Amendment implications, it is essential that the definition of 'foreign government' be sufficiently clear to provide American companies," including news outlets, "with adequate notice of when they must desist from otherwise protected speech." *Cent. Maine Power*, 144 F.4th at 36 (Aframe, J. concurring). "That is especially so where a company's wrong assessment of its speech rights exposes it to criminal penalties under a mens rea standard that is less protective than specific intent—the Maine law imposes a mens rea of 'knowing,' which typically indicates a general intent crime." *Id*. (citing *Bryan v. United States*, 524 U.S. 184, 193 (1998) for the proposition that, "[u]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."); *see also Reno v. Am. C.L. Union*, 521 U.S. 844, 871–72 (1997) (general concern about chilling effect of vague content-based regulations of speech is heightened where (as here) the law imposes "criminal sanctions" that "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."). If the definitions

of "foreign government" and "foreign government-influenced entity" are indefinite, how is a news outlet to determine whether the facts it knows about a prospective advertiser's owners or investors cause the advertiser to fall under the statutory definition? And if a news outlet cannot make that determination, how is it to decide whether it is entitled to the protection of the safe harbor? This uncertainty would have a substantial chilling effect on the willingness of news outlets to run political ads.

The problem is bad enough for advertisers, but even worse for news outlets. If it is burdensome for a company that places a political ad to figure out whether its own owners and investors include a group that falls under the definition of "foreign government-influenced entity," it would be exponentially more burdensome for a news outlet to make that determination with respect to an advertiser's owners and investors.[2] The safe harbor the rule purports to create is therefore of limited practical use. Which puts news outlets back in the position of having to make sense of "due diligence policies, procedures, and controls," statutory language that (as explained *supra*) is also unconstitutionally vague. The rule doesn't solve the problem.

To be clear, a news outlet does not have to *know that it is violating the law* in order to have the *mens rea* required for a criminal violation. A news outlet may have no idea whether a prospective advertiser qualifies as a "foreign government" or "foreign government-influenced entity," but still have the requisite *mens rea*, if it knows *facts that a court later determines* make the entity a "foreign government" or "foreign government-influenced entity." That is because

[2] Burdensome, and also of marginal (at best) importance, there being no evidence that a problem exists of bodies of insurgents in foreign countries or persons or groups exercising *de facto* control of parts of foreign countries seeking to influence Maine elections.

"the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998). Instead, "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." *Id*. (quotation marks omitted); *see also id*. at 192–93 ("[I]n *United States v. Bailey*, 444 U.S. 394 (1980), we held that the prosecution fulfills its burden of proving a knowing violation of the escape statute if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission. . . . And in *Staples v. United States*, 511 U.S. 600 (1994), we held that a charge that the defendant's possession of an unregistered machinegun was unlawful required proof that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. . . . It was not, however, necessary to prove that the defendant knew that his possession was unlawful. Thus, unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.") (citations, quotation marks, and footnote omitted). For a news outlet that knows facts about a prospective advertiser that give rise to the possibility that a court could find that the advertiser is a foreign government or foreign government-influenced entity, the chilling effect is clear. And because all prospective advertisers must be screened for possible foreign government influence, the chilling effect of subsection 7 would impact the willingness of news outlets to publish any political ads at all.

Judge Aframe correctly concluded that "there is a likelihood that the 'foreign government' definition, the linchpin provision of Maine's law, is sufficiently vague that people 'of common intelligence must necessarily guess at its meaning and *differ as to its application*.'" *Cent. Maine Power*, 144 F.4th at 36–37 (emphasis in original). That being so, "a company

otherwise wishing to participate in a Maine election would likely abstain from political speech entirely – especially given the criminal penalties that may attach from an inaccurate evaluation of the political situation in a faraway place at any given time." *Id*. at 37. "It is precisely to avoid such chilling of speech that the Supreme Court has closely policed statutory vagueness in areas implicating free expression." *Id*. This court should do so here. *Id*. ("As this case returns to the district court, I urge consideration of this potential vagueness problem."). A safe harbor that is only available if an unconstitutionally vague statutory requirement is met is no safe harbor at all.

## II. Subsection 7's burden on news outlets is unconstitutional and it fails strict scrutiny review.

Separate and distinct from the vagueness problem, subsection 7 places an unconstitutional burden on news outlets. On its face, the burden is extraordinary and the statute is obviously unconstitutional. As interpreted by the rule, the burden is still substantial and the requirements it imposes are not narrowly tailored to a compelling governmental interest.

"Because the Act applies to domestic actors as well as foreign actors, the First Amendment's protections apply." *Cent. Maine Power*, 144 F.4th at 22. Contrary to what the State has suggested, the Media Plaintiffs are not proceeding on behalf of prospective advertisers or foreign entities whose claims may be subject to a different level of scrutiny; they are asserting news outlets' own First Amendment right to publish political speech. That means "[t]he Act's restrictions on contributions must withstand exacting scrutiny, and its remaining burdens on political speech must withstand strict scrutiny." *Id*. (citations omitted) ("[l]aws that burden political speech ordinarily are subject to strict scrutiny") (quotation marks omitted). Subsection 7 is not a contribution limit, but a restriction on political speech by news outlets that wish to run political ads. Because it restricts political speech by Maine news outlets, not just speech by

foreign entities, strict scrutiny applies. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (quotation marks omitted). "Narrow tailoring in the strict scrutiny context requires the statute to be 'the least restrictive means among available, effective alternatives.'" *Rideout v. Gardner*, 838 F.3d 65, 70 (1st Cir. 2016) (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)). Subsection 7 does not survive strict scrutiny.

**A. On its face the Act is obviously unconstitutional.**

If "due diligence policies, procedures and controls" means anything, it must mean that news outlets are required to conduct some sort of investigation into the global ownership structure of each prospective political advertiser before publishing their speech. "Due diligence" is commonly understood to mean something more than having a counterparty to a transaction check a box: Black's Law Dictionary defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation," and gives as an example "[a] prospective buyer's or broker's *investigation and analysis* of a target company, a piece of property, or a newly issued security." DILIGENCE, Black's Law Dictionary (11th ed. 2019) (emphasis added) ("A failure to exercise due diligence may sometimes result in liability, as when a broker recommends a security without first investigating it adequately."). Investigation and analysis of every prospective political advertiser is not a task Maine news outlets with limited budgets can realistically undertake. And it is not a burden the First Amendment permits the State to impose on the press. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

**1. Subsection 7's due diligence requirements impermissibly burden the freedom of the press.**

The Act burdens news organizations by requiring them to ascertain the ownership of, and the sources of influence over, every political advertiser. Modern business entities often have complex ownership structures that require extensive research, investigation, and legal training to uncover and understand. Many businesses and organizations keep their ownership structure secret, or obscure their true beneficial owners under layers of interrelated legal entities about which little or no information is available to outsiders. To reasonably "ensure" that a political ad was not paid for by a "foreign government-influenced entity," if it is even possible to do so, would require an extraordinary amount of work that news outlets have neither the personnel, the expertise, nor the financial capacity to perform.

There is no list of "foreign government-influenced entities"—a term the Act invents—for news outlets to consult. If required to expend their own resources to figure out whether each prospective political advertiser is foreign government-influenced, news outlets would have to hire and train new staff or retain outside investigators and attorneys. This would divert scarce resources away from the core First Amendment activity of reporting the news. Even if news outlets had unlimited personnel and financial resources to do the massive amount of work that would be required to determine who owns or "indirectly participates in the decision-making process" of every prospective political advertiser, it is unclear how it would be possible for a news outlet to reasonably "ensure" that it has not missed some owner or indirect decision-making participant. Moreover, any steps news outlets could take toward that end would inevitably delay the running of political ads, which would further burden free expression. *See In re Perry*, 859 F.2d 1043, 1047 (1st Cir. 1988) ("Without question, the right to free speech

includes the right to timely speech on matters of current importance."). We are aware of no other law in the United States that requires so much of the press before it can exercise its basic First Amendment right to serve as a platform for political speech.

The extent of what the Act demands is extraordinary. It does not just require news outlets to determine whether a "foreign government" *owns* as little as five percent of an advertiser. Instead, the Act defines a "foreign government-influenced entity" as *either* an entity five percent or more of which is owned by a foreign government (or another foreign government-owned entity), *or* an entity where a foreign government (or another 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 . . . entity to influence the nomination or election of a candidate or the initiation or approval of a referendum . . . ." 21-A M.R.S. § 1064(1)(E). The Act thus requires news outlets to figure out, for every political advertiser, whether a foreign government (or another foreign government-influenced entity), even if it has no ownership stake in the advertiser, "indirectly participates in the decision-making process with regard to" the advertiser's activities. That is not a task news outlets can plausibly be expected to complete, or a burden the State may constitutionally impose on them. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait . . . ");[3] *Braun v.*

[3] The Court explained that the press's "constitutional guarantees" were "not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time*, 385 U.S. at 389.

*Soldier of Fortune Mag., Inc.*, 968 F.2d 1110, 1117 (11th Cir. 1992) ("[I]f state . . . law places too heavy a burden on publishers with respect to the advertisements they print, the fear of liability might impermissibly impose a form of self-censorship on publishers. Such a chilling effect would compromise the First Amendment interest in commercial speech by depriving protected speech of a legitimate and recognized avenue of access to the public.") (citation and quotation marks omitted). Because it imposes substantial compliance burdens and costs, the Act amounts in practical effect to a tax on the press for publishing political speech, something the Supreme Court has never upheld. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983) ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."). By imposing substantial compliance burdens on news outlets that publish political speech without a compelling justification (*see infra*), the Act infringes the freedom of the press.

**2. Subsection 7 is not narrowly tailored to a compelling governmental interest.**

The problem the Act purports to address is foreign government-influenced entities spending money to influence Maine elections. The Media Plaintiffs take no position here on whether there is a compelling governmental interest in restricting spending by foreign

government-influenced entities to influence Maine elections.[4] But if there is, there are more tailored and less restrictive ways to do so. The obvious alternative to enlisting news outlets to investigate and police the ownership of political advertisers would be to simply ban expenditures the State deems objectionable and penalize the advertisers, not the news outlets. This approach would be less restrictive in that it would remove the burden subsection 7 places on news outlets. The Media Plaintiffs do not endorse this alternative, and take no position on whether it would be constitutional, but offer it as an example of a less restrictive means the State could employ to achieve its objectives. There is no reason to believe that a law regulating expenditures by foreign government-influenced entities would not be enough to address any problem that may exist.

If the State believes its interest in preventing foreign government-influenced entities from spending money in Maine elections is so compelling that a due diligence investigation is necessary, the government could achieve that objective in a way that is less restrictive of the Media Plaintiffs' First Amendment rights by conducting the investigation itself.[5] While the Media Plaintiffs do not endorse such behavior by the State, they note for purposes of the narrow tailoring analysis that this would be a better way to achieve the Act's objectives, because the State—unlike news outlets, many of which are small operations with limited budgets—has investigators and attorneys with the expertise needed to conduct the investigative work the Act may require. Having the State do the investigating would also avoid the inconsistent interpretation and application of the Act that would inevitably ensue if hundreds of Maine news

[4] This is an unsettled question. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010).

[5] The Media Plaintiffs would have First Amendment objections to this approach, but it would be less burdensome than forcing news outlets to undertake such investigations.

outlets with varying resources were each to conduct their own investigations. The impact of the Act if investigation and enforcement activities were undertaken by each individual news outlets would be both overbroad (because some domestic entities would be prevented from or delayed in engaging in political speech when a news outlet could not ensure that they were not foreign government-influenced) and underinclusive (because some foreign government-influenced entities would inevitably slip through the rather large cracks in any plausible vetting process news outlets could establish). If the State determines that investigating is to be done, it would be less restrictive of First Amendment activities for the State itself to just do it, rather than commandeering under-resourced news outlets and their unqualified staff to do the State's work for it. The outsourcing to news organizations of the job of investigating whether advertisers are violating the Act is an extraordinary mechanism that is obviously not the least restrictive way of dealing with any plausible concern the State may have about foreign government-influenced advertising. There is no reason whatsoever to imagine that the problem of foreign government-influenced entities placing political ads in Maine is so grave and intractable that this novel and unprecedented mechanism is required to address it. The statute is not narrowly tailored to the problem it purports to address.

Another way in which subsection 7 is not narrowly tailored lies in the expansiveness of its concept of a "foreign government-influenced entity." It would be one thing for the State to determine that it has a compelling interest in preventing *actual foreign governments* from running political ads in Maine. But the Act goes way beyond that, to the point of regulating political spending, not just by actual foreign governments, but by entities that are just five-percent owned by a foreign government, or even by entities that have no foreign government

ownership at all, but where a foreign government has somehow indirectly influenced their decisionmaking about political advertising in Maine.[6] § 1064(1)(E). A law that sweeps so broadly is not narrowly tailored to a compelling governmental interest. *See Hightower v. City of Bos.*, 693 F.3d 61, 81 (1st Cir. 2012) ("[A] law may be invalidated under the First Amendment as overbroad if a substantial number of its applications are unconstitutional . . . .") (quotation marks omitted).

It is also a problem for the narrow tailoring analysis that the Act cannot reasonably be expected to solve the problem it purports to address. That is because foreign governments have many ways to influence Maine elections other than by purchasing television and newspaper ads. Foreign governments have infamously tried to use social media sites like Facebook, Tik Tok, Twitter, and Instagram to influence American politics, but those platforms cannot be regulated by Maine pursuant to Section 230(c) of the Communications Decency Act of 1996. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 233 (7th Cir. 2015) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.") (quoting 47 U.S.C. § 230(c)(1)). And the Act contains numerous other loopholes. What about books, billboards, signs, leaflets, parades, speeches, mass gatherings, or other expressive activities by foreign government-influenced entities? If Maine has a compelling interest in shutting down political speech by or influenced by foreign governments, it would presumably need to regulate these methods of communication too.

[6] Not to mention situations where the indirect influencing is being done by bodies of insurgents in foreign countries or persons or groups exercising *de facto* control of parts of foreign countries. *See* section I *supra*.

The Media Plaintiffs are unaware of any law anywhere that imposes open-ended and onerous due diligence obligations on news organizations like the obligations subsection 7 appears to create. That may not be "conclusive" of the Act's constitutionality, but practices in other jurisdictions are "probative of the weight to be assigned [to Maine's] asserted interests and the extent to which the prohibition in question is necessary to further them." *Butterworth v. Smith*, 494 U.S. 624, 635 (1990). If subsection 7 were to go into effect it would constitute an unprecedented expansion of the power of states to enlist news outlets to achieve their ends.

"Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive." *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) (quotation marks omitted). Subsection 7 would chill First Amendment activities by burdening news outlets that wish to run political ads with due diligence obligations. The D.C. Circuit has addressed the potential chilling effect this creates. In *Loveday v. F.C.C.*, a statute (47 U.S.C. § 317) required radio broadcasters[7] to announce who "paid for or furnished" a sponsored program, and to "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make [that] announcement . . . ." 707 F.2d 1443, 1449 (D.C. Cir. 1983). The Court agreed with the FCC—based on the statutory text, the legislative history, and deference to the

[7] The governmental interest in regulating First Amendment activities is greater where the spectrum of available outlets is limited, as with over-the-air broadcasting. *See Washington Post v. McManus*, 944 F.3d 519 (4th Cir. 2019) ("[B]ecause broadcast licensees are given a federal grant to operate one of these limited channels, the Court has given the government wider latitude in regulating what is said on them. This justification, however, is inapposite for the virtually limitless canvas of the internet.") (citation omitted); *Reno v. Am. C. L. Union*, 521 U.S. 844, 868–69 (1997) ("[T]he vast democratic forums of the Internet [have never] been subject to the type of government supervision and regulation that has attended the broadcast industry."). Here, the Act regulates not just broadcasters but all news outlets.

agency—that the phrase "exercise reasonable diligence" did not require "the exertion of every effort by licensees to identify the real sponsors of paid material that is broadcast." *Id*. at 1448–49. In so doing the court noted the constitutional problem that requiring a more comprehensive investigation could create:

> [W]e have grave doubts that the Commission could . . . require more of the licensees than it did in this case. A duty to undertake an arduous investigation ought not casually be assigned to broadcasters. A variety of considerations, ranging from practical ones of administrative feasibility to legal ones involving constitutional difficulties, support that view.

*Id*. at 1449. The court explained that requiring the broadcasters to conduct a full-scale investigation, as subsection 7 appears to require here, "would be to create an administrative quagmire, to establish standards so variable as to invite abuse, and to raise possible constitutional questions." *Id*. at 1457.

One problem with requiring news outlets to do the government's investigative and enforcement work for it is that news outlets "are not grand juries," and "[h]ave no power to subpoena documents or to compel the attendance of witnesses." *Id*. And even if the subjects of the investigation voluntarily cooperated, "the result would be to judicialize the process of being allowed to utter a political statement." *Id*. In the absence of cooperation, "the alternative would be a field investigation by agents of the stations, involving requests for documents and interviews and, perhaps, observation of suspected persons." *Id*. "[T]he burden, expense, and delay would be considerable and in many cases possibly prohibitive." *Id*. The upshot, the D.C. Circuit observed, would be "to turn broadcasters into private detectives." *Id*. "Equally problematic," the Court noted, would be "the question of fairness to the [broadcasters], who would have to guess in every situation what the Commission would later find to be 'reasonable

diligence.'" *Id*. (also noting "the opportunities for abuse that such a variable and unknown standard would present should some future Commission use its powers for political purposes.").

In the face of these uncertain but seemingly extensive obligations, the D.C Circuit reasoned, "the most likely result would be that many stations, in lieu of incurring the expense of the investigation and the risk that the Commission would later assess their duties differently, would try . . . to avoid carrying advertisements of the type involved here." *Id*. at 1458. That is exactly what may happen if enforcement of subsection 7 is not enjoined. Stating the obvious, the court concluded that it was "not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives." *Id*.

Subsection 7 is a content-based restriction on political speech that is not narrowly tailored or the least restrictive means of achieving a compelling governmental interest. It unnecessarily burdens any news outlet that wishes to run any political ad, and its chilling effect is unmistakable. It is therefore unconstitutional.

### B. Even under the Commission's rule, the burden subsection 7 imposes is still substantial and its requirements are not narrowly tailored to a compelling governmental interest.

As a threshold matter, the Court should not consider the Commission's rule in determining whether subsection 7 is constitutional, because the rule specifically provides that it is not currently in effect, and that it does not become effective unless the statute is held to be constitutional. *See* 94-270 Code Me. R. ch.1, § 16(9) ("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*.") (emphasis added). The rule was promulgated in response to arguments the Media Plaintiffs have made in this litigation. As the rule makes clear that it is only effective and enforceable if the statute is constitutional, the Court should not consider the rule in making that determination.

If the Court does consider the rule, it should hold that the requirements subsection 7 imposes on news outlets are not narrowly tailored to a compelling governmental interest. Under the rule, before running a political ad, a news outlet must take the following steps:

1. Determine whether it "has actual knowledge of facts indicating that" the advertiser "is a foreign government-influenced entity or is acting on behalf of a foreign government-influenced entity";

2. Require the advertiser to "certify in writing that it is not a foreign government-influenced entity or acting on behalf of a foreign government-influenced entity";

3. "Preserve" the certification for at least 2 years; and

4. "Immediately remove" from the internet any ad that is found to have been purchased by or on behalf of a foreign government-influenced entity and notify the Commission.

Each of these steps imposes a significant burden on news outlets.

The statute's definition of "foreign government-influenced entity," if not unconstitutionally vague as argued *supra*, means at a minimum that it is no straightforward task to determine whether a news outlet it "has actual knowledge of facts indicating that" the advertiser "is a foreign government-influenced entity or is acting on behalf of a foreign government-influenced entity." *See* section I *supra*. The certification requirement imposes a burden on news outlets to establish, implement and maintain a certification system. The

preservation requirement expands that burden into an ongoing archiving requirement. The "immediately remove" and "notify the Commission" requirements demand additional actions by news outlets that further distract from their First Amendment activities. These burdens may not be as great as the burden that would be imposed by the statute's "due diligence policies, procedures and controls" requirement absent the rule, but that does not mean they are narrowly tailored to a compelling governmental interest.

If there is a compelling governmental interest in preventing "foreign government-influenced entities" from paying for political ads in Maine, the narrowly tailored approach to addressing that problem would be by simply making payment for such ads illegal and penalizing foreign government-influenced entities that pay for them in violation of the law. It may be convenient for the State to commandeer news outlets to help enforce the law against political advertising by foreign government-influenced entities, but there is no basis for believing that doing so is necessary, or even important, to achieving any state interest, let alone a compelling one. There is no history of illegal ads being placed by foreign government-influenced entities that a regime of pre-screening by news outlets would have prevented, or any reason to believe that simply making it illegal for foreign government-influenced entities to engage in political spending in Maine would not solve the problem the statute purports to address without having to enlist news outlets in the state's law enforcement project. Nor is it plausible to imagine that prominent corporations like Hydro-Québec or Avangrid, Inc., which are among the Act's main targets, could run paid political ads in Maine without regulators noticing. In short, there is no reason why the State, if it wishes to regulate political advertising by foreign government-influenced entities, could not enforce its own laws against advertisers who break them. *See*

*Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.") There is no plausible basis to conclude that this standard regulatory approach would not solve any problem that may exist. Because regulating news outlets is unnecessary to address the State's purported interest in censoring advertising by foreign government-influenced entities, subsection 7 is not narrowly tailored.

The chilling effect of subsection 7 on political speech, even under the rule, would be very real. In *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), a Maryland statute required "online platforms" to post certain information about political ads they run (the identity of individuals exercising control over the advertiser and the amount paid) and to retain records that the state could review on request.[8] *Id*. at 511–12. The Court observed:

> Maryland's law is different in kind from customary campaign finance regulations because the Act burdens platforms rather than political actors. So when "People for Jennifer Smith" want to place an online campaign advertisement with the *Carroll County Times*, it is the *County Times* that has to shoulder the bulk of the disclosure and recordkeeping obligations created by the sections of the Act challenged here.

*Id*. at 515. The same is true here: subsection 7 makes news outlets responsible for investigating and enforcing the law against campaign spending by foreign government-influenced entities. As the Fourth Circuit noted, "this platform-oriented structure poses First Amendment problems of

[8] The central First Amendment problem in *McManus* was that the statute compelled political speech. *See* 944 F.3d at 514–15 ("Time and again, the Supreme Court has made clear that it makes little difference for First Amendment purposes whether the government acts as censor or conductor," because "the freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.") (quotation marks omitted). Subsection 7 also compels political speech when it requires that, upon discovering a violation of the Act, an "Internet platform shall immediately remove the communication *and notify the commission*." Subsection 7 is unconstitutional for this additional reason.

its own." *Id*. In particular, a law that imposes burdens on news outlets "makes certain political speech more expensive to host than other speech because compliance costs attach to the former and not to the latter." *Id*. at 516. "Accordingly, when election related political speech brings in less cash or carries more obligations than all the other advertising options, there is much less reason for platforms to host such speech." *Id*.

The news outlets in *McManus* argued that to comply with the statute's disclosure and record-keeping requirements "they would have to acquire new software for data collection; publish additional web pages; and disclose proprietary pricing models." 944 F.3d at 516. The Fourth Circuit reasoned that "platform-based campaign finance regulations create freestanding legal liabilities and compliance burdens that independently deter hosting political speech," and that, "[f]aced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?" [9] *Id*. *See also 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," in which case "political and electoral coverage would be blunted or reduced."). Here as in *McManus*, enlisting news outlets to enforce campaign finance laws has the clear potential to "make it financially irrational, generally speaking, for platforms to carry political speech . . . ." 944 F.3d at 516. Burdening news outlets in this way

[9] Campaign finance rules imposed on direct participants in the political process, as opposed to news outlets, have less of a deterrent effect, the court explained, because "[p]olitical groups, by design, have an organic desire to succeed at the ballot box. And this ambition generally offsets, at least in part, whatever burdens are posed" by campaign finance laws. *McManus*, 944 F.3d at 516.

cannot be justified absent a showing that imposing this burden is narrowly tailored to a compelling governmental interest. It is not.

### III. Subsection 7 imposes an unconstitutional prior restraint.

On top of the problems with vagueness, burden, and narrow tailoring, subsection 7's requirement that a news outlet "immediately remove" any political ad that it "discovers" is in violation of the Act should be struck down for the additional reason that requiring the immediate removal of political speech from the public sphere without due process or procedural safeguards amounts to an unconstitutional prior restraint. A law that "limits or conditions in advance the exercise of protected First Amendment activity" is analyzed as a prior restraint. *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 20 n.15 (1st Cir. 2007) (quotation marks omitted). A prior restraint on expression is subject to a heightened standard of precision: such restraints "have to contain 'narrow, objective, and definite standards' to guide" decisions to approve or reject speech. *Id.* at 20 n.15 (quoting *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). When a "prior restraint impinges upon the right of the press to communicate news and involves expression in the form of pure speech—speech not connected with any conduct—the presumption of unconstitutionality is virtually insurmountable." *Matter of Providence J. Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986), *opinion modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987). The government bears the "heavy burden of showing justification for the imposition of such a restraint," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976), which must survive "the most exacting scrutiny demanded by our First Amendment jurisprudence." *Sindi v. El-Moslimany*, 896 F.3d 1, 32 (1st Cir. 2018).

Subsection 7 amounts to an unconstitutional prior restraint because its practical impact would be functionally equivalent to a law requiring that political ads be screened by the State before their publication. Subsection 7 requires news outlets to enforce a categorical ban on political speech by certain advertisers in advance of their speaking, and to "immediately remove" political speech upon its "discover[y]," with no procedural safeguards. The Act requires news outlets to screen and censor speech on the State's behalf in advance of its publication, something the State itself could not constitutionally do. *See Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) ("A prior restraint is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity," and such a limitation may be unconstitutional unless it is "narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected . . . ."). "[W]hen the onus is placed on platforms, we hazard giving government the ability to accomplish indirectly via market manipulation what it cannot do through direct regulation—control the available channels for political discussion." *McManus*, 944 F.3d at 517; *see also Lafortune v. City of Biddeford*, No. 01-250-P-H, 2002 WL 823678, at *8 (D. Me. Apr. 30, 2002), *report and recommendation adopted*, 222 F.R.D. 218 (D. Me. 2004) ("Requiring a written release from every person who is not a 'public official' whose name may be mentioned during the broadcast of a local-access television program . . . imposed an unconstitutional prior restraint on the plaintiff's freedom of speech, by giving private individuals the effective power of censorship."). Subsection 7 contains none of the procedural safeguards the First Amendment requires before speech may be restricted in advance of its utterance. *See Freedman v. State of Md.*, 380 U.S. 51, 58 (1965) (statutory censorship regime "avoids constitutional infirmity only if

it takes place under procedural safeguards designed to obviate the dangers of a censorship system"); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (nuisance statutes could not be enforced against film exhibitors without "special safeguards"). The Act's due diligence scheme has no procedural safeguards to ensure that protected speech is not inadvertently banned. Instead, news outlets that have neither the training nor the expertise to do so are required to make *ad hoc* determinations about whether an advertiser is foreign government-influenced.

Imposing on news outlets the legal duty to preemptively censor political speech in advance of its publication, with neither clear standards nor procedural safeguards to govern their exercise of that power, cannot plausibly be the least restrictive means to advance any compelling interest the State may have in regulating political advertising by foreign government-influenced entities. Imposing a prior restraint on speech is not a narrowly tailored solution to the problem the Act identifies.

## CONCLUSION

For the forgoing reasons, judgment on the pleadings should be granted in favor of Plaintiffs Maine Press Association and Maine Association of Broadcasters.

Dated at Portland, Maine this 21st day of November, 2025.

Respectfully Submitted,
MAINE PRESS ASSOCIATION AND
MAINE ASSOCIATION OF
BROADCASTERS

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