UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 24-1265

CENTRAL MAINE POWER COMPANY; VERSANT POWER; ENMAX CORPORATION; MAINE PRESS ASSOCIATION; MAINE ASSOCIATION OF BROADCASTERS; JANE P. PRINGLE, individually and in her capacity as a registered voter and elector; KENNETH FLETCHER, individually and in his capacity as a registered voter and elector; BONNIE S. GOULD, individually and in her capacity as a registered voter and elector; BRENDA GARRAND, individually and in her capacity as a registered voter and elector; LAWRENCE WOLD, individually and in his capacity as a registered voter and elector,
Plaintiffs-Appellees,

v.

MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES; WILLIAM J. SCHNEIDER, in his official capacity as Chairman of the Maine Commission on Governmental Ethics and Election Practices; DAVID R. HASTINGS, III, in his official capacity as a Member of the Maine Commission on Governmental Ethics and Election Practices; SARAH LECLAIRE, in her official capacity as a Member of the Maine Commission on Governmental Ethics and Election Practices; DENNIS MARBLE, in his official capacity as a Member of the Maine Commission on Governmental Ethics and Election Practices; STACEY D. NEUMANN, in her official capacity as a Member of the Maine Commission on Governmental Ethics and Election Practices; AARON M. FREY, in his official capacity as Attorney General for the State of Maine,
Defendants-Appellants.

On Appeal from a Judgment of the United States District Court for the District of Maine

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BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE OF THE LOWER COURT'S ORDER

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to Fed. R. App. P. 26.1, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

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STATEMENT OF ISSUE

Amicus curiae New England Legal Foundation ("NELF") addresses the following issue presented in this case:

> Is a state law facially overbroad under the First Amendment when it categorically prohibits any corporation with 5% foreign government ownership from engaging in campaign spending?[1]

INTEREST OF AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to judicial enforcement of a corporation's First Amendment right to engage in political speech, which includes various forms of campaign spending. Accordingly, NELF advocates rigorous judicial review of a state law that

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[1] Pursuant to Fed. R. App. P. 29(a)(2), amicus states that counsel for all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E)(i)-(iii), amicus also states that neither the plaintiffs-appellees nor their counsel, nor any other individual or entity aside from amicus and its counsel, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission.

categorically prohibits certain corporations from engaging in campaign spending, based solely on the national identity of certain of their minority shareholders.

ARGUMENT

THE DISPUTED MAINE CAMPAIGN FINANCE ACT IS FACIALLY OVERBROAD UNDER THE FIRST AMENDMENT BECAUSE IT CATEGORICALLY PROHIBITS ANY CORPORATION WITH 5% FOREIGN GOVERNMENT OWNERSHIP FROM ENGAGING IN CAMPAIGN SPENDING, WITHOUT REQUIRING THE STATE TO SHOW THAT THE CORPORATION IS, *IN FACT*, A "FOREIGN GOVERNMENT-INFLUENCED ENTITY."

The central issue in this case is whether a Maine statute, 21-A M.R.S. § 1064, entitled "An Act to Prohibit Campaign Spending by Foreign Governments" (the Act), can survive the "rigorous standard of review" that the First Amendment requires. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014) (cleaned up). Under the Act, any corporation with 5% or more foreign government ownership is deemed *conclusively* to be a "foreign government-influenced entity," and is therefore prohibited from engaging in any campaign contributions and expenditures for political candidates and ballot initiatives. 21-A M.R.S. §§ 1064(1)(E)(2)(a), 1064(2).[2]

[2] Specifically, the Act defines a "foreign government-influenced entity," in part, as a corporation as 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). 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).

The First Amendment, however, protects a corporation's right to engage in campaign spending as a form of core political speech. "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (striking down federal statutory ban on corporate expenditures for political candidates). The Act contravenes *Citizens United* precisely because it *does* suppress a corporation's political speech on the basis of the speaker's corporate identity. Specifically, the Act bans a corporation's campaign spending solely because the corporation has some foreign minority shareholders, without requiring the Government to prove any *actual* foreign influence over the corporation's campaign spending decisions.

But first some words on the applicable standard of review. "Laws that burden [a corporation's] political speech ordinarily are subject to strict scrutiny, requiring the government to prove that any restriction 'furthers a compelling interest and is

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Section 1064(2), in turn, bars a "foreign government-influenced entity" from engaging in the following campaign spending activities:

> 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).

narrowly tailored to achieve that interest.'" *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012) (quoting *Citizens United*, 558 U.S. at 340) (cleaned up).

Moreover, the Supreme Court has drawn a distinction between the First Amendment protections afforded campaign contributions and those afforded campaign expenditures. *Compare McCutcheon*, 592 U.S. at 197 (applying strict scrutiny to laws restricting independent expenditures, under which "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.") *with id.* (applying lesser standard of review to restrictions on campaign contributions, under which "the State [must] demonstrate[] a *sufficiently important* interest and [must] employ[] means *closely drawn* to avoid unnecessary abridgement of associational freedoms.") (cleaned up) (emphasis added).

However, this court "need not parse the differences between the two standards in this case," *McCutcheon*, 558 U.S. at 199, because the Government has failed under either standard of review. Even assuming, for the sake of argument, that the State of Maine has a compelling interest to prevent foreign influence over its elections, "*the means selected* [fail] to achieve that objective." *McCutcheon*, 572 U.S. at 199 (emphasis added). That is, the Government has not shown *why* the mere fact of 5%

foreign government ownership should automatically determine that a corporation is a statutory "foreign government-influenced entity" that must forfeit its right to engage in campaign speech:

> [R]egardless whether we apply strict scrutiny or [the] 'closely drawn' test, *we must assess the fit between the stated governmental objective and the means selected to achieve that objective*. . . . [I]f a law that restricts political speech does not avoid *unnecessary abridgement of First Amendment rights*, . . . it cannot survive rigorous review.

McCutcheon, 572 U.S. at 199 (cleaned up) (emphasis added). *See also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

More specifically, the Government has not proven, with the "hard evidence" that the First Amendment requires, *Playboy Entm't Grp.*, 529 U.S. at 819, that any corporation meeting the statutory 5% foreign-ownership threshold is *actually* under the influence or control of those foreign shareholders whenever it makes its campaign spending decisions. "[W]e have never accepted *mere conjecture* as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210 (cleaned up) (emphasis added).

After all, a corporation's foreign minority shareholders could simply be *passive investors* who have no interest or involvement whatsoever in the corporation's

campaign spending decisions. "A domestic corporation with a foreign shareholder holding [five] percent of its shares is banned from speaking, even if that foreign national is a passive investor who exercises no influence or control over the corporation's election expenditures." *Minnesota Chamber of Com. v. Choi*, 2023 WL 8803357, at *8 (D. Minn. Dec. 20, 2023) (invalidating substantially similar state campaign finance law under First Amendment).

For instance, it is "mere conjecture," *McCutcheon*, 572 U.S. at 210, unsupported by even a scintilla of "hard evidence," *Playboy Entm't Grp.*, 529 U.S. at 819, that the foreign-government minority shareholders of Central Maine Power Company (CMP), the lead plaintiff in this case, have exerted any degree of influence or control over CMP's campaign spending decisions. Indeed, the Government, in its brief, commits the same logical error that underlies the Act, by concluding that the mere existence of foreign government shareholders automatically establishes actual foreign influence or control over CMP's campaign speech. Appellants' Brief at 8-9. The First Amendment cannot abide such speculative "proof," asserted as a matter of ipse dixit.

Put otherwise, "[t]he State must specifically identify an *actual problem*" of foreign minority shareholder influence over campaign spending decisions that is "in need of solving." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (cleaned

up) (emphasis added). But the Government has identified no such "actual problem" of foreign minority shareholders influencing or controlling a corporation's campaign spending decisions. "When the Government defends a regulation on speech as a means to prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996) (cleaned up).

Moreover, "[t]here must be *a direct causal link* between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (emphasis added). Here, "the restriction imposed" is the Act's ban on campaign speech for every corporation with 5% foreign government ownership, while the purported "injury to be prevented" is foreign influence over Maine elections. But where is the "direct causal link" between the two? The Government has failed to establish this necessary causal connection, resulting in "a substantial mismatch between the Government's stated objective and the means selected to achieve it." *McCutcheon*, 572 U.S. at 199.

As a result, the 5% provision of the Act is facially, and fatally, overbroad under the First Amendment, because "a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly [or even *potentially*] legitimate sweep." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (cleaned

up). Indeed, it is unclear whether the Act's 5% provision has any "legitimate sweep" so far, as an empirical matter, because the Government has failed to identify any examples of foreign minority shareholders actually influencing a corporation's campaign spending in a Maine election.

In this connection, the Supreme Court in *Citizens United* indicated that, to avoid such facial overbreadth under the First Amendment, a campaign finance law would have to require "predominate" foreign ownership of a domestic corporation (i.e., well above 50%) to justify a categorical ban on that corporation's campaign spending. *See Citizens United*, 552 U.S. at 362 (federal statutory ban on corporate campaign expenditures for candidates "[was] not limited to corporations or associations that were created in foreign countries or *funded predominately by foreign shareholders*. [The federal statute] therefore would be *overbroad* even if we assumed, arguendo, that the Government has a compelling interest in limiting foreign influence over our political process.") (emphasis added).

The Act's paltry 5% foreign-ownership threshold falls far below the "predominate" foreign ownership that *Citizens United* would require to support a constitutionally viable presumption that such a corporation is subject to foreign influence or control in its campaign spending decisions. Therefore, the Act's categorical ban on campaign spending for all corporations with 5% foreign

government ownership is "overbroad even if we assumed, arguendo, that the Government has a compelling interest in limiting foreign influence over our political process." *Id.*, 552 U.S. at 362.

CONCLUSION

For the foregoing reasons, amicus curiae New England Legal Foundation respectfully requests that the Court affirm the order of the District Court.

Respectfully submitted,

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Dated: July 30, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i), because it contains 1,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify further that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on July 30, 2024, I filed electronically the within appellate amicus brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system, and thereby served all parties or their counsel of record.

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