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Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending

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DARK MONEY RISES: FEDERAL AND STATE ATTEMPTS TO REIN IN UNDISCLOSED CAMPAIGN-RELATED SPENDING

*Kristy Eagan**

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INTRODUCTION

Perhaps the most infamous of attack advertisements, titled “Peace, Little Girl,” depicted a little girl in a field plucking petals from a daisy as she counted up from one to nine.¹ At the end of her count, a man’s voice began counting down from ten.² Upon reaching zero, an atomic bomb exploded.³ As the mushroom cloud appeared on the television screen, the voice of then-President Johnson stated: “These are the stakes—to make a world in which all of God’s children can live, or go into the dark. We must either love each other, or we must die.”⁴ The ad was intended to attack statements that Barry Goldwater, the Republican presidential candidate, had made regarding nuclear warfare.⁵ Although the ad aired only once, it is credited with ushering in a new era of American politics.⁶ However, attack ads are nothing new—neither are anonymous ones.

1. ROBERT MANN, DAISY PETALS AND MUSHROOM CLOUDS: LBJ, BARRY GOLDWATER, AND THE AD THAT CHANGED AMERICAN POLITICS 55 (2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 56.

6. *Id.* at 109–12.

In 1800, President John Adams faced reelection against Thomas Jefferson.⁷ The Alien and Sedition Act prevented anyone from openly criticizing the President, so Jefferson sought other ways to get his message out.⁸ Jefferson anonymously distributed campaign propaganda⁹ and financially supported James Callender while encouraging him to publish a series of essays in the *Richmond Examiner* that attacked Adams, referring to him as a “hideous hermaphroditical character which has neither the force or firmness of a man, nor the gentleness and sensibility of a woman.”¹⁰ Adams fought back, calling Jefferson “a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.”¹¹

Today, negative campaign advertisements dominate the airwaves during election cycles.¹² Just as Americans have come to expect to see more holiday-themed advertisements in November and December,¹³ they too have come to expect a flood of negative campaign ads in the months preceding elections.¹⁴ In 2012, Americans witnessed the most expensive election campaign in history, topping off at approximately seven billion dollars.¹⁵ Modern attack ads, produced by strategy teams including behavioral scientists,¹⁶ are noticeably less overt, although no less persuasive, than they were in the nineteenth century.¹⁷ Rather than employ traditional name calling, modern

7. DAVID McCULLOUGH, *JOHN ADAMS* 536 (2001).

8. *Id.* at 536.

9. *Id.*

10. *Id.* at 536–37.

11. *Then & Now: Running for President*, PBS, www.pbs.org/wgbh/americanexperience/features/then-and-now/presidents (last visited May 1, 2013).

12. Albert R. Hunt, *Media Share Blame for Negative Ads*, N.Y. TIMES, Oct. 14, 2012, <http://www.nytimes.com/2012/10/15/us/15iht-letter15.html>. In 2012, “80 percent of [advertisements] put out by President Barack Obama and 84 percent of those by Mitt Romney” were negative. *Id.* Over 90% of advertisements by outside groups were negative. *Id.*

13. Stuart Elliott, *Calendar Says October; Retailers Say It's Christmas*, N.Y. TIMES, Oct. 29, 2012, at B3.

14. Pauline Arrillaga, *Election 2012: Negativity Dominates Campaign Cycle*, HUFFINGTON POST (Oct. 21, 2012), http://www.huffingtonpost.com/2012/10/21/election-2012-negativity_n_1998436.html.

15. Audio recording: Open Meeting of the Federal Election Commission (Jan. 31, 2013) (statement of Ellen Weintraub, Chair, of the FEC), available at <http://www.fec.gov/audio/2013/2013013101.mp3>.

16. Benedict Carey, *Academic 'Dream Team' Helped Obama's Effort*, N.Y. TIMES, Nov. 12, 2012, at D1.

17. See Hunt, *supra* note 12.

attack ads use subliminal messaging¹⁸ and sympathetic personal stories to paint negative pictures of political candidates.¹⁹

In 2012, an advertisement produced by Priorities USA Action used the personal story of Joe Soptic.²⁰ In the ad, Soptic described how he lost his job and health insurance plan when Governor Romney decided to close the plant where Soptic worked.²¹ Soptic's wife later became ill but did not tell him until he brought her to the hospital and they discovered that it was too late to save her. "I don't know how long she was sick and I think maybe she didn't say anything because she knew that we couldn't afford the insurance," Soptic lamented.²² The ad ended with Soptic stating: "I do not think Mitt Romney realizes what he's done to anyone, and furthermore I do not think [that he] is concerned."²³ The ad was widely criticized as tying Governor Romney to cancer.²⁴ Nevertheless, Priorities USA Action defended the ad, calling it "wildly successful."²⁵ President Obama responded in a news conference, stating: "I don't think that Governor Romney is somehow responsible for the death of the woman that was portrayed in that ad. But keep in mind this is an ad that I didn't approve."²⁶

Priorities USA Action is a Super PAC,²⁷ which means that it does not contribute to or coordinate with federal candidates and can receive unlimited contributions from individuals, corporations, and

18. See generally TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001) (studying the use of implicit racial appeals in political campaigns).

19. See Arrillaga, *supra* note 14.

20. Rachel Weiner, *Priorities Ad Ties Mitt Romney to Cancer Death*, WASH. POST (Aug. 7, 2012, 8:16 AM), http://www.washingtonpost.com/blogs/the-fix/post/priorities-ad-ties-mitt-romney-to-cancer-death/2012/08/07/d723d8c0-e084-11e1-8fc5-a7dcf1fc161d_blog.html.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Sabrina Siddiqui, *Priorities USA Action Defends Controversial Romney Ad As 'Wildly Successful'*, HUFFINGTON POST (Aug. 9, 2012, 2:48 PM), http://www.huffingtonpost.com/2012/08/08/priorities-usa-action-romney-ad_n_1756972.html.

26. Barack Obama, President of the United States, Remarks to the White House Press Corps (Aug. 20, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

27. See *Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012> (last updated Apr. 11, 2013).

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labor unions.²⁸ Given that Super PACs are subject to extensive disclosure requirements under the Federal Election Campaign Act (“FECA”), one would think that it would be easy to determine who funds Priorities USA Action’s ads, but that is not always the case. Some of the information disclosed on Priorities USA Action’s itemized receipts clearly identifies the source of contributions, but some information does not.²⁹ For example, in 2011, Priorities USA Action received \$215,234.42 in contributions from Priorities USA, a 501(c)(4) non-profit organization that is not required to disclose the source of its contributions when it contributes that money to a Super PAC.³⁰

To date, the identities of the contributors of nearly 30% of money spent in 2012 by outside organizations on campaign-related activity subject to disclosure remain undisclosed.³¹ That figure was higher in 2010, at 44%.³² These statistics stand in stark contrast to prior election years, where undisclosed spending averaged less than 5% and never exceeded 13.3%.³³ As undisclosed or “dark” money makes up a greater portion of overall spending, the influence of anonymous donors increases, and, accordingly, the public interest in knowing the sources of contributions becomes more imperative.³⁴

Some commentators point to the recent rise in undisclosed spending as evidence that the interest in avoiding disclosure is both strong and prevalent.³⁵ They also point to statistics showing that

28. See *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/indexp.shtml> (last updated Jan. 2013); *Independent Expenditure-Only Committees*, FED. ELECTION COMMISSION, http://www.fec.gov/press/press2011/ieoc_alpha.shtml (last updated May 20, 2013); see also *infra* Part II.A.1.

29. See Priorities USA Action, Report of Receipts and Disbursements (FEC Form 3X) at 5 (Dec. 6, 2012), available at <http://images.nictusa.com/pdf/812/12963769812/12963769812.pdf>.

30. See *id.* at 21.

31. See *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/disclosure.php> (last visited May 1, 2012).

32. *Id.*

33. *Id.* The statistics are based on data provided for the nine federal elections that preceded 2008. *Id.*

34. See Kim Barker, *In Montana, Dark Money Helped Democrats Hold a Key Senate Seat*, PROPUBLICA (Dec. 27, 2012, 11:40 AM), <http://www.propublica.org/article/in-montana-dark-money-helped-democrats-hold-a-key-senate-seat>.

35. See Paul Blumenthal, ‘Dark Money’ In 2012 Election Tops \$400 Million, 10 Candidates Outspent by Groups with Undisclosed Donors, HUFFINGTON POST (Nov. 2, 2012, 1:36 PM), <http://www.huffingtonpost.com/2012/11/02/dark-money-2012->

when disclosure requirements change, campaign spending shifts to those activities that are subject to less or no disclosure.³⁶ They argue that individuals and groups that are determined to remain anonymous will choose to redirect their spending, even where the alternatives are more costly, rather than subject themselves to disclosure.³⁷

For over a century, Congress has recognized the need for campaign finance reform. Congress first addressed this need in 1907 when it passed a law banning corporations and national banks from making contributions in connection with political elections.³⁸ Over the course of the next forty years, Congress passed additional legislation that, among other things, barred unions and corporations from making independent expenditures, established contribution and spending limits, and required disclosure of certain contributions and expenditures.³⁹ In 1971, these laws were consolidated into the “FECA.”⁴⁰ Congress has amended the FECA several times since its

election-400-million_n_2065689.html; see also Lee Drutman, *Latest Dark Money Tallies: \$213 Million in the General Election and Counting, 81% on Behalf of Republicans; 34 Races with \$1 Million or More*, SUNLIGHT FOUND. (Nov. 2, 2012, 7:20 AM), <http://sunlightfoundation.com/blog/2012/11/02/dark-money-tallies/>.

36. See Julius Chen, *Electioneering Communications Start to Reemerge After D.C. Circuit’s Van Hollen Ruling*, INSIDE POL. L. (Oct. 1, 2012), <http://www.insidepoliticallaw.com/2012/10/01/electioneering-communications-start-to-reemerge-after-d-c-circuits-van-hollen-ruling>; Alex Engler, *Dark Money Organizations Change Strategies to Keep Donors Secret*, SUNLIGHT FOUND. (Sept. 25, 2012, 1:56 PM), <http://sunlightfoundation.com/blog/2012/09/25/dark-money-organizations-change-strategies-to-keep-donors-secret/>; Kevin Glandon, *“Electioneering Communications” Virtually Vanish in Wake of Van Hollen Decision*, INSIDE POL. L. (Sept. 12, 2012), <http://www.insidepoliticallaw.com/2012/09/12/electioneering-communications-virtually-vanish-in-wake-of-van-hollen-decision/>; Robert Maguire, *What Citizens United (et al) Wrought: The Shadow Money Explosion*, OPENSECRETS.ORG (Sept. 18, 2012, 12:53 PM), <http://www.opensecrets.org/news/2012/09/what-citizens-united-et-al-wrought.html>.

37. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708, 1737 (1999); Anthony Johnstone, *A Madisonian Case for Disclosure* 19 GEO. MASON L. REV. 413, 416 (2012); Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 485–86 (2007); see also Fed. Election Comm’n v. Wis. Right to Life (*Wisconsin II*), 551 U.S. 449, 515, 517 n.10 (2007) (Souter, J., dissenting) (noting how the hydraulics of political money and the “‘ingenuity and resourcefulness’ of political financiers revealed the massive regulatory gap left by [*Buckley*’s] ‘magic words’ test,” and ultimately lead to an “explosive growth of campaign-based advocacy, without even disclosure of its activities and funding sources”).

38. See FEC, THIRTY YEAR REPORT 3 (2005).

39. See *id.* at 3–4.

40. See *id.* at 4.

enactment, twice passing sweeping legislation that promised increased disclosure.⁴¹

The actions and inactions of the executive and judicial branches of the federal government, however, have undermined Congress's intentions and contributed to the recent rise in dark money. The decisions of the Supreme Court⁷ and the rules promulgated by the Federal Election Commission ("FEC") have inadvertently created easily exploitable loopholes in the FECA's disclosure provisions.⁴² The FEC Commissioners are divided evenly over the proper scope of the agency's authority and the permissible interpretation of several provisions of the FECA and corresponding regulations.⁴³ These splits have prevented the agency from promulgating any substantive rules since *Citizens United v. FEC*⁴⁴ and from taking action against any conduct that falls beyond the scope of the FECA, as three Commissioners have narrowly interpreted it. This narrow reading essentially creates a bright-line test that provides organizations with a manual for evading disclosure requirements.

Thus far, attempts to reduce deadlocks within the FEC and to eliminate some of the adverse and unintended effects of some of the Supreme Court's decisions have failed. In 2008, then-candidate Obama promised to appoint new FEC commissioners. Since taking office, however, President Obama has made only one unsuccessful attempt.⁴⁵ Responding to the President's call for increased

41. *See id.* at 5, 7 (discussing the 1974 Amendments to the FECA and the Bipartisan Campaign Reform Act of 2002).

42. *See generally infra* Part II.A.2.

43. *See infra* Part II.B.2.

44. *See* Trevor Potter, President, Campaign Legal Ctr., Address to the Annual Meeting of the American Law Institute (May 23, 2012), *available at* http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1739:may-24-2012-trevor-potter-addresses-the-campaign-finance-crisis-in-speech-to-the-american-law-institute-annual-meeting&catid=63:legal-center-press-releases&Itemid=61 (discussing the FEC's failure to garner the four votes necessary to put out a Notice of Proposed Rulemaking revising regulations since *Citizens United*).

45. *See* Editorial, *That Campaign Promise About Campaigning*, N.Y. TIMES, Apr. 7, 2012, <http://www.nytimes.com/2012/04/08/opinion/sunday/that-campaign-promise-about-campaigning.html>; *Reforming the Federal Election Commission*, CITIZENS FOR RESP. & ETHICS WASH., <http://www.citizensforethics.org/policy/entry/reforming-the-fec> (last visited Feb. 16, 2013). After a fifteen-month delay on a vote for Senate approval, President Obama's nominee withdrew his nomination citing a "broken system." Josh Isreal & Aaron Mehta, *Withdrawn FEC Nominee Laments "Broken" Confirmation Process*, CENTER FOR PUB. INTEGRITY (Oct. 7, 2010), <http://www.publicintegrity.org/2010/10/07/2450/withdrawn-fec-nominee-laments-broken-confirmation-process>.

disclosure,⁴⁶ members of Congress twice brought bills to the floor promising just that.⁴⁷ Both bills, however, were ultimately defeated by filibuster after failing to garner the sixty votes necessary to invoke cloture.⁴⁸ Although President Obama expressed dissatisfaction with the defeat of the more recent bill⁴⁹ and recent polls show that the vast majority of Americans support disclosure of the source of contributions to outside groups,⁵⁰ the President has yet to call upon Congress to continue its efforts to pass legislation increasing disclosure.⁵¹

In the meantime, several state legislatures have adopted legislation that would avoid creating the kinds of loopholes that are currently apparent in the federal campaign laws. The constitutionality of these laws, however, has been vigorously challenged in the courts.⁵² In determining the validity of these laws which, like the federal laws, are densely filled with campaign finance jargon incomprehensible to laypersons,⁵³ lower courts must grapple with a series of precedential opinions that are “baffling[,] conflicted,”⁵⁴ “unnecessarily incoherent,” and which too frequently provide inadequate guidance as to when compelled disclosure that goes beyond what the Supreme Court has specifically upheld as permissible.⁵⁵ Without clear

46. See State of the Union Address, 2010 DAILY COMP. PRES. DOC. 8 (Jan. 27, 2010).

47. See Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012, S. 3369, 112th Cong. (2011); Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2010, H.R. 5175, 111th Cong. (2009).

48. See S. Res. 5007, 112th Cong. (2012), 158 CONG. REC. S5008 (daily ed. July 16, 2012) (roll call vote on motion to proceed); S. Res. 7383, 111th Cong. (2010), 156 CONG. REC. S7388 (daily ed. Sept. 23, 2010) (same).

49. See President Barack Obama, Statement on Senate Action on Campaign Finance Legislation, 2012 DAILY COMP. PRES. DOC. 1 (July 16, 2012).

50. Memorandum from Stan Greenberg et al., Democracy Corps, to Friends of Democracy Corps et al. (Nov. 13, 2012), available at <http://www.democracycorps.com/attachments/article/930/dcor.pcaf.postelect.memo.111312.final.pdf> (based on a survey finding that eighty-seven percent of Americans who voted for Democrats and eighty-three percent of Americans who voted for Republicans in the 2012 general election supported increased disclosure of spending by outside groups).

51. See generally State of the Union Address, 2013 DAILY COMP. PRES. DOC. 1–13 (Feb. 12, 2013).

52. See generally *infra* Part III.

53. See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 471–72 (7th Cir. 2012).

54. *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004).

55. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 622–23 (2011); Richard L. Hasen, *Beyond Incoherence: The*

guidance, some courts have opted to take a precautionary approach, erring on the side of free speech,⁵⁶ while other courts have upheld equivalent laws, noting the importance of the government interest in providing the public with adequate disclosure.⁵⁷ The Supreme Court has yet to clarify the permissible bounds of compelled disclosure.⁵⁸

This Note consists of four parts. Part I examines the two competing interests that are at the center of this debate—free speech rights and the government’s interest in disclosure—and the development of campaign finance jurisprudence over the past half-century. Part II explores the current federal disclosure requirements, their inadequacies, and the ongoing debate among the FEC Commissioners over the proper interpretation of the FECA’s disclosure requirements. Part III focuses on states’ attempts to increase disclosure for local elections beyond the federal requirements and evaluates the divergent approaches taken by courts in applying Supreme Court precedent and the exacting scrutiny standard of review. Part IV proposes changes that can and should be made by all branches of government to increase disclosure. Part IV argues that in order to close the loopholes in the federal requirements, Congress should do away with the major purpose test, and the FEC should employ multi-factor tests to determine which communications are express advocacy and electioneering communications. Part IV further argues that the heightened specificity of review standard for laws banning speech should not apply to mere disclosure laws, and that courts should be particularly

Roberts Court’s Deregulatory Turn in *FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1108–09 (2008); Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 849–50 (2007); Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 56–57 (2004); see also *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 687 n.25 (2011), *rev’d on other grounds*, 706 F.3d 270 (4th Cir. 2013) (explaining that the Supreme Court and Courts of Appeals have issued “fractured and somewhat obscure opinions” in the area of election-related laws).

56. See *Tennant*, 849 F.2d at 687 n.25 (describing the “significant analytical struggle” undertaken in order to determine the validity of the state law).

57. For a discussion of cases upholding state disclosure laws, see generally *infra* Part II.B.

58. See, e.g., *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544, 550 n.2 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013) (mem.). This is the most recent case addressing the constitutionality of disclosure laws in which the Supreme Court has denied a writ of certiorari.

deferential to state legislative attempts to reign in undisclosed spending in light of the special interests that are involved.

I. BACKGROUND: FREE SPEECH RIGHTS AND COMPELLED DISCLOSURE

A. Free Speech Rights

1. *The Origins of and Justifications for Free Speech Rights*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”⁵⁹ Enacted as part of the Bill of Rights, the primary purpose of the freedom of speech clause “was to protect the free discussion of governmental affairs, including discussion of candidates.”⁶⁰ The First Amendment was added to the Constitution, in part, to create a counterbalance to the immunities provided to Congress in the Speech or Debate Clause.⁶¹ For election debates to be equal, the ratifiers believed that the people needed to enjoy the same freedoms as Congress when discussing the merits of candidates.⁶² Thus, the First Amendment served not only to protect the rights of unpopular minorities against a hostile majority, but also to protect the “rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.”⁶³

A few years after the Constitution was ratified, Congress enacted the Alien and Sedition Act (“Sedition Act”),⁶⁴ limiting some of the broad protections that the First Amendment guaranteed.⁶⁵ Although

59. U.S. CONST. amend. I.

60. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) (internal quotation marks omitted).

61. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 102–03 (2005).

62. *Id.* at 104.

63. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 21 (1998).

64. The Alien and Sedition Act “made it a crime, punishable by a \$5,000 fine and five years in prison, ‘if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.’” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964) (quoting Sedition Act of 1798, 1 Stat. 596).

65. AMAR, *supra* note 61, at 103. James Callender, who had attacked President Adams in a series of essays, was one of the individuals tried and convicted under the Act. *See Sparf v. United States*, 156 U.S. 51, 70 (1895).

the Sedition Act significantly curtailed free speech rights, it did protect one area of speech—the truth.⁶⁶ Nevertheless, it was found to be unconstitutional.⁶⁷

The current understanding of the First Amendment is that it provides the people with the right to openly criticize public officials unless a public official can prove that the statement was made “with knowledge that it was false or with reckless disregard, whether it was false or not.”⁶⁸ This high bar protects the people’s right to “freely examin[e] public characters and measures,”⁶⁹ including those who produce negative campaign ads.

Political speech made during election campaigns is considered to be at the very core of the First Amendment.⁷⁰ Political speech is not limited to speech per se. Rather, it includes expressive conduct, such as wearing armbands to protest a war,⁷¹ desecrating a flag,⁷² and spending money on political speech.⁷³ There are four primary justifications for protecting free speech.⁷⁴ First, free speech promotes self-governance by allowing an open discussion of candidates.⁷⁵ Second, free speech aids the public in discovering the truth by facilitating a marketplace of ideas.⁷⁶ Third, free speech advances autonomy by protecting self-expression.⁷⁷ Finally, free speech promotes tolerance by protecting unpopular or distasteful speech.⁷⁸ Protecting speech can also serve as a way to protect other constitutional rights, such as the right to freedom of association,

66. AMAR, *supra* note 61, at 104.

67. *See Sullivan*, 376 U.S. at 274 (1964).

68. *Id.* at 279–80.

69. *Id.* at 274 (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 553–54 (1876)).

70. *See Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310, 339–40 (2010) (“The First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”)).

71. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

72. *See United States v. Eichman*, 496 U.S. 310, 313 (1990).

73. *See Citizens United*, 558 U.S. 310.

74. *See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 926 (Vicky Been et al. eds., 4th ed. 2011).

75. *Id.*

76. *Id.* at 927–29.

77. *Id.* at 929.

78. *See id.* at 930.

which includes the right to pool money through contributions, and the right to privacy.⁷⁹

Because free speech is considered to be so crucial in ensuring a healthy, functioning democracy, laws restricting speech are generally upheld only if they can survive strict scrutiny and, as a result, must be narrowly tailored to a compelling governmental interest.⁸⁰ The Supreme Court has recognized, however, that there are countervailing and often competing interests that justify regulating political speech.⁸¹ In light of these competing interests, the Court has created a two-tiered system of review for laws restricting political speech.⁸² Laws that suppress speech—laws that, for example, limit the amount that individuals, corporations, or other organizations can spend on political speech—are reviewed under strict scrutiny.⁸³ Laws that burden speech, but that do not prevent anyone from speaking, such as laws that impose disclosure requirements on those that spend money on political speech, are subject to exacting scrutiny, which requires that they must be “substantially related” to a “sufficiently important” governmental interest.⁸⁴

2. *Common Challenges to Laws Regulating Election-Related Speech*

The three most common challenges to laws restricting political speech are that they are overly broad, vague, or directly violative of the First Amendment. Laws restricting speech will be struck down on their face if they are impermissibly vague, overbroad, create no set of circumstances under which they would be valid,⁸⁵ or lack any plainly legitimate sweep.⁸⁶ To prevail, a challenger must demonstrate a substantial risk that enforcing the law would lead to the suppression of speech.⁸⁷ Facial invalidation is “manifestly strong medicine” that is

79. *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976) (quoting *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)).

80. *See, e.g., Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982).

81. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding law requiring solicitors to stand 100 feet from polling entrances based in part on government’s compelling interest in protecting the fundamental right to vote).

82. *See Buckley*, 424 U.S. at 64.

83. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

84. *See id.* at 366–67 (quoting *Buckley*, 424 U.S. at 64, 66, 96).

85. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 & n.5 (1982) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)).

86. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

87. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

used only as a last resort.⁸⁸ Accordingly, before striking down a law, a court will consider any limiting construction that is proffered.⁸⁹

Vagueness and overbreadth challenges are frequently described as overlapping theories capable of being analyzed concurrently.⁹⁰ However, they are in fact two distinct doctrines.⁹¹ A law or regulation is vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited⁹² or if it permits arbitrary and discriminatory enforcement.⁹³ In the context of laws capable of suppressing speech, even greater specificity is required.⁹⁴ The overbreadth doctrine provides for facial invalidation of laws that prohibit a real and substantial amount of protected speech when judged in relation to their overall scope.⁹⁵

Overbroad laws risk deterring or “chilling” constitutionally protected speech, especially when they impose criminal sanctions.⁹⁶ The overbreadth doctrine permits a challenge to a law even though, as applied to the defendant, the law is constitutional.⁹⁷ The purpose is to protect society, which, without an available remedy, would be deprived of an uninhibited marketplace of ideas. Otherwise, rather than challenge the law, many individuals would simply abstain from engaging in protected speech.⁹⁸

Laws restricting political speech can also be vague⁹⁹ or in violation of the First Amendment as applied to certain speech.¹⁰⁰ A plaintiff

88. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also* *FW/PBS v. Dallas*, 493 U.S. 215, 223 (1990) (“[F]acial challenges to legislation are generally disfavored.”).

89. *Hoffman Estates*, 455 U.S. at 494 & n.5 (citing *Grayned*, 408 U.S. at 110).

90. *See* *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 479 (7th Cir. 2012) (quoting *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005)) (explaining that vagueness and overbreadth challenges are “two sides of the same coin”).

91. *See infra* Part I.A.2.

92. *Grayned*, 408 U.S. at 108.

93. *Id.*

94. *See* *Hispanic Leadership Fund v. Fed. Election Comm’n*, No. 1:12cv893, 2012 WL 4759238, at *16 (E.D. Va. Oct. 4, 2012) (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

95. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

96. *See, e.g.,* *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977); *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

97. *See, e.g.,* *Hicks*, 539 U.S. at 118 (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)).

98. *See id.* at 119 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965)).

99. *See, e.g.,* *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 872–73 (1997).

100. *Fed. Election Comm’n v. Wis. Right to Life (Wisconsin I)*, 546 U.S. 410, 411–12 (2006).

bringing a First Amendment challenge may argue that the law does not meet the requisite level of scrutiny. For example, a law will be deemed invalid where one can show that the government's justification is not sufficient as applied to the restricted speech or conduct.¹⁰¹ A plaintiff may also argue that the law interferes with a constitutionally protected right warranting heightened scrutiny and that the law does not survive the heightened level of scrutiny. For example, although disclosure laws are ordinarily reviewed under exacting scrutiny, where compelled disclosure "seriously infringes on privacy of association and belief guaranteed by the First Amendment" such that it would subject minority parties to "threats, harassment, or reprisals," the law will be reviewed under strict scrutiny.¹⁰²

B. Compelling Disclosure

1. *The Interests in Compelling Disclosure*

In *Buckley v. Valeo*, the Supreme Court recognized several important governmental interests in compelled disclosure.¹⁰³ First, the public has an interest in knowing the sources of political campaign money ("informational interest").¹⁰⁴ The informational interest can be parsed into several separate, but related, interests. The government has an interest in its people knowing which associations support particular issues and candidates.¹⁰⁵ Members of organizations, shareholders, and stakeholders have an interest in knowing about an association's or a corporation's campaign-related speech.¹⁰⁶ Finally, voters have an interest in knowing the sources of contributions, which allows them "to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches," to determine which

101. *Wisconsin II*, 551 U.S. 449, 478–79 (2007) (holding that the government's interest in preventing quid pro quo corruption or the appearance of quid pro quo corruption did not justify prohibiting use of corporate funds to finance corporation's issue-advocacy advertisements).

102. *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982).

103. 424 U.S. 1, 66–68 (1976).

104. *Id.* at 66.

105. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 205 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

106. *See Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 882 (8th Cir. 2012) (Melloy, J., dissenting) (citing *Citizens United*, 130 S. Ct. at 916).

interests a candidate will most likely respond to,¹⁰⁷ and who stands to benefit from that candidate's election.¹⁰⁸ Second, the government has an interest in “deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity”¹⁰⁹ (“anti-corruption interest”). In the disclosure context, this interest was most famously summarized by Justice Brandeis, who stated that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹¹⁰ A different type of anti-corruption interest is that of preventing the “corrosive and distorting effects” that result when immense accretions of wealth by corporations are used for political purposes unrelated to the public's support for the corporation's political ideas (“anti-corporate corruption interest”).¹¹¹ Third, the government has an interest in being able to gather the data that is necessary to detect circumventions of its laws.¹¹²

2. *The Interests in Avoiding Disclosure*

The right to speak anonymously is recognized both in tradition¹¹³ and in legal precedent.¹¹⁴ The tradition harks back to long before our nation's founders published the Federalist papers under the pseudonym “Publius.”¹¹⁵ Throughout history, many writers have used pen names, including French enlightenment writer François-Marie Arouet, who advocated for freedom of speech under the pen name

107. *Buckley*, 424 U.S. at 67.

108. *Family PAC v. McKenna*, 685 F.3d 800, 808 (9th Cir. 2012).

109. *Buckley*, 424 U.S. at 67. This interest, however, is not consistent with the Supreme Court's holding in *Citizens United* that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and, thus, is only relevant in the context of contributions made directly to candidates. *Swanson*, 692 F.3d at 887 (Colloton, J., concurring in part and dissenting in part) (quoting *Citizens United*, 130 S. Ct. at 909).

110. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (National Home Library Foundation ed. 1933); see also *Fed. Election Comm'n v. Colo. Republican Fed. Campaign*, 533 U.S. 431, 456 (2001); *Ill. Liberty PAC v. Madigan*, No. 12 C 5811, 2012 WL 4764152, at *5 (N.D. Ill. Oct. 5, 2012) (discussing the “prophylactic” effect of disclosure), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. Oct. 24, 2012).

111. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 205 (2003), *overruled by Citizens United*, 558 U.S. 310.

112. *Buckley*, 424 U.S. at 67–68.

113. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342–43 (1995).

114. See, e.g., *id.* at 357 (invalidating law prohibiting distribution of any anonymous campaign literature); *Talley v. California*, 362 U.S. 60, 65 (1960) (invalidating law prohibiting distribution of anonymous handbills).

115. *McIntyre*, 514 U.S. at 342.

Voltaire.¹¹⁶ The Supreme Court has recognized that anonymity promotes the marketplace of ideas by permitting more speech and providing a way for those who may be personally unpopular to ensure that readers will not prejudge their message.¹¹⁷ Some scholars argue that disclosure laws may actually harm the public, by decreasing the quality of public discourse and encouraging “debate about the origins of electoral messages rather than about their truth.”¹¹⁸ Anonymity also protects persecuted groups that criticize the government from the risk of oppression.¹¹⁹ It protects individuals who may fear retaliation or social ostracism if they speak openly, or who may desire to preserve their privacy.¹²⁰

There are also several less noble reasons for wanting to remain anonymous. Individuals and organizations may have an interest in avoiding disclosure where they have a personal financial stake in the outcome of an election or ballot initiative, particularly where disclosing their identity would undermine their efforts to influence the outcome.¹²¹ Corporations and individuals who serve as executives or directors of corporations may have an interest in avoiding backlash from shareholders or consumers for using general treasury funds to

116. See ROGER PEARSON, *VOLTAIRE ALMIGHTY: A LIFE IN PURSUIT OF FREEDOM* 406 (2005); see also *McIntyre*, 514 U.S. at 341 n.2.

117. See *McIntyre*, 514 U.S. at 342.

118. Johnstone, *supra* note 37, at 418 (citations omitted) (internal quotation marks omitted).

119. See *Talley*, 360 U.S. at 64.

120. *McIntyre*, 514 U.S. at 341–42.

121. As an example, in 2012 the people of Maryland voted on a referendum, “Question 7,” to expand gambling with the proceeds earmarked for education. S. Bill 1, 2012 Leg., 2nd Special Sess. (Md. 2012), available at <http://mgaleg.maryland.gov/2012s2/bills/sb/sb0001e.pdf>. A group called “Get the Facts Vote No on 7” aired advertisements featuring teachers stating that they did not believe that any of the proceeds would actually go towards education. Joy Resmovits, *Maryland Question 7 Pits Casino Against Casino in Debate on Education Dollars*, HUFFINGTON POST (Oct. 12, 2012), http://www.huffingtonpost.com/2012/10/12/maryland-question-7-ads_n_1961672.html. It was later revealed that an owner of rival casinos in neighboring states contributed substantially to “Get the Facts Vote No on 7.” *Id.* FEC Commissioner Weintraub argued that knowing that the rival casino owner was a major sponsor of those advertisements would have affected how some Maryland voters credited those ads. See Open Meeting of the Federal Election Commission (Oct. 12, 2012), available at <http://www.fec.gov/audio/2012/2012100407.mp3> (statement of Commissioner Weintraub). Thus, it would follow that the organization receiving the contribution would benefit from not disclosing that donor’s identity.

support issues or candidates not supported by their shareholders or consumers.¹²²

Candidates and outside groups also may have an interest in the names of donors contributing to outside groups remaining anonymous. The promise of anonymity makes it more likely that groups producing controversial, but nevertheless effective, attack ads will receive donations.¹²³ With adequate funding for outside groups to do the heavy lifting, candidates are able to preserve their integrity by focusing on positive messaging and staying “above the fray.”¹²⁴ Anonymity also provides controversial figures with the ability to spend substantial sums to influence an election without risking harm to the reputation of the candidate or candidates that they support.¹²⁵ Controversial donations, even when they are made to outside groups, can reflect negatively on candidates.¹²⁶ In some cases, the threat of negativity is such that candidates have rejected or redirected such

122. See, e.g., Jennifer Martinez & Tom Hamburger, *Target Feels Backlash from Shareholders*, L.A. TIMES, Aug. 19, 2010, <http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820>; Brian Bakst, *Target Apologizes for Political Donation to Group Supporting Anti-Gay Candidate*, HUFFINGTON POST (Aug. 5, 2010), http://www.huffingtonpost.com/2010/08/05/target-apologizes-for-pol_n_672167.html.

123. At least one group has used the promise of anonymity as a selling point to potential donors. See *W. Tradition P'ship v. Att'y Gen. of State*, 271 P.3d 1, 7 (Mont. 2011) (reciting excerpts from Western Tradition Partnership's 2010 Election Year Program Executive Briefing), *cert. granted, judgment rev'd sub nom. on other grounds*, *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

124. See Meredith McGehee, *Unlimited Contributions to Parties Would Be Disastrous*, HILL'S CONGRESS BLOG (Oct. 10, 2012, 2:00 PM), <http://thehill.com/blogs/congress-blog/campaign/261261-unlimited-contributions-to-parties-would-be-disastrous#ixzz2HbS9F73h>. In 2012, both presidential candidates deplored the use of negative ads in the months leading up to the election. Julie Pace & David Espo, *Romney, Obama Bemoan Attack Ads, but Both Benefit*, ASSOCIATED PRESS (Aug. 9, 2012, 7:08 PM), <http://bigstory.ap.org/article/obama-pushes-economic-fairness-ad-draws-derision>.

125. For example, in 2012 it was revealed that Clayton Williams Energy, Inc. donated one million dollars to the Super-PAC American Crossroads. Clayton Williams Energy Inc.'s chairman of the board, president, and chief executive officer is Clayton Williams, Jr. Williams, a former Texas Republican gubernatorial nominee, lost the election after he made deplorable comments defending rape. See Josh Israel, *Karl Rove's Super PAC Accepts \$1 Million From Notorious Rape Defender*, THINK PROGRESS (Sept. 21, 2010, 9:26 AM), <http://thinkprogress.org/election/2012/09/21/887631/karl-roves-super-pac-accepts-1-million-from-notorious-rape-defender>.

126. See, e.g., *Bill Maher's Obama SuperPAC Donation Causing Stir*, NPR (Mar. 28, 2012, 4:00 AM), <http://www.npr.org/2012/03/28/149512215/bill-mahers-obama-superpac-donation-causes-stir>.

donations.¹²⁷ In addition, anonymity protects the reputation of elected candidates post-election by preventing the media from scrutinizing possible special favors to individuals or groups that contributed large undisclosed sums supporting a candidate.

C. The Evolution of the Federal Election Campaign Act: From *Buckley* to *Citizens United*

This section briefly examines the development of campaign finance jurisprudence over the past half-century. This overview helps to explain how some of the current loopholes in the federal regulations came to fruition and what Congress was attempting to solve when it enacted the Bipartisan Campaign Reform Act of 2002 (BCRA). It also provides a backdrop for understanding why the FEC Commissioners and lower courts are divided over how much disclosure the federal and state governments can require.

In 1974, Congress responded to serious misuses of campaign funds during the 1972 Presidential election campaign by amending the FECA. The amendments provided for increased disclosure, imposed hard limits on contributions to and expenditures by candidates, and created the FEC. Two years after its passage, the Supreme Court evaluated several provisions of the FECA in *Buckley v. Valeo*.¹²⁸ The Court reviewed the limits on contributions and expenditures under strict scrutiny, upholding the former while simultaneously striking down the latter.¹²⁹ In upholding the contribution limits, the Court found that the government's anti-corruption interest was sufficiently compelling to justify a limit on contributions to candidates and that the limits were narrowly tailored to that interest.¹³⁰ The Court then reviewed the disclosure requirements. The Court found that, unlike limits on candidates' expenditures, which constituted "direct and substantial restraints on the quantity of political speech," the disclosure requirements "impose[d] no ceiling on campaign-related

127. See, e.g., Alexander Burns, *Brown Donates Clayton Williams Money to Anti-Domestic Violence Group*, POLITICO (Aug. 21, 2012, 6:30 PM), <http://www.politico.com/blogs/burns-haberman/2012/08/brown-donates-clayton-williams-money-to-antidomestic-132750.html>. In 2012, Senator Brown donated \$1,000 to an anti-domestic violence group out of an "abundance of caution" after it was revealed that the Senator may have received a \$1,000 donation from Clayton Williams, Jr. in 2010. *Id.*

128. 424 U.S. 1, 6 (1976).

129. *Id.* at 64.

130. See *id.* at 29. But see *McCutcheon v. Fed. Election Comm'n*, 133 S. Ct. 1242 (2013) (agreeing to reconsider this holding).

activities” and thus should be reviewed under exacting scrutiny.¹³¹ The Court upheld the requirements, finding that they were sufficiently justified by important governmental interests.¹³²

Before upholding the disclosure requirements, however, the Court narrowed several terms in order to avoid vagueness concerns.¹³³ The Court narrowed the term “political committees” (defined as any group of persons receiving contributions or making expenditures exceeding \$1,000 in a calendar year)¹³⁴ to encompass only those groups that were “under the control of a candidate or whose major purpose was the nomination or election of a candidate.”¹³⁵ The Court construed the term “contributions” to encompass only direct or indirect contributions to candidates, political parties, or campaign committees, and contributions earmarked for political purposes or made in cooperation or with the consent of a candidate, his agent, or his authorized political committees.¹³⁶ The Court narrowed the term “expenditure” to encompass only those funds that were used for communications that “expressly advocate[d]” for the election or defeat of a “clearly identified candidate.”¹³⁷ These communications included those using the words “vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, or reject,”¹³⁸ later referred to as the “magic words” test.¹³⁹

The Court intended to create a bright-line distinction between groups that were “directly and intimately” involved in the election process and groups that were less involved.¹⁴⁰ The effect, however, was that the Court unintentionally provided groups seeking to avoid

131. *Buckley*, 424 U.S. at 39, 64.

132. *See id.* at 68, 85; *see also supra* Part I.B.1 for a description of these three interests.

133. *Buckley*, 424 U.S. at 76–78.

134. *See id.* at 222.

135. *Id.* at 79 n.107.

136. *Id.* at 78. The FECA defined “contribution” as donations made “for the purpose of influencing the nomination for election, or election.” 2 U.S.C. § 431(e)(1)(A) (1976). Individuals were prohibited from making contributions exceeding \$1,000 and were required to report all contributions exceeding \$100. *See Buckley*, 424 U.S. at 79 n.107.

137. *Buckley*, 424 U.S. at 80. The FECA defined “expenditure” as spending “for the purposes of . . . influencing the nomination . . . or election” of a candidate. 2 U.S.C. § 431(f) (1976).

138. *Buckley*, 424 U.S. at 44 n.52.

139. *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126 (2003), *overruled in part by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

140. JACK MASKELL, CONG. RESEARCH SERV., RL33794, GRASSROOTS LOBBYING: CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS 9 (2007).

disclosure requirements with a clear manual on how to do so. Groups easily circumvented disclosure requirements by replacing the words “vote for” or “vote against” with “call [candidate’s name] and tell her what you think.”¹⁴¹ By omitting *Buckley’s* “magic words,” groups were able to use misleading names to conceal their identities from the public.¹⁴²

In 2002, Congress enacted the BCRA¹⁴³ in order to close the loopholes that the Court’s narrow reading of several of the terms within the FECA created.¹⁴⁴ Congress found that the effectiveness of campaign-related ads on influencing elections bore little relation to whether the ads used *Buckley’s* “magic words.” Congress further found that many of the ads eschewing the “magic words” aired within sixty days of an election, were specifically designed to influence elections, and that spending on these communications had increased drastically over the past decade.¹⁴⁵ To close this loophole, Congress added “electioneering communication” (“EC”) to the category of regulable campaign-related activities.¹⁴⁶ In addition, the newly amended FECA prohibited corporations and unions from using general treasury funds to pay for ECs or express advocacy.¹⁴⁷ If a corporation or union wanted to engage in express advocacy or ECs, it had to establish a political action committee (“PAC”) funded by a segregated account. PACs were subject to limits and restrictions on the sources from which they could receive contributions.¹⁴⁸

141. *McConnell*, 540 U.S. at 127.

142. *Id.* at 128 (“‘Citizens for Better Medicare,’ for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And ‘Republicans for Clean Air,’ which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals—brothers who together spent \$25 million on ads supporting their favored candidate.”).

143. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.). The BCRA amended the FECA. *See id.*

144. Bipartisan Campaign Reform Act § 203.

145. *McConnell*, 540 U.S. at 127 & n.20. Congress found that, “in the final two months before the 2000 election, 94% of all televised issue ad spots were seen as making a case for or against a candidate.” 107 CONG. REC. S2136 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe) (discussing findings of Annenberg report).

146. Bipartisan Campaign Reform Act § 203.

147. Bipartisan Campaign Reform Act §§ 201–14. Prior to the BCRA’s enactment, the FECA made it “unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with” certain federal elections. 2 U.S.C. § 441b(a) (2006).

148. 2 U.S.C. § 441b(b)(4) (2006); 11 C.F.R. § 114.10(h)(2013).

In 2003, less than one year after the BCRA was enacted, the Supreme Court upheld the BCRA's disclosure requirements in *McConnell v. FEC*. The Court rejected the plaintiff's assertion that speech that fell outside of the scope of *Buckley's* "magic words" test could not be regulated.¹⁴⁹ The Court also upheld the restriction on the use of corporate and union general treasury funds to pay for ECs,¹⁵⁰ reasoning that the restrictions were permissible since the vast majority of ads that fell within the EC definition clearly had the purpose or effect of influencing voters' decisions,¹⁵¹ and, thus, were "the functional equivalent of express advocacy."¹⁵²

Four years later in *Wisconsin II*, the Supreme Court reviewed a challenge to a restriction on the use of general treasury funds to pay for ECs as applied to a nonprofit corporation's advertisements.¹⁵³ Before the Court could examine the constitutionality of the restriction, however, it had to determine whether the plaintiff's proposed communications fell within the scope of the provision—whether they were the functional equivalent of express advocacy.¹⁵⁴ The Court held that the functional equivalent of express advocacy encompassed only those communications that were "susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate."¹⁵⁵ The Court determined that the ads were not the functional equivalent of express advocacy because they expressed an opinion on a legislative issue, encouraged viewers to reach out to their representatives in order to press them to adopt a position, did not mention anything related to an election, and took no position on any candidates' qualifications for office.¹⁵⁶

149. *McConnell*, 540 U.S. at 102–03. In upholding the provisions, the Court quoted the lower court's conclusion that the plaintiffs' gave no satisfactory answer as to how "uninhibited, robust, and wide-open speech" could occur when plaintiffs used misleading names to obscure their identities from the public. *Id.* at 197.

150. *McConnell*, 540 U.S. at 203.

151. *Id.* at 206.

152. *Id.* In reaching its holding, the Court reasoned that because it had previously found that a ban on general treasury funds to pay for express advocacy was constitutional, a similar ban on ECs was also valid to the extent that they were the functional equivalent of express advocacy. *McConnell*, 540 U.S. at 203–09.

153. *Wisconsin II*, 551 U.S. 449 (2007).

154. *Id.* at 456.

155. *Id.* at 451. This is the "appeal to vote" test.

156. *Id.* at 451–52. The ads declared that a group of senators had filibustered to prevent the appointment of several federal judges and urged viewers to contact Wisconsin senators and tell them to oppose the filibuster. *Id.* at 449.

The Court then reviewed the restriction on corporate and union use of general treasury funds to finance certain campaign activity under strict scrutiny¹⁵⁷ and found that the government did not have a compelling interest in restricting the use of the nonprofit corporation's general treasury funds for the advertisements in question.¹⁵⁸ The Court first noted that it had previously found only that the government's anti-corruption interest was sufficiently compelling to justify limits on contributions to federal candidates and independent expenditures that were the functional equivalent of express advocacy.¹⁵⁹ The Court then reasoned that, because the proposed advertisements were not the functional equivalent of express advocacy, the government lacked a compelling interest to limit the corporation from using its general treasury funds to pay for the ads.¹⁶⁰

Although *Wisconsin II* did not address BCRA's disclosure requirements, it served as the catalyst for the FEC's decision to revise its rules.¹⁶¹ In 2007, the FEC issued a notice of proposed rulemaking to revise rules governing ECs in order to incorporate the Court's holding in *Wisconsin II*.¹⁶² In addition, the Commission proposed revising disclosure requirements to accommodate reporting by corporations and union organizations using general treasury funds to finance ECs.¹⁶³ Commentators urged the Commission to promulgate an exemption for corporations and labor organizations from reporting the sources of their general treasury funds.¹⁶⁴ They argued that general treasuries were largely comprised of funds received by those who did not necessarily support the organization's ECs, and that requiring disclosure would be "costly and require an inordinate amount of effort."¹⁶⁵ The FEC's inquiry focused on whether any useful information would come from such disclosure¹⁶⁶ and whether

157. *See id.* at 476–77.

158. *Id.* at 452.

159. *See id.* at 478–81.

160. *Id.* at 481.

161. *See* Electioneering Communications: Notice of Proposed Rulemaking, 72 Fed. Reg. 50,261–01 (Aug. 31, 2007).

162. *See generally* Electioneering Communications, 72 Fed. Reg. 72,899, 72,899–72,901 (Fed. Election Comm'n Dec. 26, 2007).

163. Electioneering Communications, 72 Fed. Reg. 50,261, 50,271 (Fed. Election Comm'n Aug. 31, 2007).

164. Electioneering Communications, 72 Fed. Reg. at 72,910.

165. *Id.* at 72,911.

166. *See* Transcript of Record at 167–68, *In re* Electioneering Communications Notice 2007-16 (Fed. Election Comm'n Oct. 17, 2007), *available at*

broad disclosure would interfere with donors' interests in remaining anonymous.¹⁶⁷ Neither the commentators nor the FEC considered whether the adopted revisions would create a loophole in the reporting requirements.¹⁶⁸ Ultimately, the FEC revised its disclosure rules "to require corporations and labor organizations to disclose *only* the identities of those persons who made a donation aggregating \$1,000 or more specifically *for the purpose of furthering* ECs made by that corporation or labor organization,"¹⁶⁹ thus mirroring the disclosure rules for express advocacy.¹⁷⁰

In 2010, the Court again reviewed the BCRA's restriction on corporations' and labor organizations' use of their general treasury funds to pay for express advocacy or ECs in *Citizens United v. FEC*, and this time struck it down.¹⁷¹ After Congress enacted the BCRA, the FEC had promulgated a safe-harbor provision that used a two-part, eleven-factor balancing test to define certain permissible ECs that corporations and unions could produce using general treasury funds.¹⁷² In reviewing the ban and the correlative safe-harbor provision, the Supreme Court deemed the FEC's multi-factor test a prior restraint.¹⁷³ The Court found that a PAC was a separate

http://www.fec.gov/pdf/nprm/electioneering_comm/2007/ec_hearing_finaltranscript10-17-07.pdf (statements of Comm'r Weintraub and Donald Simon, Counsel, Democracy 21).

167. Electioneering Communications, 72 Fed. Reg. 72,899, 72,901 (Fed. Election Comm'n Dec. 26, 2007).

168. See Audio recording: Open Meeting of the Fed. Election Comm'n (Oct. 4, 2012), available at <http://www.fec.gov/audio/2012/2012100407.mp3> (explaining how the intent of the Commission was not to undermine the laws that it was trying to implement) (statement of Comm'r Weintraub). According to a report from Public Citizen, the percentage of groups disclosing the financiers of their ads fell from nearly 100% before *Wisconsin II* to less than 50% in 2008 and to just over a 33% in 2010. In 2010, groups making ECs disclosed the sources for just 23.3% of the money that was spent on ECs. The top ten electioneering groups disclosed only 10.8% of money spent. *Id.* See generally Electioneering Communications, 72 Fed. Reg. at 72,899–72,901.

169. Electioneering Communications, 72 Fed. Reg. at 72,911 (emphasis added).

170. See *Buckley v. Valeo*, 424 U.S. 1, 62–63 (1976).

171. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and partially overruling *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)). The Court held that requiring a corporation or union to speak through a separate entity was an "outright ban" on speech. *Id.* at 337.

172. See 11 C.F.R. § 114.15 (2013), *invalidated by Citizens United*, 558 U.S. 310.

173. *Citizens United*, 558 U.S. at 335. There is a strong presumption against the constitutionality of prior restraints. 2 RODNEY SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:2 (1994). The canon was derived from sixteenth and seventeenth century English laws that conditioned speech upon first obtaining a

association and thus did not allow the corporation to speak.¹⁷⁴ According to the Court, even if a PAC did allow a corporation to speak, it was a “burdensome alternative” and, therefore, the option to form one did not diminish First Amendment concerns.¹⁷⁵

The Court also reviewed a challenge to the disclosure requirements for ECs and voted 8-1 to uphold them,¹⁷⁶ finding that the informational interest alone was sufficient to justify the disclosure requirements.¹⁷⁷ The Court expressly rejected the petitioner’s contention that the Constitution required disclosure requirements to be confined to speech that is the functional equivalent of express advocacy as it had done in *Wisconsin II* in the context of restrictions on independent expenditures.¹⁷⁸ Justice Kennedy, who authored the opinion, lauded the disclosure requirements, calling them “an effective means” of providing the public with the information necessary to “hold corporations and elected officials accountable,” and to determine whether elected officials were “‘in the pocket’ of so-called moneyed interests.”¹⁷⁹

Notwithstanding Justice Kennedy’s proclamation, the Supreme Court was not tasked with determining whether the FECA’s provisions were an effective means of bringing about meaningful disclosure. Rather, those duties are assigned to Congress and the FEC. In fact, several of the Supreme Court’s decisions inadvertently created some of the easily exploitable loopholes in the BCRA that have since undermined the law’s efficacy.¹⁸⁰ Although some public officials were quick to recognize and express concern over the

license, and which are seen as being at odds with the principles of the First Amendment. *See Taucher v. Rainer*, 237 F. Supp. 2d 7, 12 (D.D.C. 2002). The Court cited the complex web of regulatory rules and explanations that, when coupled with the deference that courts give to agency decisions, practically required organizations to receive prior consent from the agency before speaking, if it wanted to avoid the risk of criminal liability and costly legal fees. *See Citizens United*, 558 U.S. at 335.

174. *Citizens United*, 558 U.S. at 337–38.

175. *Id.* (“[PACs] are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.”).

176. *Id.* at 316.

177. *See id.* at 369.

178. *Id.* at 368–69.

179. *Id.* at 370 (internal quotation marks omitted). The Court also found that the Internet made disclosure both “rapid and informative.” *Id.*

180. *See infra* Part II.A.2.a.

possible effects of the Supreme Court's decisions,¹⁸¹ Congress and the FEC have yet to act.¹⁸² As a result, organizations have found and have been able to exploit a myriad of loopholes in the FECA and its related regulations.¹⁸³

II. THE CURRENT STATE OF THE FEDERAL DISCLOSURE REQUIREMENTS

A. The Current Federal Disclosure Requirements

Under the FECA, organizations are separated into two categories—those that are subject to continued reporting and disclosure requirements, and those that are subject to more limited, event-driven requirements. A political organization must register with the FEC as a PAC if a candidate controls it or if it accepts contributions or makes expenditures aggregating more than \$1,000 in a calendar year and has as its “major purpose” the “nomination or election of a [federal] candidate.”¹⁸⁴ In addition to extensive disclosure requirements, PACs are also subject to contribution limits¹⁸⁵ and restrictions on the types of sources from which they can receive contributions.¹⁸⁶ PACs making only independent expenditures¹⁸⁷ (more commonly known as Super PACs), however,

181. See, e.g., State of the Union Address, 2010 DAILY COMP. PRES. DOC. 8 (Jan. 27, 2010).

182. See Trevor Potter, President, Campaign Legal Ctr., Address to the Annual Meeting of the American Law Institute (May 23, 2012), available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1739:may-24-2012-trevor-potter-addresses-the-campaign-finance-crisis-in-speech-to-the-american-law-institute-annual-meeting&catid=63:legal-center-press-releases&Itemid=61; see also David M. Herszenhorn, *Campaign Finance Bill Is Set Aside*, N.Y. TIMES, July 27, 2010, at A14 (discussing Congress's inability to pass the DISCLOSE Act). The FEC did put out a Notice of Proposed Rulemaking on December 27, 2011 after two previous attempts failed. Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80,803-01 (proposed Dec. 27, 2011). Comments were submitted and a hearing was held on March 7, 2012. *Id.* The FEC has yet to take any further action. *Id.*

183. See, e.g., Interview by Bill Moyers with Trevor Potter, President, Campaign Legal Ctr. (PBS television broadcast Nov. 16, 2012), available at <http://billmoyers.com/segment/trevor-potter-on-fighting-big-money-in-the-2012-election>.

184. 2 U.S.C. § 431(4)(A) (2006).

185. See 2 U.S.C. § 441a.

186. See 11 C.F.R. §§ 110.4, 114.2, 115.2 (2013).

187. An independent expenditure is “an expenditure . . . for a communication expressly advocating the election or defeat of a clearly identified candidate that is not

are exempt from these limits and restrictions,¹⁸⁸ but are not exempt from the disclosure and reporting requirements.¹⁸⁹ To comply with the disclosure regulations, PACs must register,¹⁹⁰ designate a treasurer¹⁹¹ and committee bank account,¹⁹² maintain records for receipts and disbursements,¹⁹³ report independent expenditures,¹⁹⁴ and file periodic disclosure reports revealing the source of every contribution exceeding \$100 and the recipient and purpose of every expenditure over \$100.¹⁹⁵ If the PAC wants to cease filing disclosure reports, it must first file a termination report or a written statement with the FEC.¹⁹⁶

Individuals and all other organizations that are not PACs—e.g., non-profit organizations that fall within § 501(c)(4) (social welfare organizations), § 501(c)(5) (unions), and § 501(c)(6) (trade associations) of the Internal Revenue Code—need only file disclosure statements with the FEC when they purchase “electioneering communications”¹⁹⁷ or advertisements that expressly advocate for the election or defeat of a candidate.¹⁹⁸

Electioneering Communications (ECs) are defined as

made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents.” 11 C.F.R. § 100.16(a).

188. See *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010) (holding that FECA provision limiting contributions by individuals that made only independent expenditures that expressly advocated the election or defeat of a candidate, violated First Amendment free speech rights); *Commonsense Ten*, A.O. 2010-11, 2010 WL 3184269 (Fed. Election Comm’n July 22, 2010) (extending the court’s holding in *SpeechNow.org* to apply to corporations, labor organizations, and PACs); *Club for Growth*, A.O. 2010-09, 2010 WL 3184267 (Fed. Election Comm’n July 22, 2010) (same).

189. See *Commonsense Ten*, A.O. 2010-11, 2010 WL 3184269 (Fed. Election Comm’n July 22, 2010); *Club for Growth*, A.O. 2010-09, 2010 WL 3184267 (Fed. Election Comm’n July 22, 2010).

190. See 11 C.F.R. § 102.1.

191. See 11 C.F.R. § 102.2(iv).

192. See 11 C.F.R. § 102.2(vi).

193. See 11 C.F.R. § 102.8.

194. See 11 C.F.R. §§ 104.3(b)(3)(vii)(A)(2013), 104.4(a)–(f)(2013), 109.10(c).

195. 11 C.F.R. § 104.5(c). PACs that are not authorized committees of candidates may file quarterly or monthly reports.

196. See 11 C.F.R. § 102.3(a)(1).

197. See 11 C.F.R. § 104.20(b).

198. See *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/index.shtml> (last updated Jan. 2013).

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any broadcast, cable, or satellite communication that: (1) [r]efers to a clearly identified candidate for Federal office; (2) [i]s publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election... and (3) [i]s targeted to the relevant electorate.¹⁹⁹

Once an individual or organization spends more than \$10,000 in the aggregate on ECs, it must, within twenty-four hours, file a report with the FEC that includes the date and title of the communication, the name and address of any donor contributing \$1,000 or more since the first day of the previous year for the purpose of furthering ECs, and the name and address of officers, directors, and the executive director of the organization.²⁰⁰ Subsequent reports must also be filed for any additional ECs aggregating in an additional excess of \$10,000 in the same calendar year.²⁰¹

Express advocacy is defined as any communication that uses phrases similar to *Buckley's* "magic words" or that could only be interpreted as advocating the election or defeat of a candidate.²⁰² Once the total cost of express advocacy with respect to a given election exceeds \$250, an individual or organization must file a report disclosing the identity of any payee, the candidate supported or opposed, and the name, address, employer and occupation of any donor who gave more than \$200 during the year for the purpose of making independent expenditures.²⁰³ In addition, individuals and organizations must file additional reports when their aggregate independent expenditure spending exceeds certain amounts during election periods.²⁰⁴

B. The Inadequacies of the Federal Requirements

1. Various Ways of Avoiding Disclosure Under the FECA

The FECA limits the amount that individuals and organizations can contribute to candidates and PACs that coordinate with or contribute to candidates. If individuals want to make unlimited

199. 11 C.F.R. § 100.29(a).

200. 11 C.F.R. § 104.20.

201. 11 C.F.R. § 104.20.

202. 11 C.F.R. § 100.22(a)-(b).

203. 11 C.F.R. § 109.10(b).

204. 11 C.F.R. §§ 104.4(b)(2), (c), 109.10(b).

contributions or expenditures for campaign-related activity,²⁰⁵ they have three options: they can make non-coordinated expenditures,²⁰⁶ contribute to Super PACs or non-PAC organizations,²⁰⁷ or create a shell corporation which can be used to funnel money to various organizations.²⁰⁸ If an individual wants to pay for independent expenditures or ECs, he will have to disclose his identity once he spends more than the threshold amount.²⁰⁹ If an individual instead prefers to pool his money with others, thereby delegating control to organizations with more political savvy, he may donate unlimited funds to a Super PAC or non-PAC organization.²¹⁰

If the individual contributes to a Super PAC, however, his identity will be disclosed if he contributes more than \$100 in a calendar year.²¹¹ Likewise, if he contributes to a non-PAC organization, his identity will be disclosed if he gives more than \$250 for the purpose of making independent expenditures or \$1,000 for the purpose of furthering ECs.²¹² If, instead, the individual would prefer not to have his identity revealed, he can donate unlimited funds for general use to a non-PAC organization.²¹³ His identity will also not be revealed if the non-PAC organization receiving his contribution elects not to pay for express advocacy or ECs, but instead uses the contribution to make its own contribution to a Super PAC or a non-PAC organization. This indirect contribution is generally referred to as “campaign money laundering,”²¹⁴ which is perfectly legal under federal laws.²¹⁵

205. The proceeding analysis also would apply to non-PAC organizations, corporations, and labor unions.

206. See *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last updated Jan. 2013).

207. See *supra* note 188 and accompanying text.

208. See, e.g., Justin Sink, *Colbert Creates Shell Corporation to Lampoon Karl Rove’s Groups*, HILL BLOG (Sept. 30, 2012, 10:31 AM), <http://thehill.com/video/in-the-news/184755-colbert-creates-shell-corporation-to-lampoon-rove-money-laundering>.

209. See *supra* notes 200–01, 203 and accompanying text.

210. See *supra* note 207.

211. See *supra* note 195 and accompanying text.

212. See *supra* notes 200, 203 and accompanying text.

213. See, e.g., *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009).

214. Andy Kroll, *California’s Biggest “Campaign Money Laundering” Scheme, Revealed—Kinda*, MOTHER JONES (Nov. 5, 2012), <http://www.motherjones.com/mojo/2012/11/california-americans-responsible-leadership-donation-jerry-brown>.

215. See Interview by Bill Moyers with Trevor Potter, President, Campaign Legal Ctr. (PBS television broadcast Sept. 21, 2012), available at <http://billmoyers.com/segment/trevor-potter-on-fighting-big-money-in-the-2012->

If the individual is particularly concerned about privacy, he can set up a shell corporation using an obscure name, preferably incorporated, in a state that requires minimum disclosure.²¹⁶ Once established, anyone can funnel unlimited funds through the shell corporation either to a Super PAC or to a non-PAC organization. Since Super PACs and other organizations must only disclose the immediate sources of their funding, the only information revealed will be that of the shell corporation.²¹⁷ If the individual is absolutely determined to hide his identity, he can “create structures that resemble the corporate equivalent of matrushka dolls” by funneling money through multiple legal entities.²¹⁸

2. *The Effect of Splits on Disclosure*

At present, the FEC Commissioners are divided evenly over what constitutes express advocacy and electioneering communications, and over what types of activity qualify a group as a PAC. The effect of these splits is that the agency lacks the four votes necessary to commence enforcement proceedings against groups that, according to three of the Commissioners, are engaged in express advocacy, ECs, or that qualify as PACs, but have not complied with the requisite disclosure requirements.²¹⁹

a. *Defining Express Advocacy*

The FEC is split over whether it acted outside of its statutory and constitutional authority in promulgating and continuing to enforce its definition of “express advocacy” under § 100.22(b).²²⁰ The FEC promulgated subsection (b) in 1995 after two courts held that express

election/. However, in some states, such action is illegal. *See, e.g.*, CAL. GOV'T CODE § 84302 (West 2012).

216. *See* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html>.

217. *See, e.g.*, Freedom Works for America, Report of Receipts and Disbursements (FEC Form 3X) at 169–72 (Dec. 6, 2012), *available at* <http://images.nictusa.com/pdf/285/12941445285/12941445285.pdf> (showing \$5,300,000 in year-to-date aggregate contributions by Specialty Group, Inc.).

218. Ellen L. Weintraub & Samuel C. Brown, *Following the Money: Campaign Finance Disclosure in India and the United States*, 11 ELECTION L.J. 241, 264 (2012).

219. *See generally* *infra* Part II.A.2.b.i–iii.

220. *See generally* 11 C.F.R. § 100.22 (2013). Section 100.22 defines express advocacy. Section 100.22(a) lists phrases including those referenced by the Supreme Court in *Buckley* that, if used, would constitute express advocacy.

advocacy extended beyond the “magic words” of *Buckley*. First, in *FEC v. Massachusetts Citizens for Life*, the Supreme Court held that a detachable voter guide listing the names of pro-life candidates next to the words “Vote Pro-Life” was express advocacy.²²¹ The Court reasoned that the fact that the communication was marginally less direct than *Buckley*’s magic words was not dispositive where the message supplied “in effect an explicit directive” to vote for the named candidates.²²² The following year, the Ninth Circuit held in *FEC v. Furgatch* that a newspaper ad criticizing the president, published three days before the presidential election, and asserting “DON’T LET HIM DO IT” was express advocacy.²²³ The Court reasoned that express advocacy included words not listed by the Supreme Court in *Buckley* which, “when read as a whole and with limited reference to external events, [were] susceptible of no other reasonable interpretation than an exhortation to vote for or against a specific candidate.”²²⁴ The FEC subsequently revised § 100.22, adding to the list of examples of express advocacy in subsection (a)²²⁵ and adopting subsection (b), which incorporates the language of *Furgatch* practically verbatim.²²⁶

Shortly after the FEC implemented § 100.22(b), several courts found it invalid on constitutional and statutory grounds.²²⁷ As a result

221. Fed. Election Comm’n v. Mass. Citizens for Life, 479 U.S. 238, 249–50 (1986).

222. *Id.* at 249.

223. Fed. Election Comm’n v. Furgatch, 807 F.2d 857, 864–65 (9th Cir. 1987). The advertisement also stated, “If [the President] succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion.” *Id.* at 858.

224. *Id.* at 864.

225. Notice 1995-10: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35293, 35295 (July 6, 1995). Section 100.22(b) provides that express advocacy means communications that

[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (2013).

226. Notice 1995-10: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (Fed. Election Comm’n July 6, 1995) (to be codified at 11 C.F.R. pts. 100, 106, 109, 114).

227. *See* Va. Soc’y for Human Life v. Fed. Election Comm’n, 263 F.3d 379, 392 (4th Cir. 2001); Right to Life of Dutchess Cnty. v. Fed. Election Comm’n, 6 F. Supp. 2d 248, 253–54 (S.D.N.Y. 1998); Me. Right to Life Comm. v. Fed. Election Comm’n,

of these decisions, the FEC ceased enforcement of § 100.22(b) in those circuits that held it invalid.²²⁸ In *McConnell*, the Supreme Court clarified by stating that *Buckley*'s limiting construction was “a product of statutory interpretation, not a constitutional command.”²²⁹ In light of the Supreme Court's pronouncement, the Fourth Circuit in *Real Truth About Abortion v. FEC* reversed course,²³⁰ and the FEC resumed enforcement of § 100.22(b).²³¹

FEC Commissioners McGahn, Hunter, and Peterson believe that subsection (b) is unconstitutionally vague.²³² Commissioner McGahn makes two interrelated points. First, he maintains that § 100.22(b) is unconstitutionally vague to the extent that it reaches speech that is not express advocacy as the Supreme Court defined it in *Buckley*.²³³ McGahn reads *McConnell* as only upholding the EC provisions to the extent that the speech being regulated is the functional equivalent of express advocacy.²³⁴ He believes that the Supreme Court only upheld the EC provision regulating speech that was the functional equivalent of express advocacy because the provision contained objective triggers, which are missing from the express advocacy provision.²³⁵

914 F. Supp. 8, 13 (D. Me. 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996) (per curiam); Fed. Election Comm'n v. Christian Action Network, 894 F. Supp. 946, 958–59 (W.D. Va. 1995), *aff'd*, No. 95-2600, 1996 WL 431996(4th Cir. Aug. 2, 1996).

228. See Nat'l Def. Comm., A.O. 2012-27 Draft A, at 25 (Fed. Election Comm'n Aug. 24, 2012).

229. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 103 (2003), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); see *id.* at 278 n.11 (Scalia, J., dissenting in part) (noting that the Court had essentially overruled every Court of Appeals that had addressed the issue except the Ninth Circuit).

230. 681 F.3d 544, 550 n.2 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013).

231. See Nat'l Def. Comm., A.O. 2012-27 Draft A, at 29 (resuming enforcement of § 100.22(b) in order to “fill[] the gaps left by the Supreme Court between express advocacy in *Buckley* and *Mass. Citizens for Life* and the functional equivalent of express advocacy in ECs in *McConnell*” (citation omitted)).

232. See *id.* at 9.

233. DONALD F. MCGAHN, FED. ELECTION COMM'N, MUR 5831 (Softer Voices), STATEMENT OF REASONS OF COMMISSIONER DONALD F. MCGAHN 27 & n.132 (2011), *available at* <http://www.scribd.com/doc/48130178/Mur-5831-Softer-Voices-Mcgahn-Sor-Final>.

234. *Id.* at 8 & n.36.

235. *Id.* at 26 & n.120 (discussing how the “appeal to vote” test is not “free-floating” and is only triggered if speech meets additional bright-line requirements). The Seventh Circuit appeared to lend some support to this argument, noting, in upholding a state EC provision against a vagueness challenge, that the law was limited by the same five factors—medium, total amount spent, time, geography, and content—as the law that was upheld in *Wisconsin II*. See Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 485 (7th Cir. 2012).

Secondly, McGahn asserts that, even if subsection (b) could constitutionally regulate speech that was not express advocacy or its functional equivalent, it would still be unconstitutional because it is inherently vague.²³⁶ He believes that subsection (b) contains several terms that are inherently vague and inconsistent with each other, such as the requirement that the FEC consider the communication “taken as a whole” as well as its “electoral portion.”²³⁷ McGahn argues that, unlike the EC provision, subsection (b) invites the FEC to consider “rough-and-tumble” factors, such as contextual references and general proximity to the election, that the Court ordered the agency to eschew, and which are sufficiently similar to the two-part eleven-factor test that the Supreme Court struck down in *Citizens United*.²³⁸

Commissioners McGahn, Hunter, and Peterson further argue that the agency lacks the jurisdictional capacity to act. They contend that *McConnell* did not overrule prior decisions invalidating subsection (b) on statutory grounds.²³⁹ They then further contend that the Fourth Circuit in *Real Truth About Abortion* never addressed the FEC’s statutory authority and, thus, did not overrule prior cases within its jurisdiction invalidating § 100.22(b) on statutory grounds.²⁴⁰ Commissioner McGahn reasons when the Supreme Court stated that *Buckley*’s interpretation was “the endpoint of statutory

236. MCGAHN, *supra* note 233, at 12–14. *But see* *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); Transcript of Oral Ruling, *Free Speech v. Fed. Election Comm’n*, No. 12-CV-127-SWS (D. Wyo. Oct. 3, 2012), *appeal docketed*, No. 12-8078 (10th Cir. Oct. 19, 2013), *available at* http://www.fec.gov/law/litigation/freespeech_dc_transcript.pdf.

237. MCGAHN, *supra* note 233, at 12–14.

238. *Id.* at 17 & n.70.

239. Nat’l Def. Comm., A.O. 2012-27 Draft A, at 29 (citing *N.M. Youth Org. v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004); *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2003)). The Commissioners point to several court decisions holding that *Buckley*’s magic words requirement “was not altered by *McConnell* and remains a viable way to cure an otherwise vague statute.” *Id.*

240. *See* CAROLINE C. HUNTER ET AL., FED. ELECTION COMM’N, STATEMENT ON A.O. 2012-11 (FREE SPEECH), at 4 n.8 (2012), *available at* <http://saos.nictusa.com/aodocs/1209339.pdf> (listing *Right to Life of Dutchess Cnty. v. Fed. Election Comm’n*, 6 F. Supp. 2d 248, 253–254 (S.D.N.Y. 1998); *Me. Right to Life Comm’n v. Fed. Election Comm’n*, 914 F. Supp. 8, 13 (D. Me. 1996), *aff’d*, 98 F.3d 1 (1st Cir. 1996); *Fed. Election Comm’n v. Christian Action Network*, 894 F. Supp. 946, 958 (W.D. Va. 1995), *aff’d*, 92 F.3d 1178 (4th Cir. 1996) (unpublished)).

construction,²⁴¹ it spoke to the issue and the FEC should not second-guess the Court. He argues that, even if the FEC had the authority to promulgate subsection (b), which he believes it did not, in order to properly revive it, the FEC would have had to utilize Notice and Comment Rulemaking.²⁴²

Moreover, McGahn, Peterson, and Hunter point out that when Congress amended the FECA in 2002, it did not grant the FEC authority to expand the definition of express advocacy. Contrariwise, Congress considered and ultimately rejected an amendment that would have expanded the definition of express advocacy due to concerns over its constitutionality.²⁴³ They assert that, at the time of the BCRA's enactment, several members of Congress believed that § 100.22(b) was unconstitutional and were aware that the FEC was not enforcing it.²⁴⁴ They argue that, by refusing to expand the definition of express advocacy, Congress, at a minimum, accepted the preexisting construction.²⁴⁵ In short, they believe the FEC should cease enforcing the regulation in order to avoid enmeshing itself in "serious statutory and constitutional questions' raised by inter-circuit nonacquiescence."²⁴⁶ and that complete abandonment of the rule in all jurisdictions is necessary given the increased use of media to target national audiences without regard for jurisdictional boundaries.²⁴⁷

241. MCGAHN, *supra* note 233, at 28 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 126 (2003) *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

242. *See id.* at 8 n.35. The Commissioner, however, cites cases indicating that there is a split among the circuit courts over this issue. *Id.*

243. Free Speech, A.O. 2012-11 Draft A, at 11-12 (Fed. Election Comm'n Apr. 12, 2012).

244. *See* MCGAHN, *supra* note 233, at 30. McGahn makes the point that, although the FEC had stated that it would cease enforcement only in those circuits that had found it unconstitutional, the practical effect of its policy was that the FEC ceased enforcement in all jurisdictions. *Id.*; *see also* Free Speech, A.O. 2012-11 Draft A, at 15.

245. Free Speech, A.O. 2012-11 Draft A, at 15.

246. *See* Nat'l Def. Comm., A.O. 2012-27 Draft A, at 32 (Fed. Election Comm'n Aug. 24, 2012). Intercircuit nonacquiescence occurs when the court that ordinarily reviews the agency's action has not addressed a question, but a sister circuit has, and the federal agency refuses to acquiesce to the sister circuit's precedent. Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 71 (2003). Generally, courts will not find fault with such a position where the nonacquiescing party reasonably believes that it might prevail. *See id.* 71 & n.15.

247. Nat'l Def. Comm., A.O. 2012-27 Draft A, at 34-35 (arguing that enforcement in only those jurisdictions that have upheld § 100.22(b) would "subject [such advertising] to inconsistent regulatory standards[.]" forcing speakers to retain a

Nevertheless, without the four votes necessary to cease enforcement, Commissioners McGahn, Peterson, and Hunter continue to construe § 100.22(b) narrowly.²⁴⁸ They believe that, because § 100.22(b) follows the court's holding in *Furgatch*, the FEC should adhere to the central holding of *Furgatch*, which, according to these Commissioners, was that express advocacy must contain some explicit words of advocacy.²⁴⁹ They believe that the FEC should find that speech is not express advocacy if "any reasonable alternative reading of speech can be suggested."²⁵⁰ These Commissioners reject the test used by the other three Commissioners, calling it "inherently vague" and prone to the same constitutional infirmities described by the Court in *Wisconsin II*²⁵¹ and claiming further that such a test would cause some communications to qualify as both independent expenditures and as ECs, which is prohibited by the FECA and creates a filing conundrum for speakers.²⁵²

Under these three Commissioners' interpretations of § 100.22(b), the following two advertisements do not constitute express advocacy. Advertisement 1 states: "[Candidate X] has been one of the least effective members of Congress. This fall, let's make history by changing that. Learn about HR 3638."²⁵³ Advertisement 2 states: "Military voting matters. That's why [Candidate X] is such a disappointment [S]houldn't military voices and votes matter? Shouldn't yours? Be heard this fall."²⁵⁴ Why? Nothing in the advertisements "explicitly inform[s] the listener that there is an election coming up or associate[s] the communication's message with a federal campaign."²⁵⁵ The fact that listeners may be aware that an

campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before speaking, in violation of the First Amendment).

248. *Id.* at 9.

249. Free Speech, A.O. 2012-11 Draft A, at 9 (reasoning that the Ninth Circuit emphasized that the words "don't let him" were a simple and direct command to vote against the candidate). Section 100.22(b) omits the second "clear plea for action" standard from the three-part standard set forth in *Furgatch*. *Id.* at 9 n.6.

250. *Id.* at 9.

251. *See id.* at 20.

252. *See id.* at 17-18; *see also* 2 U.S.C. § 434(f)(3)(B)(ii) (2006) (the term "electioneering communication" does not include "a communication which constitutes an expenditure or an independent expenditure under this Act"); 11 C.F.R. § 100.29(c)(3) (2013) (any communication that "[c]onstitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations" is not an EC).

253. Nat'l Def. Comm., A.O. 2012-27 Draft A, at 13.

254. *See id.* at 17.

255. *Id.* at 13.

election is coming does not make the communication electoral in nature.²⁵⁶ Moreover, even if part of the advertisement included an unambiguous reference to the election, reasonable minds could still differ as to whether the advertisement exhorts the election or defeat of a candidate,²⁵⁷ as opposed to encouraging individuals to contact the candidates, protest outside of their office, or write letters to the editors of local newspapers.²⁵⁸

On the other hand, Commissioners Weintraub, Walther, and Bauerly²⁵⁹ believe that § 100.22(b) is constitutional and that the FEC has the requisite authority to enforce it. They reason that *McConnell* foreclosed any debate as to whether express advocacy could constitutionally encompass speech that falls outside of the scope of *Buckley's* magic words.²⁶⁰ Moreover, they believe that the test in subsection (b) is practically identical to the “appeal to vote” test, which the Supreme Court upheld in *Wisconsin II* in that it employs objective and restrictive criteria.²⁶¹ Finally, they argue that any lingering doubts regarding § 100.22(b)'s constitutionality should have been eliminated post-*Citizen's United*, since the regulation now acts solely as a trigger for disclosure requirements and no longer as a ban on certain types of speech.²⁶² Proponents of this viewpoint also stress that the Supreme Court's two most recent decisions expressly reject attempts to limit the scope of express advocacy to *Buckley's* magic

256. *Id.* (citing Brief of Appellees FEC and U.S. DOJ at 41, *Real Truth About Abortion v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013)).

257. *Id.* at 14 (quoting 11 C.F.R. § 100.22(b) (2013)).

258. *See id.* at 18.

259. Commissioner Bauerly resigned from the FEC on February 1, 2013. *Bauerly Departs Federal Election Commission*, FED. ELECTION COMMISSION (Feb. 1, 2013), http://www.fec.gov/press/press2013/20130201_BauerlyDeparture.shtml.

260. *See* Free Speech, A.O. 2012-11, at 2 (Fed. Election Comm'n) (Weintraub et al., concurring) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 189–94 (2003), *aff'd in part and rev'd in part sub nom. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *id.* at 278 n.11 (Thomas, J., dissenting)).

261. Nat'l Def. Comm., Comments on A.O. Request 2012-27, at 4–5 (Fed. Election Comm'n Aug. 6, 2012), *available at* http://www.campaignlegalcenter.org/attachments/CLC_D21_Comments_on_AOR_2012-27_Nat_Def_Comm_8_6_12.pdf (emphasizing that § 100.22(b) uses a similar reasonability requirement and mandates that a communication be unambiguous).

262. *See id.* at 4.

words,²⁶³ or to limit disclosure to the functional equivalent of express advocacy.²⁶⁴

There are two primary arguments that can be made in support of the position that the FEC has the requisite authority to enforce subsection (b). First, when Congress codified the term “expressly advocating,” it made no attempt to define or limit it.²⁶⁵ Thus, in promulgating subsection (b), the FEC lawfully exercised its administrative duty to “prescribe rules [and] regulations . . . to carry out the provisions of [FECA].”²⁶⁶ The Supreme Court’s interpretation of express advocacy in *Buckley* did not foreclose any subsequent agency interpretation. The Supreme Court has stated that “a court’s prior judicial construction of a statute trumps an agency construction entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”²⁶⁷ Because Congress did not speak directly to the issue, the proper question for the reviewing court is whether the agency’s answer is based on a permissible interpretation of the statute.²⁶⁸

Second, when Congress amended the FECA in 2002, it was aware of the potential constitutional issues surrounding § 100.22(b).²⁶⁹ Although Congress could have acted to limit the agency’s authority to interpret express advocacy, it did not. Additionally, out of an abundance of caution and in part due to an inability to come to an agreement over the EC provision, eighty-two Senators voted to adopt an amendment that essentially acted as a fail-safe device if the EC provision was subsequently invalidated.²⁷⁰ The amendment’s sponsor,

263. *Id.* at 4 (citing *Wisconsin II*, 551 U.S. 449, 470 (2007)).

264. *See, e.g.*, *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 54 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

265. *See* Brief of Appellee Federal Election Commission at 39, *Free Speech v. Fed. Election Comm’n*, No. 12-8078 (10th Cir. Feb. 4, 2013).

266. *Id.* at 39–40 (quoting 2 U.S.C. § 438(a)(8) (2006)).

267. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added). The Court reasoned that allowing a judicial precedent to foreclose any subsequent agency interpretation would undermine *Chevron*’s basis, which was that it is the primary responsibility of agencies, not courts, to fill statutory gaps. *Id.*

268. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

269. *See, e.g.*, 11 A LEGISLATIVE HISTORY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002, at 82–98 (William H. Manz ed., 2003).

270. The fail-safe provision provides:

If [the provision defining ECs] is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the

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Senator Arlen Specter, explained that the fail-safe provision was a streamlined version of the Ninth Circuit's holding in *Furgatch*.²⁷¹ Thus, by adopting the *Furgatch* approach as an alternative to the EC provision, Congress implied that it believed that *Furgatch* was constitutional. Even more tellingly, Senator Specter explained that the final sentence of the amendment, which provides that “nothing in this subsection shall be construed to affect the interpretation or application of 11 C.F.R. [§] 100.22(b),” referred to the “the current FEC regulation.”²⁷²

From the perspective of Commissioners Weintraub, Walther, and Bauerly', each of the advertisements described above contains unmistakable and unambiguous election portions, and no reasonable person could find that those portions do not urge defeating or voting against the candidates in the fall election²⁷³ and, therefore are regulable pursuant to subsection (b).²⁷⁴ They refute the other three Commissioners' contention that the final sentence of the first advertisement (“Learn about HR 3638”) alters the nature of the entire ad, finding instead that it simply makes an additional point.²⁷⁵

b. Defining an Electioneering Communication

The FEC is also divided over the proper interpretation of the provision defining “clearly identified” as it pertains to ECs in 11 C.F.R. § 100.29. Prior to Congress's enactment of the BCRA, the term “clearly identified,” which was used in the independent expenditure provision was defined in 2 U.S.C. § 431(18) and in 11

term “electioneering communication” means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

2 U.S.C. § 434 (2006).

271. 141 CONG. REC. S3118-23 (daily ed. Mar. 22, 2001). The provision omitted the words “unmistakable” and “unambiguous.” *Id.*

272. *Id.*

273. Nat'l Def. Comm., A.O. 2012-27 Draft B, at 5, 7 (Fed. Election Comm'n Aug. 23, 2012).

274. *Id.* at 5, 7. The Commissioners were deadlocked over whether several other advertisements constituted “express advocacy.” See Free Speech, A.O. 2012-11 Draft A, at 7-9.

275. Nat'l Def. Comm., A.O. 2012-27 Draft B, at 5.

C.F.R. § 100.17.²⁷⁶ After the BCRA was enacted, the FEC promulgated a rule adopting the pre-existing definition of “clearly identified” for use in the context of ECs.²⁷⁷

Commissioners McGahn, Peterson, and Hunter argue that Congress intended the provisions to be “narrow, objective, and clear” in order to avoid the same type of vagueness concerns that caused the Court in *Buckley* to narrowly construe the FECA provisions²⁷⁸ and that both Congress and the FEC intended the language to mean the same thing in the context of independent expenditures and ECs. Accordingly, these Commissioners found that the following three advertisements constituted ECs. In the first advertisement, a voiceover attributed the United States’ dependence on foreign oil to “the Administration,” and “the White House,” while an image of the White House was displayed on the screen. The ad concluded by informing viewers to “call the White House at (202) 456-1414” and “[t]ell [them] it’s time for an American energy plan . . . that actually works for America.”²⁷⁹

The second advertisement omitted any reference to the Administration and the White House, instead referring to “the government.” The advertisement featured images of the White House and the Washington Monument and included a recording of the President stating “[w]e must end our dependence on foreign oil.”²⁸⁰

The third advertisement used the words, “Secretary Sebelius,” “the Government,” “the Administration,” and displayed footage of the White House, while a voiceover instructed viewers to “[c]all Secretary

276. 2 U.S.C. § 431(18) (2006) (“The term ‘clearly identified’ means that—(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference.”); 11 C.F.R. § 100.17 (2013) (“The term clearly identified means the candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ‘the President,’ ‘your Congressman,’ or ‘the incumbent,’ or through an unambiguous reference to his or her status as a candidate such as ‘the Democratic presidential nominee’ or ‘the Republican candidate for Senate in the State of Georgia.’”).

277. 11 C.F.R. § 100.29(b)(2) (2013).

278. Am. Future Fund, Statement of Commissioner Donald F. McGahn on A.O. 2012-19, at 6, (Fed. Election Comm’n June 7, 2012).

279. Am. Future Fund, A.O. 2012-19 Draft A, at 3–4, 9 (Fed. Election Comm’n June 7, 2012).

280. *Id.* at 6.

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Sebelius [and] tell her it's wrong for her and the Administration to trample the most basic American right."²⁸¹

Why? According to these Commissioners, all three advertisements discuss the executive branch, which consists of many agencies and officials who are not candidates for reelection.²⁸² They argue that the definition of "clearly identified" does not include use of audio of a candidate's voice and, therefore, absent permissible reference to the speaker, a recording of a candidate's voice does not clearly identify the candidate.²⁸³ These Commissioners also maintain that reaching an alternative conclusion regarding the terms "administration" and "White House" would lead to an absurd result, transforming ads exhorting viewers to contact their representatives to support the administration on legislative issues into express advocacy.²⁸⁴

Commissioners Weintraub, Walther and Bauerly would reach the opposite result.²⁸⁵ According to these Commissioners, Congress, in enacting the BCRA, "intended to broaden the reach of the Act beyond communications that contain express advocacy or its functional equivalent."²⁸⁶ They argue that references to the "Administration" are "merely short-hand" for the President.²⁸⁷ In addition, they maintain that the contention that some listeners might not recognize a candidate's voice is "highly improbable" given that the President's voice is "widely recognized" and is also irrelevant because the analysis is supposed to be objective.²⁸⁸ Furthermore, they contend that any ambiguity caused by the third advertisement's reference to Secretary Sebelius is clarified by the footage of the White House.²⁸⁹

281. *Id.* at 7.

282. *Id.* at 5–9.

283. *See id.* at 6–7.

284. *Id.* at 5–6 (arguing that, finding that "Administration" of "White House" referred to a clearly identified candidate, would mean that, advertisements stating: "Support the White House" would constitute in determining express advocacy since they combine one of *Buckley's* magic words with a reference to a clearly identified candidate).

285. *See* Am. Future Fund, A.O. 2012-19 Draft B, at 3 (Fed. Election Comm'n June 7, 2012).

286. Am. Future Fund, Concurring Statement on A.O. Request 2012-19, at 1 (Fed. Election Comm'n June 13, 2012).

287. American Future Fund, A.O. 2012-19 Draft B, at 4–6.

288. *Id.* at 6; *see also* Am. Future Fund, Concurring Statement on A.O. Request 2012-19, at 1–2 (Fed. Election Comm'n June 13, 2012).

289. *See* American Future Fund, A.O. 2012-19 Draft B, at 8.

The District Court for the Eastern District of Virginia reviewed advertisements that were “essentially identical” to those reviewed by the FEC and came to a different conclusion—that the first and third advertisements were ECs, but that the second advertisement was not.²⁹⁰ The court looked to the references that were made in the context of the advertisement as a whole²⁹¹ and found that references to the White House and Administration, while discussing the policies of the current President and displaying images of the White House, were “clear[ly] . . . being used as synonyms for the President,” and, thus, unambiguous references to the current President.²⁹² Concerning the third advertisement, the court found that the use of the term Administration, while displaying footage of the White House, distinguished the Secretary from the Administration, making it clear to viewers that Administration referred to the President.²⁹³ The court found that the second advertisement was not an EC because there was no evidence presented that “the average listener would recognize the President’s voice simply by hearing an eight word sentence.”²⁹⁴

c. Determining When an Organization Qualifies as a PAC

’Because the Commissioners do not agree on the proper definition of express advocacy, they are at odds over when exactly an organization exceeds the threshold spending amount under the first prong of the test for determining when an organization qualifies as a PAC.²⁹⁵ Even where the Commissioners agree that a group has met the threshold requirement, they disagree over the proper test for determining whether the major purpose of an organization is the nomination or defeat of a Federal candidate (the second prong).

Commissioners McGahn, Peterson, and Hunter contend that the other commissioners’ interpretation of the major purpose test unconstitutionally exceeds the scope of the test as it was articulated in

290. *Hispanic Leadership Fund v. Fed. Election Comm’n*, No. 1:12CV893, 2012 WL 4759238, at *13 (E.D. Va. Oct. 4, 2012).

291. *Id.* at 13–15.

292. *Id.* at 13.

293. *Id.* at 14 (explaining that it is the President who “is the head of the Administration and [] resides, and works, at the White House”).

294. *Id.*

295. *Compare* Free Speech, A.O. 2012-11 Draft A, at 50–52 (Fed. Election Comm’n Apr. 12, 2012), *with* Free Speech, A.O. 2012-11 Draft B, at 22 (Fed. Election Comm’n Apr. 12, 2012). The first prong for determining whether to impose PAC status is whether a group makes contributions or expenditures aggregating in excess of \$1000 during a calendar year. *See* discussion *supra* Part II.A.

Buckley.²⁹⁶ Commissioner McGahn argues that the FEC impermissibly considers a group's overall federal campaign activity and its influence on federal elections.²⁹⁷ McGahn maintains that, by refusing to promulgate a list of factors, the agency allows itself to engage in the same sort of "intricate case-by-case determination" that the Supreme Court rejected in *Wisconsin II* and *Citizens United*.²⁹⁸

These Commissioners believe that a group meets the major purpose standard in only two situations.²⁹⁹ First, a group must register as a PAC if its "central organizational purpose" is the election or defeat of federal candidates.³⁰⁰ In determining a group's central purpose, the agency's review should be limited to "official statements, . . . organizing documents or statement of purpose, or other materials put forth under the group's name, including fundraising documents or press releases. . . ." ³⁰¹ According to these commissioners, prohibitions on express advocacy in a group's bylaws in conjunction with an official statement that the group "promotes and protects free speech, limited government, and constitutional accountability" constitutes "clear evidence of intent to focus on issues and avoid electoral speech." ³⁰²

Second, a group qualifies as a PAC if it devotes more than half of its spending to express advocacy.³⁰³ These three Commissioners maintain that, in determining the proportion of overall spending that

296. See HUNTER ET AL., *supra* note 240, at 23–24 n.71. These three Commissioners also argue that a case-by-case approach to ascertain PAC status fails to give "practical guidance" to those wishing to comply with disclosure requirements, and leaves speakers vulnerable to lengthy, burdensome investigations. *Id.* Additionally, they argue that this ex post approach fails to provide organizations with any way to determine when their first filing is due or what stretch of time the FEC will review to determine its major purpose. *Id.*

297. See MCGAHN, *supra* note 233, at 39. McGahn argues that consideration of these factors violates the District Court of the District of Columbia's holding in *FEC v. GOPAC*, which rejected the FEC's argument that in order to meet the major purpose test, "an organization need not support the 'nomination or election of a candidate,' but need only engage in 'partisan politics' or 'electoral activity.'" *Id.* (quoting Fed. Election Comm'n v. GOPAC, 927 F. Supp. 851, 861 (D.D.C. 1996)).

298. *Id.* at 43.

299. This approach mirrors the one taken by the Tenth Circuit in construing a state statute. *Cf.* N.M. Youth Organized v. Herrera, 611 F.3d 669, 678 (10th Cir. 2010).

300. See Free Speech, A.O. 2012-11 Draft C, at 45 (Fed. Election Comm'n Apr. 26, 2012).

301. *Id.* at 48. These Commissioners believe that the FEC should not review outside sources such as news articles and other unofficial statements. *Id.*

302. *Id.* at 49.

303. See *id.* at 45.

is express advocacy, the FEC should not take into account ECs or other documents, such as faxes and fundraising letters, which are not express advocacy.³⁰⁴ Moreover, they argue that review should not be limited to short time periods that could provide an “incomplete picture” of a group’s central purpose.³⁰⁵

Commissioners Weintraub, Walther, and Bauerly believe that the FEC is acting within its proper authority by taking a comprehensive approach to determining major purpose status.³⁰⁶ In *Buckley*, the Supreme Court articulated that the test was whether the group’s major purpose is “the nomination or election of a candidate.”³⁰⁷ Since then, the Court has not narrowed that definition or attempted to delineate exactly what the FEC may consider when applying the test.³⁰⁸ At a minimum, by later explaining that the “major purpose may be regarded as campaign activity” or whether its “primary objective is to influence political campaigns,” the Court signaled that the test was not static.³⁰⁹ In fact, every court that has considered the validity of the FEC’s multi-factor approach has upheld it.³¹⁰

Proponents of the multi-factor approach maintain that it makes sense from a policy perspective. They argue that disclosure that is both effective and comprehensive is now even more paramount given that individuals and entities can spend an unlimited amount of money

304. *Id.* at 51 (noting that the legislative history of the BCRA indicates that members of Congress believed that organizations would be free to run ECs without having to register and report as a PAC (citing 147 CONG. REC. S2813 (daily ed. Mar. 27, 2001) (statement of Sen. James Jeffords))).

305. *Id.* at 50 n.30. The Commissioners provided a hypothetical of a group that is created in the middle of an election year and, thus, is primarily focused on election related activities, but that intends to remain in existence after the election to focus on non-election related activities. *Id.*

306. See Nat’l Def. Comm., A.O. 2012-27 Draft B, at 15–17 (Fed. Election Comm’n Aug. 23, 2012).

307. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

308. See *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238 (1986); see also Brief for Campaign Legal Center and Democracy 21 as Amici Curiae Supporting Respondents at 29, *Free Speech v. Fed. Election Comm’n*, No. 2:1200127 (D. Wyo. Oct. 3, 2012) (noting that the court in *Shays v. Fed. Election Comm’n*, 511 F. Supp. 2d 19 (D.D.C. 2007), approved the FEC’s approach and noted that “*Buckley* established the major purpose test, but did not describe its application in any fashion”), *appeal docketed* No. 12-8078 (10th Cir. Oct. 19, 2013).

309. See *Mass. Citizens*, 479 U.S. at 262.

310. See Brief for Campaign Legal Center, *supra* note 308, at 28–29 (discussing *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544, 558 (4th Cir. 2012), *cert denied*, 133 S. Ct. 841 (2013); *Shays*, 511 F. Supp. 2d 19; and *Fed. Election Comm’n v. Malenick*, 310 F. Supp. 2d. 230, 234 (D.D.C. 2004)).

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on campaign related activity.³¹¹ Moreover, such an approach does not risk chilling speech in the same way that it did when the Supreme Court first created it, since it no longer acts to ban or limit speech.³¹²

In carrying out a multi-factor approach, Commissioners Weintraub, Walther, and Bauerly consider a group's "overall conduct," including: statements about its mission, the proportion of spending related to federal candidate campaigns, and the extent to which fundraising solicitations indicate funds provided will be used to support or oppose specific candidates.³¹³ The Commissioners compare the proportion of spending on federal campaign activity (which is not limited to express advocacy) with a group's spending on activities that are not campaign-related.³¹⁴

d. The Ensuing Effects on Disclosure

The effect of these Commissioners' 3-3 splits is that the FEC lacks the requisite votes to take action in any circumstance that falls outside of the more narrow approach that Commissioners McGahn, Peterson, and Hunter take. Thus, communications by non-PAC organizations that do not use the magic words, or, when aired within the relevant period before an election, do not refer to a candidate by explicitly naming or displaying a picture of the candidate, will not be required to disclose the sources of their contributions. Moreover, so long as a group does not spend more than half of its money on express advocacy (as narrowly defined by three of the Commissioners) during the more extended time frame that those Commissioners are likely to consider, it does not have to register as a PAC, and thus will not be subject to more stringent disclosure requirements.³¹⁵

If an organization that seeks an advisory opinion from the FEC to determine whether a proposed advertisement is express advocacy or an EC, or whether it needs to register as a PAC, does not receive an answer because the FEC lacks the requisite votes to issue an opinion,

311. See Brief of Appellee Federal Election Commission at 41–42, *Free Speech v. Fed. Election Comm'n*, No. 12-8078 (10th Cir. Feb. 4, 2013).

312. See *id.* at 43 (citing *Real Truth*, 681 F.3d at 549).

313. Political Comm. Status, 72 Fed. Reg. 5595, 5597, 5605 (Feb. 7, 2007) (to be codified at 11 C.F.R. pt. 100).

314. See *Free Speech*, A.O. 2012-11 Draft B, at 25–28 (Fed. Election Comm'n Apr. 12, 2012) (citing Political Comm. Status, 72 Fed. Reg. at 5601, 5605).

315. See *Free Speech*, A.O. 2012-11 Draft C, at 55 (Fed. Election Comm'n Apr. 26, 2012).

it has two options. The first option for the organization is to continue its planned activity without adhering to disclosure or reporting requirements, knowing that the FEC currently lacks the requisite votes to bring an enforcement proceeding against it.³¹⁶ If an individual decides to challenge the organization for non-compliance with its enabling statute, he first will have to file a complaint with the FEC.³¹⁷ Assuming that none of the Commissioners have changed their viewpoints and that none of the members have been replaced, the Commission will likely deadlock on whether the committee violated the FECA, which will result in a dismissal of the complaint.³¹⁸ The challenger can then dispute the Commission's dismissal by filing a petition with the United States District Court for the District of Columbia.³¹⁹ The District Court then will request a statement from the three Commissioners who voted to dismiss the complaint providing their reasons for dismissal.³²⁰ The court will defer to the three dissenting Commissioner's decision unless it determines that the agency's action was "contrary to law."³²¹

The second option would be to seek a declaratory judgment from a court enjoining the FEC from bringing an enforcement proceeding against it in the future.³²² The reviewing court will not defer to any of

316. Four votes are required for the FEC to act. *See* 2 U.S.C. § 437c(c) (2006).

317. *See* 2 U.S.C. § 437g(a)(1) (2006).

318. *See* Democratic Cong. Campaign Comm. v. Fed. Election Comm'n, 831 F.2d 1131, 1133 (D.C. Cir. 1987).

319. *See* 2 U.S.C. § 437g(a)(8)(A); *Democratic Cong. Campaign Comm.*, 831 F.2d at 1133.

320. *See* Fed. Election Comm'n v. Nat'l Republican Senatorial Comm., 966 F.2d 1471, 1476 (D.C. Cir. 1992).

321. 2 U.S.C. § 437g(a)(8)(C); *see Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 ("Since [the dissenting Commissioners] constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."). A decision is "contrary to law" if it is the result of an "impermissible interpretation" of law or is otherwise "arbitrary or capricious or an abuse of discretion." *Orloski v. Fed. Election Comm'n*, 795 F.2d 156, 161 (D.C. Cir. 1986).

322. *See* Hispanic Leadership Fund v. Fed. Election Comm'n, No. 1:12CV893, 2012 WL 4759238, at *1-2 (E.D. Va. Oct. 4, 2012) (finding that plaintiff had standing to seek declaratory judgment that its planned advertisements would not constitute ECs after the FEC deadlocked and, thus, failed to issue an advisory opinion regarding another committee's advertisements that were "essentially identical" to the plaintiff's proposed advertisements); *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 125, 132-33 (D.D.C. 2011) (finding committee had standing to seek a preliminary injunction to enjoin the FEC from enforcing provisions of the FECA against it for its planned campaign activity after the FEC deadlocked and, thus, failed to issue an advisory opinion regarding its planned activity).

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the Commissioner's opinions, however, since the agency's deadlock over issuing an advisory opinion constitutes a final agency action.³²³ Thus, under this option, the organization will spend additional legal fees obtaining a judgment that will not defer to those Commissioners who believe that the proposed speech does not fall within one of the regulable categories.

III. STATE ATTEMPTS TO GO BEYOND THE FEDERAL REQUIREMENTS

Recognizing that the federal disclosure laws are unable to provide meaningful disclosure, several states have enacted laws requiring more extensive disclosure and reporting.³²⁴ States arguably have a stronger interest than the federal government in requiring disclosure.³²⁵ The Supreme Court has recognized that the Guarantee Clause of the Constitution gives states broad power to define their electorates.³²⁶ It follows, then, that states have the power, within the confines of the Constitution, to regulate the influence of outside groups on state election results.³²⁷

States and local municipalities are more vulnerable to the influence of large factions than the federal government.³²⁸ Overall spending on local election campaigns is generally much more limited than spending on federal elections and, thus, outside groups spending large amounts can influence election results more easily.³²⁹ Accordingly, a

323. See *Hispanic Leadership Fund*, No. 1:12CV893, 2012 WL 4759238, at *12 (finding no deference where FEC split 3-3 on whether to issue an advisory opinion).

324. See Tara Malloy, *A New Transparency: How to Ensure Disclosure from "Mixed-Purpose" Groups After Citizens United*, 46 U.S.F. L. REV. 425, 449 (2011).

325. See Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect A Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 40 (2010).

326. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 37 (1988).

327. Cf. *id.* at 38 (noting the courts can affirm state control over state and local election franchises by recognizing that this power is one aspect of republican government promised to the states by the Guarantee Clause).

328. See Johnstone, *supra* note 37, at 466.

329. See Garry et al., *supra* note 325, at 40 n.32; Shane Goldmacher, *Does Money Talk in Congress? In 2012, It Screamed*, NAT'L J. (Nov. 10, 2012, 9:43 PM), <http://www.nationaljournal.com/magazine/does-money-talk-in-congress-in-2012-it-screamed-20121108>; Lauren Feeney, *Dark Money in State and Local Elections*, BILL MOYERS WEEKLY Q&A (June 15, 2012), <http://billmoyers.com/2012/06/15/dark-money-in-state-and-local-elections> (discussing how a local federal candidate lost an

state's citizens have a strong interest in knowing the extent of outside spending's influence. Outside spending that influences elections also undermines the principles of horizontal federalism and state sovereignty.³³⁰ Outside influence can interfere with states' abilities to serve as laboratories of experimentation and undercuts the notion that the people vote with their feet.³³¹ Increased outside spending can also undermine constituents' beliefs that state elected officials are more likely to be responsive to their needs.³³²

A. Determining What the Supreme Court Said

Although they are few and far outnumbered, some courts have concluded that *Buckley's* narrowing of certain provisions of the FECA was constitutionally required. Courts that have invalidated state laws that failed to adopt the Supreme Court's limiting interpretation of several provisions of the FECA engaged in little if no substantive analysis of whether the state law met exacting scrutiny.

1. *The Major Purpose Test*

The federal "major purpose" test has created some odd results, such as permitting large organizations that spend millions of dollars on campaign-related activity to avoid being subject to the additional PAC disclosure requirements just by ensuring that the organization's major purpose is not to nominate or elect a federal candidate.³³³ States, in an attempt to avoid similar results, have enacted laws that either completely do away with the major purpose test or define "major purpose" more broadly than federal law does.

In some instances, courts have read the major purpose test into these statutes, insisting that it is necessary to avoid vagueness concerns. In *North Carolina Right to Life v. Leake*, the Fourth Circuit found that a state law imposing PAC status on any group that "[h]as as a major purpose to support or oppose the nomination or

election where he had previously had a twelve-point lead after an outside group spent \$400,000 in the final days of the election campaign).

330. See Garry et al., *supra* note 325, at 46; see also Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 99 (2002) ("Federalism rests on principles of state autonomy and equality: each state governs its own territory and citizens but not, of course, the territory and citizens of sister states.").

331. See Garry et al., *supra* note 325, at 36–38.

332. See *id.*

333. See Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012).

election of one or more clearly identified candidates” was vague.³³⁴ The court reasoned that there could be only one purpose that was “*the* major purpose” of an organization under *Buckley*’s construction, whereas there could be several purposes that simultaneously could constitute “a major purpose” of an organization under the state law.³³⁵ The court reasoned that, in the absence of any criteria as to when a “purpose” becomes “a major purpose,” organizations lacked sufficient notice as to when they could be designated as a PAC.³³⁶ The Tenth Circuit also read the major purpose requirement into two state laws—one imposed PAC status on organizations that “operate primarily” for a political purpose,³³⁷ and a second imposed PAC status on “any group that spends more than \$200 a year to support or oppose the nomination or election of one or more candidates.”³³⁸

Other circuits have refused to invalidate or narrowly construe laws on vagueness grounds merely because they fail to use “the major purpose” test to determine PAC status. The Ninth Circuit upheld a law imposing PAC status on a group “if one of its primary purposes is to affect governmental decision-making by supporting or opposing candidates or ballot propositions, and it makes or expects to make contributions in support of or in opposition to a candidate or ballot measure” against a vagueness challenge, reasoning that the test provided “concrete, discernible criteria.”³³⁹ Other courts have upheld state laws imposing PAC status once a group’s total amount of expenditures or contributions exceeds a certain amount.³⁴⁰

State laws that alter or do away with the federal test for determining PAC status have also been challenged on First Amendment grounds. Lower courts are divided over whether a

334. *N.C. Right to Life v. Leake*, 525 F.3d 274, 323 (4th Cir. 2008). Note, however, that organizations that met the state’s requirements were subject to both disclosure requirements and limits on the amount of contributions they could receive. *See Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544, 553 (4th Cir. 2012).

335. *Leake*, 525 F.3d at 289 (explaining how a single organization could have multiple purposes).

336. *Id.* at 290 (noting that the statute’s vagueness made it susceptible to abuse by granting regulators’ broad, unguided discretion).

337. *N.M. Youth Org. v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) (citing N.M. STAT. ANN. § 1-19-26(L)) (upholding as-applied challenge).

338. *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007). In *Coffman*, the law at issue both imposed strict contributions and disclosure requirements. *See Malloy*, *supra* note 324, at 448 (footnote omitted) (citation omitted).

339. *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1020–21 (9th Cir. 2010).

340. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012).

“major purpose” is constitutionally required under the First Amendment and, if so, what constitutes a major purpose. Some courts have read the “major purpose” test into state laws, finding that without such a requirement, the laws run the risk of sweeping in a substantial amount of constitutionally protected speech.³⁴¹

Most courts, however, have dismissed such challenges, finding that such laws are not overly broad merely because they impose PAC status on organizations whose major purpose is not influencing elections. Courts rely on three primary justifications for upholding such laws. First, courts reason that the major purpose limitation that *Buckley* created, like the “magic words” test, was a product of statutory interpretation.³⁴² Second, courts distinguish state laws that deal purely with disclosure from the provision in *Buckley*, which placed hard limits on the amount that individuals could contribute to PACs and the sources from which PACs could receive contributions in addition to disclosure requirements.³⁴³ They point to the Supreme Court’s indication in *Massachusetts Citizens for Life* that, although exempt from the limit on use of general treasury funds, an organization would be subject to the FECA’s more extensive disclosure requirements for PACs if its independent spending became such that it was deemed to have as its major purpose the election or defeat of a candidate.³⁴⁴ Thus, courts reason that although the major purpose test may be required for laws imposing hard limits on campaign contributions and expenditures, it is not mandated for laws triggering additional disclosure requirements.³⁴⁵

Third, courts acknowledge that the major purpose test “yields perverse results” by requiring small groups with limited spending to register, while exempting larger groups that spend far more on

341. See *Herrera*, 611 F.3d at 677 (interpreting law requiring organizations that “operate primarily” for the purpose of “influencing or attempting to influence an election” to register as PACs as requiring that such organizations meet the major purpose test as it was articulated in *Buckley*); *Leake*, 525 F.3d at 288–89. The law in *Leake*, however, was distinguishable from the other state laws that failed to adopt the federal standard. See *Malloy*, *supra* note 324.

342. See *Madigan*, 697 F.3d at 486–89 (7th Cir. 2012); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Brumsickle*, 624 F.3d at 1009–10; *Vt. Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376, 394 (D. Vt. 2012).

343. See, e.g., *Madigan*, 697 F.3d at 488 (citing *Buckley v. Valeo*, 424 U.S. 1, 35 (1974)).

344. See *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986).

345. See *Madigan* 697 F.3d at 488; *Malloy*, *supra* note 324, at 446–49.

campaign-related activities.³⁴⁶ Courts recognize that limiting PAC status to those groups that have “the major purpose of influencing elections” would allow large groups to circumvent the law with ease by either increasing non-campaign-related activities or by merging with an organization that is not engaged in campaign-related activities.³⁴⁷

2. *Express Advocacy and Its Functional Equivalent*

Several states, in an attempt to avoid creating easily exploitable bright-line distinctions between regulable and non-regulable speech, have enacted laws compelling disclosure of communications containing speech that would fall outside of *Buckley*’s “magic words” test. Courts that have reviewed such laws can be separated into three categories, ranging from least to most permissive.³⁴⁸ In the first category, at least one court has found that a state law imposing disclosure requirements on groups making expenditures for anything other than express advocacy (as it was interpreted in *Buckley*) or ECs (as they are defined in the FECA) was impermissibly vague.³⁴⁹ In the second category are courts that have upheld disclosure requirements for speech that meets the federal express advocacy requirements found in § 100.22(a) and (b) against constitutional challenges.³⁵⁰ Also in this category is one court that found that state disclosure requirements for speech that is express advocacy or its functional equivalent (as it was defined in *Wisconsin II*) were constitutional even though the regulations were not further limited in the same ways as the federal provision.³⁵¹

In the final category are courts that have upheld language that is arguably broader than the language found in § 100.22(b) and the

346. *Madigan*, 697 F.3d at 489 (quoting *McKee*, 649 F.3d at 59).

347. *Id.* at 489–90.

348. Since these cases involve situations where courts have either upheld provisions or narrowed them in order to avoid vagueness concerns, however, they do not hold that any additional disclosure extending beyond the courts’ interpretation would be unconstitutional. *See supra* notes 89, 269 and accompanying text.

349. *See* *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 664 (5th Cir. 2006); *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008). *But see* *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544, 553 (4th Cir. 2012) (distinguishing *Leake* on the grounds that the law at issue imposed not just disclosure, but also limits on contributions and expenditures).

350. *See* *Ctr. for Individual Freedom, v. Tennant*, 706 F.3d 270, 280–81 (2013).

351. *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1045 (D. Haw. 2012) (indicating that it was not clear that such a narrow reading was necessary).

“appeal to vote” test. In *State of Vermont v. Green Mountain Future*, the Vermont District Court narrowed the term “influence” to mean “supporting or opposing one or more candidates.”³⁵² Similarly, in *National Organization for Marriage v. McKee*, the First Circuit upheld the terms “support,” “oppose,” and “opposition,” which appeared in several disclosure provisions.³⁵³

Although courts have been nearly unanimous in upholding such terms, it remains unclear whether they are in fact vague, especially when they are considered in the context of whole provisions.³⁵⁴ Lower courts upholding such language rely on *McConnell*, where the Supreme Court, in a footnote, upheld a provision defining “public communication” as a communication that “refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.”³⁵⁵ That provision was more limited than some of the state provisions, however, in that it required that the communication “refer to a clearly identified candidate”³⁵⁶ and it applied only to state party committees, whose actions are presumed to be coordinated with federal candidates.³⁵⁷

State laws going beyond the federal requirements have also been challenged on First Amendment grounds. Such challenges, however, have been largely unsuccessful.³⁵⁸ While the Supreme Court has only

352. *Vermont v. Green Mountain Future*, No. 758-10-10, at 2–3 (Sup. Ct. Vt. June 28, 2011), available at <http://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2011-6-30-1.pdf> (defining “PACs” as any entity receiving contributions or making expenditures over a threshold amount “for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question in any election or affecting the outcome of an election.”).

353. *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 62–63 (1st Cir. 2011), cert. denied, 132 S. Ct. 1635 (2012).

354. See, e.g., *Boos v. Barry*, 485 U.S. 312, 332 (1988) (finding the term “peace” was not vague as its definition was apparent from its context); see also *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 593 (1985) (“A term that appears vague on its face may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context.”).

355. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 184 (2003).

356. 2 U.S.C. § 431(20)(A)(iii) (2006).

357. See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 503–04 (7th Cir. 2012) (Posner, J., dissenting) (explaining that the provision upheld in *McConnell* was not vague). Judge Posner indicated that intent-based limitations, such as regulating speech “made for the purpose of influencing,” promoting, opposing, etc., might be sufficient to allow the provision to pass muster. *Id.* (emphasis added).

358. See *Madigan*, 697 F.3d at 484 n.17 (finding that “with just one exception every circuit that has reviewed First Amendment challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more

addressed whether “express advocacy” and “electioneering communications” as they are defined by the FECA are valid, it has never indicated that regulations may go no further.³⁵⁹

B. Determining What Exactly Is Exacting Scrutiny

Courts reviewing state laws that require disclosure of activities not addressed by the Supreme Court are forced to undergo a more substantive analysis to determine and apply the appropriate standard of review. A frequent challenge to state disclosure requirements is that they are so burdensome that they act as a de facto ban on speech and, thus, should be reviewed under strict scrutiny.³⁶⁰ Challengers argue that the Supreme Court indicated in *Citizens United* that strict scrutiny review was appropriate for laws that are “expensive to administer and subject to extensive regulations,” such as those that require an organization to appoint a treasurer, maintain detailed records, and promptly file statements when information changes.³⁶¹

Thus far, courts unanimously have rejected such attempts for two reasons.³⁶² First, lower courts are bound by the Supreme Court,³⁶³ which has held repeatedly that exacting scrutiny is the appropriate level of review for disclosure laws.³⁶⁴ Second, the burdens that the FECA imposed on corporations prior to *Citizens United* included

than just express advocacy and its functional equivalents”). The exception—the 10th Circuit—invalidated disclosure requirements as applied to certain organizations. *Id.* (discussing *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) and *N.M. Youth Org. v. Herrera*, 611 F.3d 669, 677 n.4 (10th Cir. 2010)).

359. *See* *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 684–85 (S.D.W. Va. 2011), *overruled on other grounds*, 706 F.3d 270 (4th Cir. 2013).

360. *See* Malloy, *supra* note 324, at 446.

361. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 337–38 (2010).

362. *See* *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 695–96 (D.C. Cir. 2010); *Iowa Right to Life Comm. v. Tooker*, 795 F. Supp. 2d 852, 865–67 (S.D. Iowa 2011); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 936 (E.D. Cal. 2011); *Yamada v. Kuramoto*, No. 10-00497, 2010 WL 4603936, at *10 (D. Haw. Oct. 29, 2010).

363. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 1307, 1308 (2012).

364. *See* *Citizens United*, 558 U.S. at 366–67; *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 231–32 (2003), *overruled by* *Citizens United*, 558 U.S. 310; *Buckley v. Valeo*, 424 U.S. 1, 64, 66, 96 (1976). The Eighth Circuit, however, indicated that it did not believe that the Supreme Court intended exacting scrutiny to apply to burdensome disclosure laws. *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 874–75 (8th Cir. 2011) (en banc). *But see id.* at 881 (Melloy, J., dissenting) (arguing that applying strict scrutiny to burdensome disclosure laws is “circular and conclusory . . . requir[ing] a court to assess the burden of a disclosure law to determine what level of scrutiny applies, then to evaluate that burden again under exacting or strict scrutiny”).

requirements that they create a separate association in order to speak and placed limits on the types of sources that could contribute to the separate association.³⁶⁵

While disclosure requirements generally are reviewed under exacting scrutiny, the Court in *Buckley* indicated that monetary thresholds triggering disclosure should be reviewed under rational basis.³⁶⁶ As a result, some courts have reviewed thresholds separately under rational basis.³⁶⁷ Three circuits have rejected this interpretation, however, choosing instead to review thresholds under exacting scrutiny.³⁶⁸

Although courts generally agree that exacting scrutiny is the appropriate standard of review for disclosure requirements,³⁶⁹ they do not agree completely as to what the standard requires.³⁷⁰ The “exacting” standard was first articulated by the Court in *United States v. Carolene Products Co.*,³⁷¹ long before the Court first articulated the “strict scrutiny” standard of review.³⁷² Unlike strict scrutiny and rational basis, exacting scrutiny does not presume the

365. See *Swanson*, 692 F.3d at 881 (Melloy, J., dissenting).

366. See *Buckley*, 424 U.S. at 83 (finding that thresholds for record-keeping and reporting were not “wholly without rationality”).

367. See *Nat’l Org. for Marriage v. Daluz*, 654 F.3d 115, 118–19 (1st Cir. 2011) (applying rational basis); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 60–61 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); *Daggett v. Comm’n on Gov’t Ethics & Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000) (applying rational basis); *Vt. Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376 (D. Vt. 2012) (same); *Bowen*, 830 F. Supp. 2d at 944–45 (same). *But cf.* *Family PAC v. McKenna*, 685 F.3d 800, 809 & n.7 (9th Cir. 2012) (applying exacting scrutiny to uphold \$25 and \$100 thresholds, noting, “[i]t is far from clear, however, that even a zero-dollar disclosure threshold would succumb to exacting scrutiny” and that “we are not aware of any decision invalidating a *contribution disclosure requirement*, either facially or as applied to a particular actor”).

368. See *Swanson*, 692 F.3d at 876; *McKenna*, 685 F.3d at 809; *Canyon Ferry Rd. Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009); see also *Iowa Right to Life Comm. v. Tooker*, 795 F. Supp. 2d 852, 866 (S.D. Iowa 2011) (stating that the disclosure provisions must be evaluated “as a whole”).

369. See *Swanson*, 692 F.3d at 881 (Melloy, J., dissenting) (describing the view held by six members of the Eighth Circuit that the Supreme Court never intended that exacting scrutiny was the appropriate standard of review for all disclosure laws).

370. James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, & the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 195, 225 (2008).

371. *Buckley*, 424 U.S. at 64.

372. See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 361 (2006) (discussing the birth of strict scrutiny).

law to be either constitutional or unconstitutional.³⁷³ Rather, exacting scrutiny occupies the amorphous territory between the two clearer standards. Perhaps in part due to the nature of the territory that it occupies, for many years the standard was described or applied in a consistent manner.³⁷⁴ The Supreme Court has referred to exacting scrutiny as “the most exacting scrutiny,”³⁷⁵ “critical scrutiny,”³⁷⁶ a “strict test,”³⁷⁷ and “the strictest standard of review.”³⁷⁸ In some cases, the test has been described as being akin to strict scrutiny in that it requires a “compelling interest” and the “least restrictive means.”³⁷⁹ More recently, the Court clarified the standard, explaining that the test requires a “sufficiently important governmental interest” and a “substantial relation” between the disclosure requirement and that interest.³⁸⁰

Since the Supreme Court clarified the standard for exacting scrutiny, lower courts have stated the correct standard consistently.³⁸¹ In applying the standard, however, lower courts take divergent approaches. These courts vary as to what evidence the government must provide, if any, to show that the law is “substantially related” to a “sufficiently important interest.”

Some courts have construed the Supreme Court’s assertions that the burden is on the government to show that the interest advanced is “paramount”³⁸² and “reflect[s] the seriousness of the actual burden on

373. Johnstone, *supra* note 37, at 419–20.

374. Bopp & Neeley, *supra* note 370, at 225–26; *see* Minn. Citizens Concerned for Life v. Swanson, 692 F.3d 304, 876 (8th Cir. 2011).

375. United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (plurality) (quoting Turner Broad. Sys. v. Fed. Comm’n Comm’n, 512 U.S. 622, 642 (1994)).

376. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 786–87 (1978).

377. Buckley v. Valeo, 424 U.S. 1, 66 (1976).

378. McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347–48 (1995).

379. *Alvarez*, 132 S. Ct. at 2549, 2551.

380. Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 366–67 (2010); *accord* Doe v. Reed, 130 S. Ct. 2811, 2818 (2010).

381. *See* Ctr. for Individual Freedom v. Tennant, 706 F.3d 270, 282 (4th Cir. 2013) (exacting scrutiny requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 477 (7th Cir. 2012) (same); Minn. Citizens Concerned for Life v. Swanson, 692 F.3d 864, 874–75 (8th Cir. 2012) (en banc) (same); Family PAC v. McKenna, 685 F.3d 800, 805–06 (9th Cir. 2011) (same); Nat’l Org. for Marriage v. Daluz, 654 F.3d 115, 118 (1st Cir. 2011) (same); SpeechNow.org v. Fed. Election Comm’n, 599 F.3d 686, 696 (D.C. Cir. 2010) (same).

382. Elrod v. Burns, 427 U.S. 347, 362 (1976).

First Amendment rights”³⁸³ to mean that review of the government’s justifications and the nexus between that interest and the disclosure requirements is necessary. Other courts take a more deferential approach, relying on the Supreme Court’s finding in *Citizens United*, that the informational interest alone was sufficient in finding that local governments have an important interest in compelling disclosure.

With one exception, the standard that courts apply when reviewing monetary thresholds appears to have little effect on the outcome. Applying rational basis, the Ninth Circuit invalidated a zero-dollar threshold reporting requirement for organizations, reasoning that “the value of th[e] financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.”³⁸⁴ Two years later, applying exacting scrutiny, the Ninth Circuit upheld \$25 and \$100 threshold disclosure thresholds, noting that “[i]t [wa]s far from clear . . . that even a zero-dollar disclosure threshold” would fail to meet the standard.³⁸⁵ The court reasoned, “small contributions [could] provide useful information to voters when considered *in the aggregate*.”³⁸⁶ A district court in the Second Circuit applied rational basis, but indicated that exacting scrutiny would “make little difference in the Court’s analysis of th[e] disclosure threshold.”³⁸⁷ The sole exception, the Eighth Circuit, took a less deferential approach to a \$100 reporting and disclosure

383. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 68, 71 (1976)).

384. *Canyon Ferry Rd. Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1033–34 (9th Cir. 2009) (finding Montana’s “zero dollar” reporting threshold “wholly without rationality” because “[a]s a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level” (emphasis omitted)); *see also* *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010) (finding \$20 threshold for reporting contributors’ names and addresses and \$100 threshold for reporting names, addresses, occupations, and employers were invalid under rational basis).

385. *Family PAC v. McKenna*, 685 F.3d 800, 809 & n.7 (9th Cir. 2011). The Court distinguished the contribution disclosure threshold from the reporting thresholds in *Canyon Ferry* and *Sampson*. *Id.* at 810 & n.10.

386. *Id.* at 810.

387. *Vt. Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376, 400–01 (D. Vt. 2012) (citing *McKenna*, 685 F.3d at 809 & n.7). The court found that the law had a “rational foundation” because its threshold was higher than that of twenty-eight other states and lower than that of only five states and the federal government, and that the law was not arrived at haphazardly because “the legislative history reflect[ed] a concerted effort to adjust the amount over the years” and the lower amount permitted transparency of considerably more contributions than a higher amount would. *Id.* at 401.

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threshold, scrutinizing the additional burdens that the low threshold amount imposed on speakers.³⁸⁸

1. *Expanding the Definition of Electioneering Communications*

State attempts to broaden the definition of ECs beyond the requirements of federal law have received mixed reception in courts. Courts disagree as to whether the government interests that the Supreme Court recognized in *Buckley* and subsequent cases apply to state laws that regulate more types of speech than the federal provisions do and what, if anything, the government must show to establish that the means are sufficiently tailored to those interests.

Courts in the Second and Eleventh Circuits have upheld such laws without requiring any showing by the government that an important interest was substantially related to the communications.³⁸⁹ For example, in *National Organization for Marriage v. Roberts*, the District Court upheld an electioneering communication disclosure requirement that included newspapers, magazines, direct mail, and telephone calls even though the only evidence offered in support of the regulation was an article in a local newspaper describing the “no holds-barred political brawl” that occurred during a period following a court’s invalidation of the prior EC provisions.³⁹⁰

The Courts of Appeals in the Fourth and Seventh Circuits have taken less deferential approaches. In *Center for Individual Freedom v. Madigan*, the Seventh Circuit upheld a state law including Internet speech within its definition of ECs, but only after noting that there was information in the record indicating that the major parties’ spending on online communications in 2012 was expected to increase

388. See *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 871–72 (8th Cir. 2012) (en banc).

389. *Sorrell*, 875 F. Supp. 2d at 381, 390–91, 397–400 (ECs included items like billboards, posters, pamphlets, and robotic phone calls); *Nat’l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1219 (N.D. Fla. 2010), *aff’d sub nom.* *Nat’l Org. for Marriage v. Sec’y, State of Fla.*, 477 F. App’x 584 (11th Cir. 2012) (ECs included newspapers, magazines, direct mail, and telephone calls). In *Sorrell*, the district court found that the laws were properly tailored and the burdens (requiring the sponsor to send the Secretary a one-page form and then provide a photocopy of the report to any candidates who appeared in the activity) were minimal. *Sorrell*, 875 F. Supp. 2d at 398.

390. See Defendant’s Memo in Opposition to Plaintiff’s Motion for Preliminary Injunction at 1–2, *Nat’l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217 (N.D. Fla. 2010) (No. 1:10-cv-00192-SPM-GRJ), 2010 WL 4632649. The court made no reference to any legislative findings, nor were any provided by counsel. See *generally Roberts*, 753 F. Supp. 2d 1217.

sevenfold from the prior election,³⁹¹ and that in 2008, more than half of the voting-age population went online to get involved in or learn about the Presidential campaign.³⁹²

In *Center for Individual Freedom v. Tennant*, the Fourth Circuit took a less deferential approach than the Seventh Circuit when it struck down part of a state law expanding the definition of ECs to include “materials published in any newspaper, magazine, or other periodical.”³⁹³ The court found that the state could rely on the informational interest as it was articulated in *Buckley* to justify regulating print communications.³⁹⁴ In determining whether the means were adequately tailored to the informational interest, the court looked to codified statements of the legislature’s intent as well as materials in the court’s record.³⁹⁵ The court found that the text of the statute and affidavits on the record “provide[d] ample support for including newspapers, magazines, and other periodicals [in the state’s EC] definition.”³⁹⁶ Moreover, the court found that regulating print communications furthered the state’s interest, regardless of how little money was actually spent on print ECs.³⁹⁷ Nevertheless, the court determined that the state had not provided any rationale for regulating some forms of non-broadcast media but not others such as direct mailings.³⁹⁸ Consequently, the court found the regulation was underinclusive and, thus, invalid.³⁹⁹

391. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 492 (7th Cir. 2012) (citing Jen Christensen, *Obama Outspends Romney on Online Ads*, CNN (June 3, 2012, 11:20 PM), <http://www.cnn.com/2012/06/03/politics/online-campaign-spending/index.html>).

392. *See id.* (citing Aaron Smith, *The Internet’s Role in Campaign 2008*, PEW INTERNET & AM. LIFE PROJECT (Apr. 15, 2009), <http://www.pewresearch.org/pubs/1192/internet-politics-campaign-2008.aspx>).

393. *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 283–85 (4th Cir. 2013).

394. *Id.* at 282–83.

395. *See id.* at 284–85. The Court noted that there was “little, if any, formal legislative history.” *Id.* at n.4.

396. *Id.* at 284. The court noted that “the statute explicitly mention[ed] the legislature’s fear that ‘[f]ailing to regulate non-broadcast media would permit those desiring to influence elections to avoid the principles and policies that are embodied in existing state law’” and that the “affidavits clearly support[ed] the informational purpose that the [state] legislature enunciated.” *Id.*

397. *Id.* at 284–85. Information on the record revealed that as little as 0.4% of third-party spending financed print communications. *Id.*

398. *Id.* at 285.

399. *Id.* Earlier versions of the statute included direct mailings, telephone banks, and billboard advertising, but the legislature had removed them following the District Court’s determination that the state could not regulate non-broadcast media. The court acknowledged that the state legislature had likely removed those

2. PAC-Style Disclosure Requirements

Several of the states that do not use a major purpose-style test to determine PAC status have opted instead to impose disclosure requirements similar to the federal PAC requirements on all organizations making contributions or expenditures exceeding a certain amount.⁴⁰⁰ The state laws, like the federal PAC disclosure laws, require organizations exceeding the threshold to register, name a treasurer, maintain records and file regular reports with the state agency charged with enforcement, and provide for penalties for non-compliance.⁴⁰¹ The laws differ from each other in the amount of spending that triggers the more extensive disclosure requirements, how long groups have to register, the extensiveness of the filing requirements, which donors groups must disclose, and the severity of the penalties for non-compliance.⁴⁰²

With one exception, courts have upheld such laws against challenges that they are unduly burdensome and thus violative of the First Amendment. The First Circuit upheld a state law setting a \$5,000 threshold for imposing PAC status on groups receiving contributions or making expenditures for “the purpose of promoting, defeating or [expressly advocating or its functional equivalent for or against] the nomination or election of any candidate to political office.”⁴⁰³ Under the law, groups were required to register within seven days of exceeding the threshold amount.⁴⁰⁴ Once registered, groups were required to file six reports during election years and four reports during non-election years.⁴⁰⁵ The law required all groups

communications from its EC definition to comply with a lower court’s order that had since been overruled. *Id.*

400. *See* Malloy, *supra* note 324, at 450 (explaining the PAC-style disclosure model).

401. *See* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 471–72 (7th Cir. 2012); Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 42–43 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); Vt. Right to Life Comm. v. Sorrell, 875 F. Supp. 2d 376, 380–81 (D. Vt. 2012).

402. *See* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 471–72 (7th Cir. 2012); Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 42–43 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012); Vt. Right to Life Comm. v. Sorrell, 875 F. Supp. 2d 376, 380–81 (D. Vt. 2012).

403. *McKee*, 649 F.3d at 42. Notably, the appellee did not challenge the substantive obligations attendant to non-major purpose PAC status or contest the registration, recordkeeping, and reporting requirements. Rather, the appellee challenged the definition of a non-major purpose PAC. *Id.* at 58.

404. *Id.* at 42 (citing ME. REV. STAT. tit. 21–A, § 1053 (2011)).

405. *Id.*

exceeding the threshold to identify all contributors donating more than fifty dollars to support or oppose a candidate or campaign.⁴⁰⁶ The law provided civil fines⁴⁰⁷ and criminal penalties ranging from fines to imprisonment of up to six months for non-compliance.⁴⁰⁸

The Seventh Circuit upheld a state law setting a \$3,000 threshold for imposing PAC status on groups and individuals receiving contributions or making expenditures on behalf of or in opposition to a candidate, or “in support of or in opposition to any question of public policy” to be submitted to the electors, or on ECs.⁴⁰⁹ Under the law, groups were required to register within two days of exceeding the threshold amount.⁴¹⁰ Once registered, groups were required to file four reports annually disclosing the sources of all contributions and to file additional reports within a few days of receiving any contributions exceeding \$1,000.⁴¹¹ The law provided civil fines and injunctions for non-compliance.⁴¹²

The district court for the District of Vermont upheld a state law setting a \$500 threshold for imposing PAC status on any two or more individuals receiving contributions or making expenditures “for the purpose [of] . . . advocating a position on a public question, or supporting or opposing one or more candidates in any election.”⁴¹³ Under the law, groups were required to register within ten days of exceeding the threshold amount.⁴¹⁴ Once registered, groups were required to file reports, up to six times during an election year and once during non-election years, disclosing the sources of all contributions exceeding \$100.⁴¹⁵ The law provided for civil fines, investigations, enforcement actions, and criminal penalties ranging from fines to imprisonment for up to six months for non-compliance.⁴¹⁶

406. *Id.*

407. *See* ME. REV. STAT. tit. 21-A, § 1062-A(1) (2011); tit. 21-A, § 1020-A(5-A)(A); tit. 21-A, § 1014(4).

408. *See* tit. 21-A, § 1004; ME. REV. STAT. tit. 17-A, § 1252 (2008).

409. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 497 & n.35, 480 (7th Cir. 2012) (citing 10 ILL. COMP. STAT. 5/9-8.6(a) (2012)).

410. *Id.*

411. *Id.* at 471-72.

412. *Id.*

413. *Vt. Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376, 380 (D. Vt. 2012).

414. *Id.* at 396.

415. *Id.*

416. *Id.* at n.3.

In *Minnesota Citizens Concerned for Life v. Swanson*, the Eighth Circuit, the sole exception, reviewed a state law setting a \$100 threshold for imposing PAC status on any two or more individuals receiving contributions or making expenditures.⁴¹⁷ Under the law, groups were required to register within fourteen days of exceeding the threshold amount.⁴¹⁸ Once registered, groups were required to file one report annually and five reports during election years disclosing the sources of all contributions exceeding \$100.⁴¹⁹ Failure to comply could result in civil and criminal penalties, ranging from fines to imprisonment of up to five years.⁴²⁰

Six of the eleven judges on the Eighth Circuit hearing *Swanson* voted to grant a preliminary injunction enjoining enforcement of the law.⁴²¹ The majority emphasized two points. First, the majority maintained that the law impermissibly distinguished between corporations and any other associations and individuals, the latter of which were subject to additional burdens when their spending exceeded the statutory threshold.⁴²² Second, and more intrinsic to its holding, the majority found that the burdens were substantial and virtually identical to burdens imposed on PACs.⁴²³ Most onerous, in the majority's mind, was the reporting requirement triggered by a \$100 threshold, which continued until it was dissolved, regardless of whether the association continued to make expenditures.⁴²⁴ The court found that the government "ha[d] not stated any plausible reason why continued reporting from nearly all associations, regardless of the association's major purpose, [wa]s necessary to accomplish [its] interests."⁴²⁵ The court found that the state could accomplish its interests through "less problematic measures," such as requiring reporting whenever money is spent.⁴²⁶

417. See *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 867–68 (8th Cir. 2012).

418. *Id.* at 886.

419. *Id.* at 887.

420. *Id.* at 870.

421. *Id.* The Court found that the lower court "abused its discretion by denying their motion for preliminary injunction because [the plaintiff's] w[ere] likely [to] succeed on the merits of their claim that Minnesota's campaign finance laws unconstitutionally infringe upon the right to engage in political speech through independent expenditures." *Id.*

422. *Id.* at 871.

423. *Id.* at 872.

424. *Id.* at 873.

425. *Id.* at 877 (emphasis omitted).

426. *Id.* at 876–77 (citation omitted) (internal quotation marks omitted).

Swanson represents a departure from the more deferential approach that other courts take. Other courts repeatedly have upheld laws distinguishing among speakers in the disclosure context,⁴²⁷ and the Supreme Court has referenced the prohibition against distinguishing amongst speakers only in the context of laws prohibiting speech.⁴²⁸

Moreover, although the monetary thresholds were higher in the laws that were upheld by other courts, they all required ongoing reporting regardless of the extent of a PAC's activity until it dissolved. In *Sorrell*, the court found that the ongoing requirements were "reasonable," even though the committees were required to make reports when they were inactive, because such reports "took no more than ten to fifteen minutes to complete."⁴²⁹ The dissolution requirements in the law reviewed in *Sorrell* were arguably more burdensome than the requirements in the law in *Swanson*, which merely required checking a box on the front page of the form.⁴³⁰ Unlike the law struck down in *Citizens United*, the law in *Swanson* did not require the organizations to speak through a separate association nor did it limit who could make donations to the organizations.⁴³¹

IV. WHERE DO WE GO FROM HERE: PLUGGING HOLES AND INCREASING DISCLOSURE

A. Congress's Role

In an era that promotes transparency, Congress should follow the approach that several states have taken. Congress should enact broad disclosure requirements that impose PAC-style continuous reporting requirements on all individuals and organizations receiving contributions or making expenditures over a certain amount in a calendar year for the purpose of supporting or defeating a federal

427. See, e.g., *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 42 (1st Cir. 2011); *Vt. Right to Life Comm. v. Sorrell*, 875 F. Supp. 2d 376 (D. Vt. 2012).

428. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898–99 (2010) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

429. *Sorrell*, 875 F. Supp. 2d at 396.

430. *Swanson*, 692 F.3d at n.4; see *id.* at 885 (Melloy, J., dissenting) (disagreeing with the majority that "fil[ing] a statement of inactivity which comprises a one-page form, on which the treasurer can check a box for inactivity" does not impose an "undue" burden).

431. *Id.* at 881 (Melloy, J., dissenting) (citations omitted) (internal quotation marks omitted).

candidate.⁴³² The threshold amount should be set at a level that is sufficiently high so that it does not unduly burden small groups with limited resources.⁴³³

The federal government can constitutionally require the proposed comprehensive disclosure requirements. Since *Citizen's United*, with the exception of one circuit, all lower courts have found that the major purpose test is not constitutionally mandated.⁴³⁴ In *Buckley*, the Supreme Court read the major purpose test into a provision that acted not only as a regulation, but also as a ban on speech by restricting the amounts and sources of contributions to PACs. The current PAC requirements serve only to regulate speech, thus eliminating the need for the major purpose test.⁴³⁵ This reasoning is supported by the Supreme Court's assertion in *Massachusetts Citizens for Life* that, although the Constitution mandated an exemption for an organization from a limit on the use of its general treasury funds for campaign-related activity, it did not exempt it from more extensive disclosure requirements.⁴³⁶ Moreover, in *Citizens United*, eight Justices rejected an attempt to limit the scope of permissible disclosure requirements to its prior interpretation of certain provisions of the FECA, thus implying that its prior limiting construction of provisions placing limits on speech is not constitutionally mandated for mere regulations of speech.⁴³⁷

By replacing the major purpose test with a monetary trigger, Congress would reflect the sentiment of the vast majority of the voting public and, at the same time, fulfill the original intent of the BCRA by making it harder for organizations intent on circumventing the requirements to avoid disclosure.⁴³⁸ The President has supported broad disclosure requirements,⁴³⁹ especially in light of the Supreme

432. See generally *supra* Part III.B.2.

433. Cf. *supra* notes 400–02 and accompanying text.

434. See *supra* notes 342–47, 393–99 and accompanying text; see also *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 & n.17 (7th Cir. 2012) (explaining how, although “*Herrera* was argued and decided after *Citizens United*, briefing [was] completed prior to the Supreme Court’s decision,” and “[t]he only reference to *Citizens United* was . . . in a footnote” of the court’s opinion). Moreover, two of the laws that were found unconstitutional prior to *Citizens United*, imposed bans in addition to disclosure requirements on non-major purpose organizations. See *supra* notes 334, 338.

435. See *supra* note 344 and accompanying text.

436. See *supra* note 343 and accompanying text.

437. See *supra* Part II.A.2.a.

438. See *supra* notes 143–48 and accompanying text.

439. See *supra* note 46 and accompanying text.

Court's decision in *Citizens United*, which had the effect of green-lighting the use of campaign money laundering tactics by those determined to avoid disclosure.⁴⁴⁰ In enacting broad disclosure requirements, members of Congress would have no reason to fear voter backlash, since the vast majority of Americans support increased disclosure.⁴⁴¹ Congress's intent when it enacted the BCRA was to prevent groups from easily circumventing disclosure requirements by omitting *Buckley's* magic words, which allowed those groups to use obscure names to mislead the public.⁴⁴² Today, organizations just as easily can avoid disclosure as they could before the BCRA's enactment by omitting certain words and references in their communications,⁴⁴³ siphoning contributions for general purposes only,⁴⁴⁴ or using their coffers to finance other organizations' campaign-related activities.⁴⁴⁵

A monetary trigger would increase predictability by providing organizations with clear notice as to when they would be subject to continued reporting requirements. Large organizations frequently have many purposes,⁴⁴⁶ and determining their single major purpose is no easy task.⁴⁴⁷ Moreover, the major purpose of organizations may shift over time.⁴⁴⁸ For example, the major purpose of an organization during a federal election campaign could be influencing the election, but once the election is over, the major purpose could shift to other missions, such as influencing the legislative agendas of members of Congress.⁴⁴⁹ That an organization's major purpose may shift over time should not be the basis for finding that the organization's major purpose is not influencing elections.

As it stands now, the major purpose test serves as an easy way for organizations to thwart disclosure requirements by either increasing non-campaign related activities or by merging with organizations that

440. *See supra* note 215 and accompanying text.

441. *See supra* note 50, at 9.

442. *See supra* notes 142–46 and accompanying text.

443. *See supra* notes 253–58, 278–84, 299–305 and accompanying text.

444. *See supra* note 214 and accompanying text.

445. *See supra* note 215 and accompanying text.

446. *See supra* note 346

447. *See supra* notes 296–314 and accompanying text (discussing the FEC Commissioners' disagreement over how to determine a group's major purpose).

448. *See supra* note 305.

449. *See, e.g.*, Editorial, *When Super PACs Become Lobbyists*, N.Y. TIMES, Nov. 26, 2012, at A30.

are not engaged in campaign-related activities.⁴⁵⁰ The prevalence of this circumvention is apparent from the rapid increase in undisclosed spending following the Supreme Court's decision in *Wisconsin II*.⁴⁵¹ A monetary trigger would make it more difficult for organizations to avoid disclosure by funneling money from non-PAC organizations or shell corporations to political committees.⁴⁵² Even those with the resources and determination to avoid disclosure would be less able to hide inside the corporate equivalent of matrushka dolls.⁴⁵³

Furthermore, by doing away with the major purpose test, non-PACs no longer would be able to avoid disclosure by instructing donors who wish to remain undisclosed not to earmark their contributions.⁴⁵⁴ Large organizations involved in non-campaign-related activity would still be able to establish segregated funds for campaign activity if they did not want to disclose all contributions, but would not be required to do so.⁴⁵⁵ As a result, many large corporations would be incentivized to create segregated funds, which would have the added effect of protecting shareholder interests by ensuring that large corporations would not be able to spend exorbitant amounts of their general treasury funds on campaign-related activity that was contrary to their shareholders' interests.⁴⁵⁶

B. The FEC's Role

All six members of the FEC should enforce the plain meaning of § 100.22(b)'s definition of express advocacy. Enforcement of the plain meaning means that the agency must consider, "when taken as a whole," whether the advertisement expressly advocates the election or defeat of a federal candidate.⁴⁵⁷ Section 100.22(b) is not invalid on constitutional or statutory grounds, and without it, groups can easily evade disclosure by avoiding the use of "magic words," thereby frustrating the intent of the BCRA.⁴⁵⁸

450. See *supra* note 336 and accompanying text.

451. See *supra* notes 31–33 and accompanying text.

452. Cf. *supra* notes 204–08 and accompanying text.

453. See *supra* notes 204–08 and accompanying text.

454. Once an organization's contributions or expenditures were to exceed the threshold amount, all donors contributing more than \$100 to the organization would be disclosed. See *supra* note 198 and accompanying text.

455. See, e.g., *supra* note 148 and accompanying text.

456. Cf. *supra* note 148 and accompanying text.

457. 11 C.F.R. § 100.22(b) (2013).

458. See *supra* notes 144–47 and accompanying text.

Section 100.22(b) is not unconstitutional because it extends beyond the Supreme Court's interpretation in *Buckley*. In order to avoid facial invalidation of a law, a court is required to consider any limiting construction and not the most liberal construction that is permitted under the Constitution.⁴⁵⁹ Moreover, the Supreme Court's interpretation did not foreclose the possibility of subsequent agency action.⁴⁶⁰ This understanding is supported by the Supreme Court's conclusion in *McConnell* that *Buckley's* magic words test was "a product of statutory interpretation and not a constitutional command."⁴⁶¹ It also helps explain why the Chief Justice's controlling opinion in *Wisconsin II* rejected the argument that the only permissible test for express advocacy is the "magic words" test,⁴⁶² and why the Court has declined to hear challenges to § 100.22(b)'s validity.⁴⁶³

Congress intended the FEC to enforce § 100.22(b) when it enacted the BCRA. The intent of the BCRA was to increase disclosure and prevent outside groups from easily circumventing disclosure requirements.⁴⁶⁴ In enacting the BCRA, Congress listened to substantial hearings and engaged in extensive debate over proposed amendments to many aspects of the FECA.⁴⁶⁵ Although members of Congress expressed concern over the constitutionality of § 100.22(b), they did not act to strike it down.⁴⁶⁶ Congress also did not attempt to limit the FEC's authority to promulgate rules expanding the definition of express advocacy.⁴⁶⁷ That members of Congress were aware of § 100.22(b) and the potential constitutional issues surrounding it but chose not to amend or repeal it constitutes, at a minimum, acquiescence to the FEC's statutory authority to continue to enforce § 100.22(b).⁴⁶⁸

When Congress enacted the BCRA, its clear intent was to define ECs more expansively than the pre-existing definition of express

459. *See supra* notes 87–88 and accompanying text.

460. *See supra* notes 267–68 and accompanying text.

461. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 103 (2003).

462. *See Real Truth About Abortion v. Fed. Election Comm'n*, 681 F.3d 544, 551 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *supra* note 243.

463. *See Real Truth About Abortion v. Fed. Election Comm'n*, 133 S. Ct. 841 (2013) (denial of certiorari).

464. *See supra* notes 141–46 and accompanying text.

465. *See supra* note 269.

466. *See id.*

467. *See supra* notes 269–72 and accompanying text.

468. *Cf. supra* note 230 and accompanying text.

advocacy.⁴⁶⁹ Congress clearly was aware that, during the thirty or sixty days preceding an election, some communications that would otherwise constitute express advocacy could qualify as electioneering communications.⁴⁷⁰ By inserting language in § 434 stating that ECs do not constitute independent expenditures, Congress clearly intended to convey that ECs were not to be narrowly construed in such a way as independent expenditures had been in *Buckley*.⁴⁷¹ To construe the language otherwise would lead to the seemingly absurd result that, by enacting the BCRA, Congress intended to limit enforcement of express advocacy. Moreover, the filing conundrum can be resolved by requiring that all communications within the requisite number of days before an election that would otherwise qualify as express advocacy be filed as ECs and express advocacy.⁴⁷²

The FEC should determine whether a communication “refers to a clearly identified federal candidate” by looking to the references in the context of the communication as a whole.⁴⁷³ In enacting the BCRA, Congress intended to provide disclosure requirements that would not be easily evaded by avoiding certain words.⁴⁷⁴ By interpreting “clearly identified” statically, the Commissioners are ensuring that organizations will have a clearly defined manual for evasion, thereby frustrating Congress’s general intent. The phrase “refers to a clearly identified candidate” is not static, but varies depending on the timing and the context of the communication as a whole. Moreover, § 100.17 does not use any qualifying language that would prohibit consideration of external events.⁴⁷⁵ What may not be an “unambiguous reference” to a candidate six months prior to an election may be in the days immediately preceding the election. Further, as elections draw nearer, candidates become closely associated with issues, such that a reference to those issues, in viewers’ minds, may be a reference to the candidates themselves.⁴⁷⁶

469. See *supra* note 144–47 and accompanying text.

470. See 2 U.S.C. § 434(b)(3)(A) (2006); 11 C.F.R. § 104.20(c)(9) (2013).

471. See *supra* notes 270–71 and accompanying text.

472. See *supra* note 252 and accompanying text.

473. See *supra* note 291 and accompanying text.

474. See *supra* notes 141–46 and accompanying text.

475. Compare 11 C.F.R. § 100.22(b) (2013), with 11 C.F.R. § 100.17 (2013).

476. See Nat’l Def. Comm., Comments on A.O. Request 2012-27, at 2–5 (Fed. Election Comm’n Aug. 6, 2012); *supra* note 261 and accompanying text. For example, a reference to Obamacare would have been meaningless before its usage was adopted to mean legislation that was part of the President’s first term agenda.

C. The Courts' Role

1. *The Heightened Specificity Standard Should Not Apply to Disclosure Laws*

The “greater degree of specificity” that laws restricting speech require should not apply to laws compelling disclosure. The Supreme Court has only applied a heightened specificity standard for vagueness in the context of laws that act as a ban on speech.⁴⁷⁷ Broad standards in the context of disclosure laws do not create the same vagueness concerns that they do in the context of standards that are used to determine when an entity may speak. A broad standard will not have a real and substantial deterrent effect on legitimate expression because entities are not faced with determining whether speaking would subject them to criminal sanctions, but whether they will be penalized for not disclosing information related to their speech.⁴⁷⁸ Thus, the effect is that entities will disclose more than they would otherwise have to, not that they will refrain from speaking. Organizations concerned with over-disclosure have a variety of means by which they can limit disclosure, such as by creating separate segregated funds.⁴⁷⁹

The Supreme Court’s justifications for applying exacting scrutiny instead of strict scrutiny to disclosure laws lends further support to this argument.⁴⁸⁰ Broad laws compelling disclosure do not impose a ceiling on campaign-related activities,⁴⁸¹ and serve important governmental interests, including preventing groups from easily circumventing disclosure requirements.⁴⁸²

2. *Courts Should Be Deferential to State Attempts to Discover the Extent of Outside Influence in their Local Elections*

With overall spending on state elections generally far more limited than spending on federal elections, outside groups spending large amounts can have a disproportionate influence on local elections.⁴⁸³ Arguably, then, states have an even greater interest than the federal

477. *See generally supra* Part I.B.

478. *See supra* notes 95–96 and accompanying text.

479. *See supra* note 148 and accompanying text.

480. *See supra* note 129 and accompanying text.

481. *See id.*

482. *See generally supra* Part I.B.1.

483. *See supra* note 325 and accompanying text.

government in requiring disclosure of adequate information to enable their citizens to assess the extent of outside influence on local elections. Local representatives, too, have recognized the negative impact of non-disclosure by voting in favor of increased disclosure, often against their own interests and the interests of the special interest groups that contribute substantially to their reelection campaigns.⁴⁸⁴ Thus, a state's ability to implement broad disclosure requirements represents a concerted effort on behalf of local legislators to meet the needs of their state's citizenry.⁴⁸⁵ Recognizing both the strong interest of the states⁴⁸⁶ along with the expertise of state legislatures in matters relating to campaign finance and the charge of state legislatures to pass laws tailored to address the specific needs of their state, courts should be particularly deferential to state decisions to compel disclosure.⁴⁸⁷

By invalidating pure disclosure laws, courts undermine the notions of horizontal federalism and state autonomy.⁴⁸⁸ States should be free to serve as laboratories of experimentation, especially in the context of determining the electorate and reducing the influence of outside groups on the electorate subject to the bounds of the Constitution.⁴⁸⁹ While courts can be inquisitive when states enact disclosure requirements that set relatively low monetary thresholds, they should still be deferential.⁴⁹⁰

CONCLUSION

The proliferation of undisclosed spending in recent elections has resulted in increasing calls for the FEC and Congress to act. Eighty-five percent of Americans surveyed desire increased disclosure. Although Congress and the FEC may be divided, the nation is not. Congress and the FEC should act to increase disclosure to meet the public's demands.

On the judicial front, although courts have been nearly unanimous in upholding state disclosure laws, the Eighth Circuit's decision in *Swanson* signals that this trend may be reversing. Without proper guidance from the Supreme Court, lower courts will be forced to

484. *See supra* notes 328–32 and accompanying text.

485. *See id.*

486. *See id.*

487. *See id.*

488. *See supra* note 330 and accompanying text.

489. *See* Patrick M. Garry et al., *supra* note 325, at 37, and accompanying text.

490. *See supra* note 366 and accompanying text.

continue to grapple with a series of confusing and seemingly contradictory precedential decisions that offer little guidance concerning whether enhanced disclosure is constitutional. In the meantime, lower courts should continue to accord state legislatures deference in their decisions to increase disclosure of campaign spending in local elections.