

## Georgia State University Law Review

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Volume 27  
Issue 4 Summer 2011

Article 7

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March 2012

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### Recommended Citation

Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. (2012).

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## HAS THE TIDE TURNED IN FAVOR OF DISCLOSURE? REVEALING MONEY IN POLITICS AFTER *CITIZENS UNITED* AND *DOE V. REED*

Ciara Torres-Spelliscy\*

In 2008, a group few had heard of called Citizens United argued to the federal district court in D.C. that although their film, *Hillary the Movie*, was basically a feature length campaign ad about the then-front-runner presidential candidate, Senator Hillary Clinton, nevertheless it should *not* be subject to the federal election law's disclosure requirements. Their basic argument was that a 2007 Supreme Court case about campaign funding source restrictions called *Wisconsin Right to Life II* (*WRTL II*) applied to disclosure as well, and *WRTL II* excused them, their film, and its ads from federal reporting requirements.<sup>1</sup> The D.C. District Court did not buy what Citizens United was selling.<sup>2</sup> This lower court found the funding of *Hillary the Movie* and its ads should be subject to the federal election laws and therefore should be fully transparent.

Two years later, the case of *Citizens United* morphed from an arcane battle about whether on-demand political documentaries were broadcast campaign ads subject to disclosure for the purposes of federal election law into a paradigm-shifting Supreme Court case about the ability of all corporations to spend their treasury money on any election ad. The rest is history.<sup>3</sup> The Supreme Court in *Citizens United v. Federal Election Commission* announced that corporate money (and union money for that matter) could be spent on any

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1. Fed. Election Comm'n v. Wis. Right to Life, Inc. (*WRTL II*), 551 U.S. 449 (2007).

2. *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 280-81 (D.D.C. 2008) (holding *WRTL II* did not reach disclosure).

3. For a clever summary of *Citizens United v. Fed. Election Comm'n*, see Devereux Chatillon, *Citizens United: Coming Soon to a Cable Broadcast and Satellite Channel Near You!*, 27-APR. COMM. LAW. 1 (Apr. 2010).

independent expenditure (IEs) or electioneering communication (ECs) in any future election.<sup>4</sup>

But the basic nub of how the *Citizens United* case started has largely been missed in the media's coverage of the case's more shocking holding allowing unlimited corporate spending.<sup>5</sup> The Supreme Court agreed with the district court that *Citizens United*'s film and its ads for the film could both be constitutionally subject to federal campaign finance disclosure and disclaimer laws. This holding will have positive and lasting consequences for states that are eager to provide their electorates with robust campaign finance information. The Supreme Court, as well as lower courts, has generally been supportive of revealing the sources of money in politics with a few narrow exceptions, excusing (1) disclosure of *de minimis* political expenditures and (2) disclosures that could result in harassment.

First, let me offer a few words about the scope of this article. There are two basic types of campaign finance disclosure: (1) entity-wide disclosure that is applied to candidate campaign committees, political action committees, and political parties and (2) event-triggered disclosure that is initiated by purchasing a political advertisement that applies to any purchaser. Entity-wide disclosure is much more comprehensive and usually requires the committee to account for every dollar that comes into the committee and every dollar that goes out of the committee. Or in other words, PACs and other registered political committees are subject to complete transparency. This article is primarily focused on the disclosure that is triggered by the purchase of a political advertisement in either a candidate's election or in a ballot initiative election. At times to be complete, I will discuss how a particular case disposed of a challenge to entity-wide disclosure, but my primary focus here is disclosure that is triggered by the purchase of a political ad. In most cases, this requires the

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4. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913–17 (2010) (invalidating restrictions on independent expenditures and electioneering communications funded by corporate treasuries, while upholding federal disclosure and disclaimer laws).

5. Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 255 (2010) (questioning how much disclosure voters can digest).

entity that funded the ad to report to the state that the ad was purchased, as well as the underlying funders of the ad. In many states, disclaimers are required on the face of the ad identifying who is responsible for the advertisement. Most of the discussion in this article will focus on the disclosure triggered by the purchase of “electioneering communications,” which are also known as “sham issue ads.” Under federal law, “electioneering communications” are defined as “any broadcast, cable, or satellite communication that . . . refers to a clearly identified candidate . . . within 60 days before a general election . . . or within 30 days before a primary . . . [and that] can be received by 50,000 or more persons [in the candidate’s constituency]” costing at least \$10,000.<sup>6</sup>

This article will cover a short but tumultuous period in the history of campaign finance disclosure law from 2007 to 2010. This article will proceed primarily in a chronological fashion to highlight the dramatic 180 degree turn that the law has taken on the issue of the constitutionality of disclosure within the past four years. First, I will explore the hostility that many lower courts were exhibiting in the short window between *Wisconsin Right to Life II (WRTL II)* in 2007 and *Citizens United* in 2010. Basically these lower courts made the mistake of applying *WRTL II* to disclosure laws. This mistake was corrected by the Supreme Court in *Citizens United* and *Doe v. Reed* in 2010. After *Citizens United* and *Doe*, lower courts all over the country have adopted the Supreme Court’s view that disclosure and disclaimers can be constitutionally applied to advertisements that feature candidates for office directly before an election. And lower courts have gone further to endorse disclosure around ballot measure fights as well. This article will also explore the two exemptions to disclosure laws that remain alive and well even after *Citizens United* and *Doe*: (1) *de minimis* spending and (2) fear of harassment. Finally, this article will conclude with a few policy suggestions for lawmakers crafting new disclosure laws.

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6. 2 U.S.C. § 434(f)(3)(A)-(C).

## I. DARK DAYS FOR DISCLOSURE 2007–2010

In 2008, the *Citizens United* plaintiffs were probably confident that they would win their challenge to disclosure as applied to their documentary because lower courts were growing more hostile to even modest campaign finance disclosure laws.<sup>7</sup> As courts struggled with the balance between the First Amendment rights of political speakers—including a right to anonymous speech in certain limited circumstances—and the public’s right to know who is bankrolling political battles, during the first years of the new millennium, some lower courts struck down certain state campaign finance disclosure laws. Typically, the state laws that were found unconstitutional were ones that regulated more broadly than the federal election law.

To understand the jurisprudential battle raging in the courts between 2007 and 2010 about the permissible scope of political ad disclosures, a bit of background of campaign finance law is necessary. In 1976, *Buckley v. Valeo* upheld the Federal Election Campaign Act’s (FECA’s) disclosure requirements for independent expenditures, but limited this disclosure to the magic words express advocacy.<sup>8</sup> As a result, from 1976 to 2002, hundreds of millions of dollars of corporate and union treasury funds—money that could not legally be used to influence elections at the time—poured into federal campaign ads through the “sham issue ad” loophole<sup>9</sup>—the

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7. Many of these cases challenging disclosure were brought by the law firm Bopp, Coleson & Bostrom whose leading partner James Bopp has bragged to the *New York Times* shortly after *Citizens United v. Fed. Election Comm’n* was handed down that the next step in his ten-year plan is to roll back campaign finance disclosure rules. See David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11.

8. The *Buckley* list of magic words includes: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.” *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976). See also Brennan Center for Justice at NYU School of Law, *The Impact of FEC v. Wisconsin Right to Life, Inc. on State Regulation of ‘Electioneering Communications’ in Candidate Elections, Including Campaigns for the Bench* (Feb. 2008), <http://www.brennancenter.org/page/-/Democracy/Impact%20of%20WRTL%20II%20on%20State%20Regulation.pdf?nocdn=1>.

9. CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS, 10-11 (Brennan Center 2001), [http://brennan.3cdn.net/efd37f417f16ee6341\\_4dm6iid9c.pdf](http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf); JONATHAN S. KRASNO & DANIEL E. SELTZ, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (Brennan Center 2000); see also *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (finding political advertising

disingenuous practice of running ads that featured a federal candidate right before a federal election in a candidate's district without uttering *Buckley's* magic words "vote for" or "vote against" in order to avoid campaign finance regulations.<sup>10</sup> At the federal level, campaign finance reformers had long tried to close this sham issue ad loophole. It took decades and the collapse of the corporate giant Enron before Congress would heed the reformers' call to action.<sup>11</sup>

With the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold) this goal of closing the sham issue ad loophole was finally achieved. BCRA created a new category of regulated federal ads called "electioneering communications" (ECs) to capture the elusive sham issue ads that had evaded campaign finance regulations (including disclosure regulations) for decades. After Congress adopted BCRA and the Supreme Court gave its approval to the new law in *McConnell v. Federal Election Commission* in 2003, seventeen states copied the approach and adopted state-level electioneering communications laws.<sup>12</sup> In some states, like North Carolina, these laws barred corporations, unions, or both from funding ECs in state elections.<sup>13</sup> Other states, like Illinois, merely required disclosure of who was funding ECs without any concomitant source restrictions.

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sponsors often hid behind misleading names, such as "Citizens for Better Medicare" [the pharmaceutical industry] or "Americans Working for Real Change" [business groups opposed to organized labor].

10. BRENNAN CENTER FOR JUSTICE, WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS 2010 EDITION I-12, I-14 (Ciara Torres-Spelliscy, ed., rev. ed. 2010), available at [http://www.brennancenter.org/content/resource/writing\\_reform\\_2010](http://www.brennancenter.org/content/resource/writing_reform_2010).

11. Anthony Corrado, *The Legislative Odyssey of BCRA*, in LIFE AFTER REFORM 37 (Michael J. Malbin, ed., 2003), available at [http://www.cfinst.org/pdf/books-reports/LAR/LAR\\_ch2.pdf](http://www.cfinst.org/pdf/books-reports/LAR/LAR_ch2.pdf) ("[T]he bankruptcy of the Enron Corporation and other corporate scandals were matters of national attention, and raised alarming questions about the role political contributions played in policy decisions favorable to Enron and other corporations . . .").

12. See Alaska Stat. § 15.13.400 (5); Ariz. Stat. 16-901.01(A) & Ariz. Amend. Code R2-20-101 (10) Cal. Gov't Code § 85310; Colo. Const. Art. 28 sec. 2 (7)(a); Conn. Gen. Stat. Ann. § 9-601b(a)(2); Fla. Stat. Ann. § 106.011(18)(a); Haw. Rev. Stat. § 11-207.6(c); Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. Ann. 5/9-1.14(a); Ohio Stat. 3517.1011; Me. Rev. Stat. Ann. tit. 21-A, § 1014(2-A); N.C. Session Law 2010-170; Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31); Vt. Stat. Ann. tit. 17, § 2891; Wash. Rev. Code Ann. § 42.17.020; W. Va. Code Ann. § 3-8-1a(11)(A).

13. National Council on State Legislatures, *Life After Citizens United*, <http://www.ncsl.org/default.aspx?tabid=19607> (last visited Mar. 21, 2011) (listing states which previously banned corporate, union, or both forms of electioneering communications before *Citizens United*). These funding restrictions of political ads were declared unconstitutional in *Citizens United*.

Between 2007 and 2010, plaintiffs hostile to campaign finance reform challenged many of these new state electioneering communications laws (and in some cases, plaintiffs also challenged much older “express advocacy” disclosure laws on the books at the same time). Depending on how the state structured its laws, the legal challenges often centered around the definition of who or what qualified as a “political action committee” (PAC) because in many states campaign finance reporting is primarily triggered when an organization is deemed to be a PAC. In other cases, the challenge was to the state’s definition of ECs. But the general thrust of the challenges was similar—an attack on fundamental campaign finance laws, including basic disclosure laws. And for several years, opponents of campaign finance laws generally—and disclosure laws in particular—picked up some wins in the courts in the 2007–2010 period. The reason I explore these earlier cases in some depth, even though I believe that they are wrongly decided in light of the Supreme Court’s later rulings in 2010, is I fear that future courts may be tempted to copy their flawed reasoning when reviewing new disclosure laws. Thus, exploring their faults may make it less likely that their mistakes will be repeated.

While the courts reviewing disclosure laws between 2007 and 2010 were wrestling with the narrow jurisprudential question of whether *WRTL II* applied to campaign finance disclosure, at the same time these courts were grappling with a far deeper philosophical question of what an “election ad” is.<sup>14</sup> In *Buckley*, the Supreme Court granted the newly formed FEC clear authority over election ads that contained “express advocacy” for or against a federal candidate but held that pure “issue ads” about public policy choices could not be regulated. As alluded to above, this allowed a slew of sham issue ads that featured a tiny reference to an issue and focused on a federal candidate to go unregulated—allowing such ads to be made without an ounce of disclosure to the public as to its source.

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14. This definitional problem is not purely American. Other modern democracies have also had to grapple with this problem. Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT’L & COMP. L. 5 (2001) (comparing election laws in the US, UK and Canada).

*Buckley*'s "express advocacy/issue ad" paradigm left Congress with a conundrum. If they adopted a reasonable person test to determine when an issue ad was really a sham issue ad, then they would place elections administrators in the untenable position of being arbiters of which ads could be regulated. This would require the FEC to look at ads one by one by one to make these determinations. This would be an unadministrable system. On the other hand, if Congress drew a bright-line test based on objective criteria such as the proximity to an election, the mentioning of a candidate, or the targeting of the candidate's electorate, this would give speakers fair warning of when they would and would not be regulated, but the regulation could risk sweeping in ads that were not meant to influence the election, but either were grassroots lobbying of sitting incumbents, or were purely selling products.

In *McConnell*, this conundrum was resolved. The Supreme Court deferred to Congress and allowed it the latitude to institute a bright-line definition of ECs. *McConnell* allowed ECs to be regulated both in terms of source restrictions and disclosure requirements. It stated that the "express advocacy/issue ad" paradigm was a matter of statutory construction and not a constitutional requirement. *WRTL II* abandoned this bright-line test when it came to corporate source restrictions for the funding of ECs. In place of BCRA's bright-line definition, *WRTL II* said ECs had to contain the functional equivalent of express advocacy before then-applicable corporate money restriction could attach. But *WRTL II* did not deal with BCRA's separate disclosure provisions.

In *Citizens United*, two open questions left by *WRTL II* were clarified. First, the Supreme Court said that all corporations could spend their treasury funds on both express advocacy and electioneering communications. Second, the court dropped *WRTL II*'s functional equivalency test for electioneering communications and reverted to Congress' original bright-line approach. Thus, the nature of what is a regulable political ad at the federal level reverted to all express advocacy ads plus any ad falling within the electioneering communication definition. As federal law stands now, any ad falling outside these two categories is beyond the reach of the FEC's



regulation. Should Congress broaden the definition of electioneering communications, then more political ads may be subject to regulation in the future.<sup>15</sup>

*A. Is Federal Campaign Finance Disclosure Law a Floor or a Ceiling?*

Meanwhile, in the 50 states, regulation of political ads is more multifaceted because in addition to legislative and executive elections, 39 states must contend with judicial elections and half of states allow for ballot initiatives,<sup>16</sup> neither of which has a federal analog. This has left state and federal courts reviewing their laws to debate the conceptual problem: Is federal law a floor or a ceiling when states adopt disclosure laws that captured political ads that lack *Buckley's* magic words? This is a particularly tricky question when that calculus is applied to any type of state election that does not exist at the federal level. Hence, the on-going debate about exactly what types of election ads states may regulate rages on.

The most successful line of attack on campaign finance disclosure laws, especially after the Supreme Court decided *Wisconsin Right to Life II (WRTL II)* in 2007, was that a given state electioneering communication law or regulation was broader than the federal definition of ECs under BCRA. One version of this line of attack by plaintiffs was that states could only constitutionally require disclosure of ads that contained “the functional equivalence of express advocacy,” instead of all ads that would be captured by a state’s

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15. For example the DISCLOSE Act from the 111th Congress would have expanded the definition of ads that could be regulated. COMM. ON HOUSE ADMIN., DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS ACT’ OR THE “DISCLOSE ACT,” H.R. 5157, H.R. REP. NO. 111-492 (May 25, 2010), [http://www.rules.house.gov/111/CommJurRpt/111\\_hr5175\\_rpt.pdf](http://www.rules.house.gov/111/CommJurRpt/111_hr5175_rpt.pdf). This bill failed to overcome a filibuster in the Senate in 2010.

16. For an in depth discussion of the special issues raised by ballot measures, see Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. Rev. 1141, 1141 (2003) (“I argue that strengthening heuristic cues in direct democracy offers the best means of rehabilitating voter competence pragmatically, at low cost, without trying to force voters to adjust the way they think about politics . . . . Under the ‘disclosure plus’ framework presented here, the government should attempt not only to produce heuristic cues in direct democracy through increased campaign finance disclosure, but also to increase public awareness of those heuristic cues by broadcasting them to the public in highly visible ways.”).

given electioneering communication definition.<sup>17</sup> This amorphous phrase “the functional equivalence of express advocacy”<sup>18</sup> comes from Chief Justice Robert’s plurality opinion in *WRTL II*. According to the Court, an ad is “the functional equivalent of express advocacy” only if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>19</sup> Evidence that an ad had functional equivalence included: “tak[ing] a position on a candidate’s character, qualifications, or fitness for office.”<sup>20</sup> “Functional equivalence of express advocacy”<sup>21</sup> was deemed by *WRTL II* to be a constitutional prerequisite before the then-applicable federal ban on corporate electioneering would attach to a given ad. Plaintiffs challenging campaign finance disclosure laws argued to courts across the country that *WRTL II*, even though the case explicitly *did not* cover federal disclosure laws, could nonetheless be applied to state disclosure laws. Some lower courts fell for this argument hook, line, and sinker, striking disclosure laws from Florida to Utah.<sup>22</sup>

### B. *WRTL II Was Not About Disclosure*

The basic mistake that several lower courts made in the 2007–2010 time frame was reading *WRTL II* as a new limitation on disclosure when BCRA’s disclosure requirements for ECs were *not* before the Court in *WRTL II*. The Supreme Court had no occasion to address federal disclosure rules in this case, since this part of BCRA was not challenged by plaintiffs. *WRTL II* was merely an as-applied challenge to the federal law prohibition in § 441b of Title 2 of the U.S. Code on the use of treasury funds by corporations and unions to pay for ECs.

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17. *WRTL II*, 551 U.S. at 465.

18. *Id.*

19. *Id.* at 469–70.

20. *Id.* at 470.

21. *Id.* at 465.

22. See *N.C. Right to Life, Inc. v. Leake (NCRL III)*, 525 F.3d 274, 304 (4th Cir. 2008) (requiring a state law to conform with the federal definition of electioneering communications); *W. Tradition P’ship v. City of Longmont*, No. 09-CV-02303-WDM-MTW, 2009 WL 3418220, at \*7 (D. Colo. Oct. 21, 2009) (preliminarily enjoining a municipal electioneering communications law such that only express advocacy could be regulated).

As a plaintiff, Wisconsin Right to Life, Inc. explicitly did not seek review of the electioneering communications' disclosure provisions of the law. In the original complaint filed by Wisconsin Right to Life, Inc., they made clear that "WRTL does not challenge the reporting and disclaimer requirements for ECs, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements."<sup>23</sup> Consequently, nothing in *WRTL II* undermines *McConnell's* unequivocal holding that reporting requirements for ECs are fully constitutional. But as detailed below, for a few years lower courts made the mistake of reading *WRTL II* as dictating a limit on campaign finance disclosure laws.

### C. BCRA as a Ceiling for State Laws: Misapplying *WRTL II*

The Fourth Circuit was the first federal court of appeals to grapple with the disclosure issue after *WRTL II* in a case called *N.C. Right to Life, Inc. v. Leake (NCRL III)*.<sup>24</sup> This case challenged several interlocking definitions within North Carolina's election code, including the definition of "to support or oppose the nomination or election of one or more clearly identified candidates."<sup>25</sup> The *NCRL III* case also challenged the constitutionality of the state's deeming N.C. Right to Life and some of its affiliated entities "political committees."<sup>26</sup> The Fourth Circuit adopted the plaintiffs' arguments that BCRA was a ceiling that states could not exceed when regulating "sham issue ads."<sup>27</sup>

The Fourth Circuit chose to read *WRTL II* as severely limiting which ECs may be regulated at the state level. The court put North Carolina's EC regulations to a *WRTL II* functional equivalence test. The Fourth Circuit articulated a two-part test to determine whether a communication is the "functional equivalent of express advocacy" that fundamentally treats BCRA definition of ECs as a ceiling, rather

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23. Complaint at ¶ 36, *Wis. Right to Life v. Fed. Election Comm'n*, 2004 WL 3622736 (D.D.C. Aug. 17, 2004) (No. 04-1260), 2004 WL 2057568.

24. *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

25. N.C. GEN. STAT. § 163-278.14A(a) (2010).

26. *NCRL III*, 525 F.3d at 277.

27. *Id.* at 322 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 185 (2003)).

than merely a floor, on disclosure.<sup>28</sup> Whether a communication matched BCRA's definition of ECs is step one of the test set out by the court. As the Fourth Circuit stated, "[T]o be considered the 'functional equivalent of express advocacy' . . . the communication must qualify as an 'electioneering communication,' defined by . . . [BCRA], as a 'broadcast, cable, or satellite communication' that refers to a 'clearly identified candidate' within sixty days of a general election or thirty days of a primary election."<sup>29</sup> The second part of the Fourth Circuit's test is whether the communication is an appeal to support or oppose a specific candidate. As the Court articulated:

Second, a communication can be deemed the "functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." . . . Taken together, these two requirements should be sufficiently "protective of political speech" to allow legislatures to regulate beyond *Buckley*'s "magic words" approach.<sup>30</sup>

The North Carolina law at issue in *NCRL III* included a section entitled "evidence that communications are 'to support or oppose the nomination or election of one or more clearly identified candidates.'"<sup>31</sup> This definition was cross-referenced in other portions of the North Carolina law including the disclosure requirements, contribution limits, and limits on corporations' and unions' treasury spending. By invalidating this section, the court invalidated all of the sections of the law that cross-referenced it as well. This definition contained two prongs. The first prong was a "magic words" test that followed *Buckley* in lockstep. The second "context" prong directed

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28. Under federal law, electioneering communications are broadcast ads aired 30 days before a primary or 60 days before a general election that mention a federal candidate, cost at least \$10,000, and are targeted to the relevant electorate. *Id.* at 282.

29. *Id.* (citation omitted).

30. *Id.* (alteration in original).

31. N.C. GEN. STAT. § 163-278.14A(a) (2008).

that if the “essential nature” of a communication was “unclear,” then regulators “may” consider

contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate’s election, and the cost of the communication . . . in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.<sup>32</sup>

The Fourth Circuit explained that, in its view, the second part of North Carolina’s definition overreached in light of *WRTL II*’s holding. As the court wrote, “[I]t is clear that N.C. Gen. Stat. § 163-278.14A(a)(2) is unconstitutional. [It] regulates speech that is neither ‘express advocacy’ nor its ‘functional equivalent’ and, therefore, strays too far from the regulation of elections into the regulation of ordinary political speech.”<sup>33</sup> Of particular concern to the Fourth Circuit was the fact that the definition of evidence that communications are “to support or oppose the nomination or election of one or more clearly identified candidates” did not “explicitly limit[] its scope to either specific people or a specific time period.”<sup>34</sup> An additional flaw, according to the court, was that the North Carolina definition turned in part on a reasonable person test that could entrap an unwary speaker. As the Fourth Circuit’s majority objected:

[This law] runs directly counter to the teaching of *WRTL* when it determines whether speech is regulable based on how a “reasonable person” interprets a communication in light of four “contextual factors.” This sort of *ad hoc*, totality of the

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32. N.C. GEN. STAT. § 163-278.14A(a)(2) (1999), amended by 2008 N.C. Sess. Laws 150, § 6(b).

33. *NCRL III*, 525 F.3d at 283.

34. *Id.* at 280, 283 (internal quotation marks omitted).

circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.<sup>35</sup>

The Court struck down the reasonable person “context” prong of North Carolina’s law, taking down at the same time the disclosure that would have been triggered by most sham issue ads in North Carolina.

Under the Fourth Circuit’s reading of the law after *WRTL II*, disclosure by political committees is both “costly” and “burdensome.”<sup>36</sup> Consequently, the majority criticized disclosure requirements, like PAC reporting requirements, throughout its opinion. For example, the Fourth Circuit complained, “Political committees must . . . appoint a treasurer . . . , abide by contribution limits, and comply with time-consuming disclosure requirements that allow the state to scrutinize their affairs. These requirements are more than just nuisances, and indeed are precisely the sort of burden that discourages potential speakers from engaging in political debate.”<sup>37</sup>

*NCRL III* invalidated disclosure requirements that went beyond the definitions contained in federal law. The Fourth Circuit was hostile to campaign finance disclosure in general and as applied to the N.C. Right to Life specifically. The Court definitively decided in *NCRL III* that BCRA was a ceiling that states could not go beyond. As will be explored in more depth below, *Citizens United* indicates that *NCRL III* was likely wrongly decided because it incorrectly applied *WRTL II* restrictions to disclosure.

#### *D. A Forceful Dissent in the Fourth Circuit’s NCRL III*

Signs that *NCRL III* was wrongly decided were evident on its face because it was not a unanimous decision. The dissent in *NCRL III* penned by Judge Michael vociferously claimed that the Fourth Circuit’s majority had decided the case incorrectly by misreading

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35. *Id.*

36. *WRTL II*, 551 U.S. at 468–69.

37. *NCRL III*, 525 F.3d at 304 (citations omitted).

Supreme Court precedents. As the dissent by Judge Michael stated, “[T]he majority . . . severely restricts the well-established power of a state to regulate its elections. One result will be that organizations and individuals will be able to easily disguise their campaign advocacy as issue advocacy, thereby avoiding regulation . . . [thereby] ‘hid[ing] themselves from the scrutiny of the voting public.’”<sup>38</sup>

Judge Michael found that the majority in *NCRL III* fundamentally misread *McConnell*’s rejection of *Buckley*’s “magic words” approach. In *McConnell*, the court said that express advocacy was not a required predicate for regulation.<sup>39</sup> The dissent rejected the majority’s two-part test that the only way a state can regulate EC is if: (1) the state’s definition of ECs exactly mirror BCRA’s definition and (2) the communication is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>40</sup> Judge Michael explained, “The majority clearly errs by mandating the elements of BCRA § 203, which is simply an example of a clear and sufficiently tailored statute, as an essential part of any campaign regulation.”<sup>41</sup> In other words, BCRA was just one example of a constitutional regulation of political ads; state laws did not have to be identical to BCRA in order to be found constitutional.

Critically, the *NCRL III* dissent suggested that the majority misstepped by applying *WRTL II*’s analysis of corporate expenditure restrictions to North Carolina’s disclosure requirements. Judge Michael continued: “[T]he majority’s rule applies the *WRTL II* analysis to disclosure requirements, contribution limits, and political committee designations. No other court has applied *WRTL II* to all types of campaign finance regulations; instead, every court to address

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38. *Id.* at 308 (Michael, J., dissenting); *see also id.* at 310 (noting there are many state interests served by disclosure besides the anti-corruption interest, including the voter’s interest in knowing where political campaign money comes from and how it is spent, the regulator’s interest in finding violations of the law, and the interest in providing timely information to voters).

39. *Id.* at 314.

40. *Id.* at 315.

41. *NCRL III*, 525 F.3d at 316 (Michael, J., dissenting).

the issue has rejected any application beyond direct limits on corporate expenditures.”<sup>42</sup>

Judge Michael concluded that the majority in *NCRL III* had fundamentally misread the precedent:

Thus, the majority errs by ignoring *McConnell*'s rejection of any rigid constitutional rule that divides constitutionally protected speech from speech that can be regulated in the area of campaign finance regulation; errs by requiring the exact terms of BCRA referred to in passing by *WRTL II*; errs by ignoring the difference in treatment between facial and as-applied challenges that the Supreme Court requires; and errs by applying the same rule to every type of regulation, rather than conducting an overbreadth analysis based on the purpose and effect of the regulation.<sup>43</sup>

As will be discussed in more depth below, the Supreme Court's reasoning in *Citizens United* is more in line with Judge Michael's approach. Also, after *Citizens United*, the Ninth Circuit did not follow the Fourth Circuit's reasoning but rather adopted the approach of Judge Michael's trenchant dissent in *NCRL III*.<sup>44</sup>

#### *E. Certain District Courts Followed in the Fourth Circuit's Faulty Footsteps*

Unfortunately, some lower courts found the Fourth Circuit's analysis in *NCRL III* persuasive. Three district courts applied the Fourth Circuit's questionable “BCRA as a ceiling” approach to state campaign finance laws in order to invalidate them. For example, a federal district court in *Broward Coalition of Condominiums v. Browning* held that Florida's electioneering definition, which included non-broadcast political ads, was unconstitutional.<sup>45</sup> Under

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42. *Id.* at 317.

43. *Id.*

44. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

45. *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 4:08cv445-SPM/WCS, 2008 WL 4791004, at \*10 (N.D. Fla. Oct. 29, 2008) (preliminarily enjoining the



the Florida law, an “electioneering communication” included “a paid expression in any communications media,”<sup>46</sup> and “communications media” meant “broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies.”<sup>47</sup>

Plaintiffs in *Browning* wished to run print ads about ballot measures, but did not want to be subject to the law’s disclosure requirements. The district court concluded that only *broadcast* ECs can be regulated. The Florida court followed the Fourth Circuit’s two-part test. As the court wrote, “This two-pronged analysis is consistent with the First Amendment’s command that ‘when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to . . . a ban . . . we give the benefit of the doubt to speech, not censorship.’”<sup>48</sup> The Florida court was quite critical of the statute’s breadth. “The Florida statute is a sweeping regulation of speech—i.e., virtually all paid communications about ballot issues and candidates.”<sup>49</sup> This court noted that other lower courts had rejected regulation of speech that was broader than BCRA.<sup>50</sup>

The district court relied heavily on *WRTL II* in drawing its legal conclusion that the Florida electioneering communications statute was overbroad.

[I]t is impossible to read *Buckley* or *McConnell* as sanctioning the regulation of all the speech encompassed within Florida’s expansive and much broader definition of “electioneering communication.”

Defendants also cite *McConnell* for the proposition that there is not a constitutionally compelled line between express advocacy

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law), and 2009 WL 1457972 (N.D. Fla. May 22, 2009) (permanently enjoining the electioneering portions of the Florida law).

46. FLA. STAT. § 106.011(18)(a) (2008) (amended 2010).

47. FLA. STAT. § 106.011(13) (2010).

48. *Browning*, 2008 WL 4791004, at \*7 (omission in original) (quoting *WRTL II*, 551 U.S. 449, 482 (2007) (preliminarily enjoining the law)).

49. *Id.*

50. *Id.*

and issue advocacy. But this claim completely ignores *WRTL II*. *WRTL II* held that there is a line between speech that is the functional equivalent of express advocacy and the vast majority of political speech falling outside that category and that line *is* constitutionally compelled.<sup>51</sup>

Because Florida's law was broader than BCRA, it was deemed unconstitutional and was preliminarily enjoined. A few months later, the law was permanently enjoined.<sup>52</sup> In the later decision, the court stated that Florida's disclosure requirements were content-based restrictions of speech and constituted a prior restraint on speakers and were therefore presumptively invalid. As the district court concluded, because "[t]he reporting and disclosure requirements . . . appl[y] to certain communication and not other[s], [they are] content-based. Additionally, because this regulation allows for the communication to be burdened by the disclosure and reporting requirements in advance of the act of communicating their message, it constitutes a prior restraint."<sup>53</sup>

The Court went on to explain the three reasons why the plaintiffs could not be constitutionally compelled to disclose their print advertisements about ballot measures by the Florida law:

First, none of the Plaintiffs are issuing a communication via broadcast, cable, or satellite, as was the case in BCRA's definition (which establishes the outer bounds of permissible regulation). Second, all of the speech at issue here is susceptible of a reasonable interpretation *other than* as an appeal to vote for or against that candidate. Third, Plaintiffs' speech relating to ballot issues cannot, by definition, be express advocacy because it has nothing to do with advocating for a particular candidate.<sup>54</sup>

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51. *Id.* at \*8 (citation omitted).

52. Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs. Inc. v. Browning, No. 4:08cv445-SPM/WCS, 2009 WL 1457972, at \*8 (N.D. Fla. May 22, 2009).

53. *Id.* at \*4 (citation omitted).

54. *Id.* at \*6.

This reasoning about ballot measures appears flawed under a separate line of Supreme Court precedent.<sup>55</sup> But the basic conclusion was amazingly broad, potentially preventing the state of Florida from revealing any information about who was behind ballot measure fights if the campaign was conducted by print instead of broadcast. Like *NCRL III*, *Browning* appears to be wrongly decided in light of *Citizens United* and *Doe*.

At roughly the same time that the Florida case was being litigated, in Utah plaintiffs challenged that state's definition of "political issues expenditure" and related disclosure requirements.<sup>56</sup> The district court in Utah again found that even when only disclosure is at issue, the state may only regulate express advocacy: "[T]he [Supreme] Court's analysis of the vagueness issue, with regard to both this [Utah] provision and FECA's disclosure requirement provision, has long stood for the proposition that legislatures may only regulate those campaign communications that use the 'magic words of express advocacy.'"<sup>57</sup> For this court, perplexingly, despite the 2003 *McConnell* case, 1976's *Buckley* provided the relevant precedent. "Although *McConnell* did expand the definition of express advocacy to encompass more than just 'magic words,' it did not overturn *Buckley*'s unambiguously campaign related standard."<sup>58</sup> Like the Florida district court, the Utah district court followed the Fourth Circuit's flawed two-part test.<sup>59</sup>

In Utah, the court was particularly critical that one of the ads captured by the regulation ran seven months before an election instead of within sixty days of an election as required by BCRA. As the court complained:

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55. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) ("The integrity of the political system will be adequately protected if contributors [to ballot issue committees] are identified in a public filing revealing the amounts contributed . . .").

56. UTAH CODE ANN. §§ 20A-11-101(7) and 20A-11-101(32) (2011).

57. *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1141 n.7 (D. Utah 2008).

58. *Id.* at 1148 n.9.

59. *Id.* at 1144.

The Foundation ran its advertisements in April 2007, seven months prior to the general election—the only election in which the initiative was on the ballot—and long before the time frame that would fit it within the definition of an “electioneering communication” under BCRA. Having failed the first requirement of the functional equivalent test, the Foundation’s advertisements are not unambiguously campaign related and thus cannot be constitutionally regulated.<sup>60</sup>

Again this court treated BCRA as a ceiling for state regulations—even as applied to ballot measures which have no federal analog. The district court narrowed what could be regulated by the Utah statute to only those communications that could be regulated under BCRA, but nonetheless found that even this narrowed definition could not be constitutionally applied to plaintiffs.<sup>61</sup> Again, this case appears to be wrongly decided in light of *Citizens United* and *Doe*.

In yet a third state, a federal district court in West Virginia enjoined the state’s definition of ECs to the extent that it covered non-broadcast ads.<sup>62</sup> After this April 2008 ruling, the legislature amended the law slightly and added legislative findings supporting the regulation of non-broadcast ads.<sup>63</sup> A second judge reviewing the amended West Virginia law found that it still was too broad because it went beyond the four corners of BCRA.<sup>64</sup> According to the second judge, BCRA’s definition of ECs contains the outer limit of what can be regulated.<sup>65</sup> He stated:

In *McConnell*, the Supreme Court reached the maximum extent of the curtailment of free speech for the laudable purpose of political integrity when it upheld BCRA. Notably, in *McConnell*, the Court found the regulation of broadcast media, but not other

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60. *Id.* at 1150.

61. *Id.*

62. *Ctr. for Individual Freedom, Inc. v. Ireland*, No. 1:08-00190, 2008 WL 1837324, at \*5 (S.D.W. Va. Apr. 22, 2008).

63. *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 781 n.5 (S.D.W. Va. 2009).

64. *Id.* at 800.

65. *Id.*

forms of communication, to be constitutional when it upheld BCRA.<sup>66</sup>

The West Virginia Court was not satisfied with the evidence produced by the state that *print* ECs should be regulated.

It appears that Defendant Betty Ireland has certainly filed a sufficient amount of information for the inclusion of broadcast media in West Virginia's definition of "electioneering communication," which is clearly constitutional. However, much less has been offered in support [of] the inclusion of print media. In general what was been offered is conclusory, as in the case of the legislative findings; anecdotal instead of empirical, such as the testimonials of several legislators; or not specifically applicable to West Virginia.

In the absence of more concrete data supporting the inclusion of print media, the Court must "err on the side of protecting political speech," and find that Defendants have not met their burden of showing that West Virginia's definition of "electioneering communication" is narrowly tailored.<sup>67</sup>

Consequently, for the second time, the court granted the plaintiff's request for a preliminary injunction of West Virginia's definition of ECs.<sup>68</sup>

To be fair, not every lower court fell for the "BCRA as a ceiling" meme. Two district court cases, in Washington and Ohio, concluded rightly that disclosure of state ECs is distinct from corporate funding bans.<sup>69</sup> The D.C. federal district court also upheld federal disclosure in Citizens United's original case against a claim that *WRTL II* somehow excused it from disclosure requirements.<sup>70</sup> Decisions in

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66. *Id.* (citation omitted).

67. *Id.* at 801 (citation omitted).

68. *Id.* at 810.

69. *Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 WL 62144, at \*17 (W.D. Wash. Jan. 8, 2009), *aff'd*, 624 F.3d 990 (9th Cir. 2010); *Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n*, No. 2:08-cv-00492, 2008 WL 4186312, at \*6 (S.D. Ohio Sept. 5, 2008).

70. *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 280-81 (D.D.C. 2008).

other lower courts have noted that *WRTL II* did not reach the issue of disclosure.<sup>71</sup> In sum, these federal courts found that disclosure was amply justified by the strong public interest in an informed electorate, and the Supreme Court's holding in *WRTL II* in no way altered or touched upon this interest.

In 2008, bucking the anti-disclosure trend, a federal district court in Washington State upheld Washington's disclosure of "political advertisements," which included ads about ballot initiatives, noting that the *McConnell* Court had clearly distinguished between disclosure, upholding it "without reservation," and the restrictions on corporate funding for ECs: "*McConnell* limited the definition of 'electioneering communication' to the 'functional equivalent of express advocacy' only as far as it applied to the prohibition on corporate and union speech, and apparently not as it applied to the BCRA's disclosure requirements."<sup>72</sup> As will be discussed further below, the Ninth Circuit affirmed this lower court's ruling in *Brumsickle* post-*Citizens United*, thereby upholding robust disclosure of who is funding a ballot measure.<sup>73</sup>

A key issue in the district court's consideration of *Brumsickle* was whether Washington State's disclosure law swept too broadly, post-*WRTL II* by including issue advocacy about ballot measures. The district court concluded that Washington State's disclosure of spending on ads about ballot issues was constitutional because of the public's interest in casting an informed vote:

Accordingly, the Court rejects [plaintiffs'] contention that there is a bright-line rule prohibiting the regulation of "issue advocacy" and holds that the state's compelling interests in informing the electorate and protecting contributors justify requiring "political committees" to report on and disclose all expenditures made "in support of, or opposition to . . . a ballot

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71. See, e.g., *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1177 (9th Cir. 2007) (*WRTL II* did not reach disclosure); *Koerber v. Fed. Election Comm'n*, 583 F. Supp. 2d 740, 746 (E.D.N.C. 2008) ("The *WRTL II* decision makes no mention of the disclosure requirements upheld in *McConnell* . . .").

72. *Brumsickle*, 2009 WL 62144, at \*17 (citation omitted) (emphasis omitted).

73. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1023 (9th Cir. 2010).

proposition.” This holds even when “expenditure” is defined to include some advocacy as to the “issue” underlying the proposition, as long as such regulations are limited to the specific issue on which the public’s vote is being sought.<sup>74</sup>

Thus, in contrast to the approach by the district court in Florida, which found there could be no such thing as express advocacy with regard to ballot measures which were purely issue advocacy, the district court in Washington found that support of ballot measures could be regulated even if the regulation captured some issue advocacy.

In an unreported case, an Ohio-based federal district court also correctly interpreted the scope of *McConnell* and *WRTL II* in upholding an Ohio disclosure provision against a facial challenge.<sup>75</sup> Plaintiff Ohio Right to Life Society challenged the state’s restrictions on corporate funding of ECs.<sup>76</sup> Ohio’s definitions and treatment of electioneering communications were nearly identical to federal rules for ECs. Plaintiffs specifically challenged the validity of Ohio’s pre-election rules, which create a period in which corporations and unions are unable to pay for ECs with corporate treasury funds.<sup>77</sup>

A key issue considered by the court in *Ohio Right to Life Society* was how *WRTL II* altered *McConnell*’s holdings, if at all. The Ohio court held that with regards to the corporate treasury restrictions on pre-election spending, *McConnell* was still the controlling precedent.<sup>78</sup> This case’s holding on corporate funding restrictions has since been overruled by *Citizens United*, which found such funding source restrictions unconstitutional as applied to ECs. The federal district court in Ohio held that “[p]laintiff’s facial challenge fails because *WRTL* expressly did not alter *McConnell* . . . , which held that the blackout provision in [BCRA] is facially valid.”<sup>79</sup> However,

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74. *Brunsickle*, 2009 WL 62144, at \*18 (alteration in original).

75. *Ohio Right to Life Soc’y, Inc. v. Ohio Elections Comm’n*, No. 2:08-cv-00492, 2008 WL 4186312, at \*7 (S.D. Ohio Sept. 5, 2008).

76. *Id.* at \*2.

77. *Id.*

78. *Id.* at \*11.

79. *Id.* at \*6.

the Ohio court found that the Ohio provision was unconstitutional as applied to the plaintiff's ads because the ads were nearly identical to the ads in *WRTL II*, and did not contain express advocacy or the functional equivalent of express advocacy. Furthermore, the Ohio court found that the defendants did not identify a sufficiently compelling interest to regulate the plaintiff's particular ads.<sup>80</sup>

## II. A NEW DAY DAWNS IN 2010 WITH *CITIZENS UNITED* AND *DOE V. REED*

In the end, it would take another decision from the Supreme Court to finally put an end to this misreading of *WRTL II*. In *Citizens United*, the Supreme Court finally clarified that disclosure was not subject to *WRTL II*'s so-called "functional equivalence" test.<sup>81</sup> The Supreme Court was very sympathetic to disclosure and disclaimers in *Citizens United*, saying, "[W]e reject [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."<sup>82</sup> Instead, *Citizens United* gave a full-throated endorsement of disclosure based on both the voters' informational interest as well as, in the case of corporations, the shareholders' interest<sup>83</sup> in holding corporations accountable for their political spending.<sup>84</sup> The Supreme Court also upheld disclosure information about ballot measure petition signatories in *Doe v. Reed* in 2010.<sup>85</sup>

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80. *Id.* at \*7.

81. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

82. *Id.* at 915.

83. For a discussion of the shareholder rights implicated by *Citizens United*, see Lucian Bebchuk & Robert Jackson, *Corporate Political Speech Who Decides?* 124 HARV. L. REV. 83, 84 (Nov. 2010) (arguing for rules that "mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly through intermediaries"); Ciara Torres-Spelliscy, *Corporate Campaign Spending, Giving Shareholders a Voice* (Brennan Center 2010) (arguing for shareholder disclosure and consent).

84. *Citizens United*, 130 S. Ct. at 915–17 (upholding disclaimer and disclosure requirements for independent expenditures and electioneering communications). *Citizens United* went on to avoid federal disclosure requirements by claiming that it is a press entity. In an advisory opinion, the FEC agreed, granting *Citizens United* a media exemption from disclosure. *See Op. Fed. Elect. Comm.*, 2010-08 (Jun. 11, 2010).

85. *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (upholding disclosure of referendum petitions).



The key state interest that campaign finance disclosure laws serve is informing the average voter who paid for a given political ad so that the voter can take that information into account while assessing the ad and its argument about the upcoming election.<sup>86</sup> As the Supreme Court noted in *Citizens United*, campaign finance disclosure enables an informed electorate to weigh the political ads they view in an election cycle: “The First Amendment protects political speech; and disclosure permits citizens . . . to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>87</sup> The Court also indicated that federal campaign finance disclosures about ECs “help citizens ‘make informed choices in the political marketplace.’”<sup>88</sup>

In particular, disclosure of who is funding political speech may reveal the affiliations of the politicians who benefit,<sup>89</sup> or as the Supreme Court wrote in *Citizens United*, “[C]itizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”<sup>90</sup> The Supreme Court also acknowledged that twenty-first century technology makes campaign finance information instantaneously available for average citizens and is therefore all the more empowering.<sup>91</sup>

The Supreme Court signaled in *Citizens United* that it would not distinguish campaign finance laws based on the media used to transmit a political message—in this case, video-on-demand over a cable system. As Justice Kennedy wrote, “Courts, too, are bound by

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86. Over the past decades, the Supreme Court has recognized a number of state interests in disclosure around candidate elections including *Buckley*’s voter information interest, anti-corruption interest, and anti-circumvention interest, *Caperton v. Massey*’s due process interest in judicial elections, as well as *Doe v. Reed*’s interest in ballot measure integrity. *Buckley*, 424 U.S. 1; *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009); *Doe v. Reed*, 130 S. Ct. 2811 (2010).

87. *Citizens United*, 130 S. Ct. at 916.

88. *Id.* at 914 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003)).

89. Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1028 (2003) (“Not only ideological groups provide helpful information for voters; knowing which economic interests support particular candidates and the strength of their support can also serve as a heuristic.”).

90. *Citizens United*, 130 S. Ct. at 916 (quoting *McConnell*, 540 U.S. at 259 (Scalia, J., concurring)).

91. *See id.* (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”<sup>92</sup> Furthermore, the Supreme Court stated that federal disclosures could be constitutionally applied to both Citizens United’s broadcast ads (a push technology where the passive viewer is subject to the ad just by turning on the television) as well as its video-on-demand (a pull technology where the viewer affirmatively chooses to watch the film). This indicates that states have broader latitude than before to expand disclosure laws to cover non-broadcast as well as classic broadcast political ads.

The Court also indicated that even commercial speech (in this case, touting the purchase of the documentary, *Hillary the Movie*) can be covered by campaign finance disclosure requirements if candidates are featured directly before an election. As Justice Kennedy noted, “Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. [And] the informational interest alone is sufficient to justify application of [BCRA’s disclosure requirements] to these ads . . . .”<sup>93</sup> This greatly expands the scope of ads that can be constitutionally subject to disclosure rules. Potentially, under Kennedy’s reasoning, even ads from a competitor business that criticize a business owned by a candidate could be regulable ads if the ads are run directly before an election and mention the candidate.

Also after *Citizens United*, the length of a political ad does not matter for disclosure purposes. Interestingly, the Supreme Court in *Citizens United* upheld the application of BCRA’s disclosure and disclaimers not only to the group’s short ten-second ads, but also to its long feature-length film, *Hillary the Movie*. As Justice Kennedy wrote: “We find no constitutional impediment to the application of BCRA’s disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or

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92. *Id.* at 891.

93. *Id.* at 915–16.

expression.”<sup>94</sup> Again, this indicates that even if a future political ad takes the form of a two-hour infomercial that is broadcast on a cable network at two a.m., states still have an interest in regulating it if it discusses a candidate’s character and fitness for office directly before an election. In the case of *Hillary the Movie*, the film was scheduled to be placed on a video-on-demand cable system within thirty days of a presidential primary.

A few months after *Citizens United*, the Supreme Court reiterated its endorsement of disclosure surrounding elections in *Doe v. Reed*.<sup>95</sup> The issue in *Doe* was whether it was appropriate for the State of Washington to release the names of petition signatories in a referendum battle over gay marriage.<sup>96</sup> The case was bifurcated between a facial challenge to public disclosure in all referendum petitions and an as-applied challenge to disclosure in the particular gay marriage petition on the ballot in 2008. Only the facial challenge was being reviewed by the Supreme Court while the narrower as-applied challenged is still being litigated in the lower courts.

In *Doe*, the Supreme Court upheld the Washington law allowing public disclosure of the names of petition signatories against the plaintiff’s facial challenge. The Court said that Washington State’s disclosure of these names helped the government maintain the integrity of the election process. As Chief Justice Roberts wrote, “The State’s interest in preserving the integrity of the electoral process is undoubtedly important. States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.”<sup>97</sup>

The Supreme Court was particularly attentive when it came to the power of the state to protect its elections from fraud and from the resulting cynicism by the electorate that is created by fraud. As the Chief Justice noted, “The State’s interest is particularly strong with respect to efforts to root out fraud, which not only may produce

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94. *Citizens United*, 130 S. Ct. at 916.

95. *Doe v. Reed*, 130 S. Ct. 2811 (2010).

96. *Id.* at 2815.

97. *Id.* at 2819 (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999)).

fraudulent outcomes, but has a systemic effect as well: It ‘drives honest citizens out of the democratic process and breeds distrust of our government.’”<sup>98</sup> But, as the Supreme Court also made clear, rank fraud was not the only interest implicated by disclosure. In *Doe*, the Court remarked:

[T]he State’s interest in preserving electoral integrity . . . extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State.

. . . .  
 . . . Public disclosure can help cure the inadequacies of the verification and canvassing process.<sup>99</sup>

Disclosure is necessary within the referendum process to ensure only legally sufficient ballot measures are placed before the electorate for a vote:

Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs’ argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.<sup>100</sup>

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98. *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

99. *Id.* at 2819–20 (“[Governmental] interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is essential to the proper functioning of a democracy.” (internal quotations omitted)). Also, three Justices in *Doe* found an anti-corruption interest in disclosure in the referendum context as well as the election integrity interest embraced by the majority: “Public disclosure of the identity of petition signers . . . advances States’ vital interests in . . . ‘preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.’” *Id.* at 2828 (Sotomayor, Stevens and Ginsburg, JJ., concurring) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978)).

100. *Id.* at 2820.

Thus, between preventing outright fraud and clerical mistakes, the Justices found that disclosure of petition signatories bolstered the integrity of Washington's referendum process. Although *Doe v. Reed* is not a campaign finance case, the logic of *Citizens United* and *Doe* stands for similar principles that elections are special circumstances where a right to anonymous speech must generally give way to governmental interests in the overall integrity of the democratic process of electing candidates on the one hand or putting a referendum to a public vote on the other.<sup>101</sup>

#### A. *The Tide Turns in Favor of Disclosure After Citizens United and Doe*

Due to a slew of election-year challenges to disclosure laws across the country in 2010, lower courts have had an early chance to apply the new *Citizens United/Doe* standards to state laws.<sup>102</sup> Overwhelmingly, lower courts are upholding state disclosure laws, subject to the original two caveats: that the laws capture more than tiny spenders and that parties can assert an as-applied harassment exception to otherwise applicable disclosure laws.<sup>103</sup>

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101. See Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 253 (2010) ("The Court has always been more deferential toward campaign finance disclosure requirements than it has been toward outright limits on expenditures, contributions, and soft money. . . . The Court's recent decision in *Doe v. Reed* generally signals that even the Roberts Court remains deferential to government compelled campaign disclosure.").

102. A few 2010 cases challenging disclosure on election eve were dismissed out of hand. In New York, a federal district court dismissed a challenge to the state's political committee definition as it might apply to an anti-gay marriage group stating that it lacked subject matter jurisdiction over the plaintiff's unripe claim. "Under these circumstances, there is no reason to believe that plaintiff faces sanctions . . . anytime soon, if ever, which means that any substantive analysis that the Court attempted now would be only an academic exercise concerning unripe claims." Nat'l Org. for Marriage, Inc. v. Walsh, No. 10-CV-751A, 2010 WL 4174664, at \*4 (W.D.N.Y. Oct. 25, 2010) (dismissing complaint for lack of subject matter jurisdiction). This dismissal has been appealed to the Second Circuit. See Nat'l Org. for Marriage, Inc. v. Walsh, No. 10-4572, *appeal docketed* (2d Cir. Nov. 9, 2010). Similarly, in Rhode Island a federal district court dismissed a complaint by the National Organization for Marriage for failing Federal Rule of Civil Procedure 8, which requires notice pleadings. Nat'l Org. for Marriage, Inc. v. Daluz, No. 10-392-ML, slip op. at 1-3 (D.R.I. Sept. 30, 2010) (dismissing complaint for violation of Fed. R. Civ. P. 8). This case in Rhode Island was refilled. Plaintiff's preliminary injunction was denied on Oct. 28, 2010. This denial is being appealed in the First Circuit. Nat'l Org. for Marriage, Inc. v. Daluz, No. 10-2304, *appeal docketed* (1st Cir. Nov. 8, 2010).

103. See, e.g., *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (upholding Washington's political committee financial disclosure requirements and noting, "[i]ndeed, it is the Supreme Court's decision in *Citizens United* . . . that provides the best guidance regarding the

The D.C. Circuit was one of the first courts to apply the new *Citizens United* disclosure standards to federal independent expenditure committees in the *SpeechNow* case.<sup>104</sup> Although the D.C. Circuit threw out long-standing contribution limits to independent expenditure committees in *SpeechNow*, the court also upheld federal disclosure requirements that apply to such committees. So while federal PACs were previously subject to a \$5,000 per person contribution limit, after *SpeechNow* they can accept contributions in any size if they (1) only spend independently of candidates and (2) refrain from giving contributions directly to candidates. *SpeechNow*, in turn, has facilitated the creation of what many in the press dubbed “Super PACs”—organizations that can take in and spend unlimited amounts, including monies from corporate treasury funds.<sup>105</sup> However, *SpeechNow* lost its challenge to federal disclosure requirements; therefore even Super PACs are subject to the same full

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constitutionality of the Disclosure Law’s requirements”); *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 696–97 (D.C. Cir. 2010) (upholding ongoing disclosure requirements for organizations making independent expenditures and holding “*Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to *Citizens United*, again citing the government’s interest in providing the electorate with information”); *Nat’l Org. for Marriage, Inc. v. Roberts*, No. 1:10cv192-SPM/GRJ, 2010 WL 4678610, at \*5 (N.D. Fla. Nov. 8, 2010) (finding that Florida disclosure requirements connected to “electioneering communications organizations” “would not prohibit [plaintiff] from engaging in its proposed speech”); *Yamada v. Kuramoto*, No. 10-00497 JMS/LEK, 2010 WL 4603936, at \*1 (D. Haw. Oct. 29, 2010) (finding that “*Citizens United* also endorsed disclosure”); *Iowa Right to Life Comm., Inc. v. Smithson*, No. 4:10-cv-00416, 2010 WL 4277715, at \*3 (S.D. Iowa Oct. 20, 2010) (finding “under *Citizens United*, ‘[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements’” (alteration in original)); *Wis. Club for Growth, Inc. v. Myse*, No. 10-cv-427-wmc, 2010 WL 4024932, at \*5 (W.D. Wis. Oct. 13, 2010) (“[P]laintiffs’ reliance on *FEC v. WRTL* ignores the Supreme Court’s later treatment of disclosure and disclaimer regulations in *Citizens United*.”); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 741 F. Supp. 2d 1115, 1128 (D. Minn. 2010) (“The law to which Plaintiffs object is, in fact, a disclosure law—a method of requiring corporations desiring to make independent expenditures to disclose their activities. Such laws are permissible under *Citizens United*.”), *aff’d* --- F.3d ---, 2011 WL 1833236 (8th Cir. May 16, 2011); *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (“[I]n *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent.”); *Nat’l Org. for Marriage, Inc. v. McKee*, 723 F. Supp. 2d 245, 264 (D. Me. 2010) (upholding Maine’s political committee financial disclosure requirements and finding “NOM’s desire to limit campaign finance disclosures to ‘major purpose’ groups would yield perverse results, totally at odds with the interest in ‘transparency’ recognized in *Citizens United*”).

104. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

105. See Dan Eggen & T.W. Farnam, *New “Super PACs” Bringing Millions into Campaigns*, WASH. POST, Sept. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706500.html>.

disclosure as any other federal PAC. For example, because of this transparency, the public knows that in the 2010 midterm election, the largest Super PAC, American Crossroads, raised over \$26 million from 411 sources, in some cases with donations as big as \$2 million, including those from corporate donors.<sup>106</sup>

Even though independent expenditure committees were at issue in *SpeechNow*, the D.C. Circuit held there were still strong governmental interests in requiring disclosure of who had made contributions to the political committee. As the D.C. Circuit wrote:

[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring *SpeechNow* to organize and report to the FEC as a political committee.<sup>107</sup>

The plaintiffs in *SpeechNow* appealed their loss on the issue of whether federal disclosure laws could be constitutionally applied to them.<sup>108</sup> The Supreme Court denied *SpeechNow*'s petition for certiorari, thereby leaving the D.C. Circuit's endorsement of disclosure for federal independent expenditure committees intact.<sup>109</sup>

### B. *Post-Citizens United Governmental Interests in Disclosure*

Lower federal courts reviewing state campaign disclosure laws in 2010 have come to similar conclusions as the Supreme Court and the D.C. Circuit that there are strong governmental interests supporting

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106. American Crossroads, Center for Responsive Politics, <http://www.opensecrets.org/pacs/lookup2.php?cycle=2010&strID=C00487363> (last visited Mar. 22, 2011).

107. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010).

108. *Id.*

109. *Keating v. Fed. Election Comm'n*, 131 S. Ct. 553 (2010).

disclosure in the campaign finance and other election-related contexts.

For example, the Ninth Circuit in *Human Life of Washington Inc. v. Brumsickle* (the appeal of the 2008 *Brumsickle* case discussed at length above) found that the government has a strong interest in providing basic information to voters:

Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment. . . . “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.” Thus, by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.<sup>110</sup>

The Ninth Circuit also noted that voters’ informational interest is only likely to increase as the number of political speakers multiplies: “Access to reliable information becomes even more important as more speakers, more speech—and thus more spending—enter the marketplace, which is precisely what has occurred in recent years.”<sup>111</sup> Indeed, the appellate court noted that Washington’s disclosure law was meant to protect the electorate from secretive special interests. As the court noted, “Thus, to prevent the public from being misled by special interest groups ‘masquerading as proponents of the public weal,’ the voters who passed Washington’s Disclosure Law ‘merely provided for a modicum of information from those’ who wish to influence the public’s vote.”<sup>112</sup> Also, the Ninth Circuit relied on *Doe*

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110. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (citations omitted).

111. *Id.* at 1007.

112. *Id.* at 1017 (quoting *United States v. Harriss*, 347 U.S. 612, 625 (1954)).



in addition to *Citizens United* when selecting the appropriate level of scrutiny for disclosure.<sup>113</sup>

Post-*Citizens United*, federal district courts have likewise come to similar conclusions that disclosure aids the electorate in making sound democratic choices. The Federal Court for the Northern District of Florida—the very same court that had been so hostile to ballot measure disclosure in *Browning* in 2009 held in 2010 that “[t]he government has a sufficiently important interest to ‘increase the fund of information concerning those who support [a] candidate . . . [and] shed the light of publicity on spending.’”<sup>114</sup> The plaintiff, the National Organization for Marriage (NOM), had argued that strict scrutiny should apply to the disclosure law. The federal district court in Florida noted that: “NOM has failed to demonstrate a substantial likelihood of success. . . . Neither the ‘major purpose’ requirement nor strict scrutiny is applicable. The Florida statutes at issue pass exacting scrutiny because there is a substantial relation between the disclosure requirements and a sufficiently important governmental interest.”<sup>115</sup> Consequently this court in Florida in 2010 refused to enjoin that state’s electioneering communications disclosure law.

In Iowa, plaintiff Iowa Right To Life (IRTL) challenged (among other aspects of the law) the 48-hour filing period for certain campaign finance reporting. The Federal District Court for the Southern District of Iowa found this timeframe unobjectionable after *Citizens United*: “The Court . . . finds . . . [r]equiring prompt disclosures, especially close to an election, helps to assure that they are made ‘in time to provide relevant information to voters.’ And, contrary to IRTL’s assertions, the Court does not find the 48-hour reporting requirement to be an ‘onerous’ burden.”<sup>116</sup> In addition, the

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113. *Id.* at 1005 (“As the latest in a trilogy of recent Supreme Court cases, [*Doe v.*] *Reed* confirmed that exacting scrutiny applies in the campaign finance disclosure context. See *Citizens United*, 130 S.Ct. at 914; *Davis*, 128 S.Ct. at 2765-66.”).

114. Nat’l Org. for Marriage, Inc. v. Roberts, No. 1:10cv192-SPM/GRJ, 2010 WL 4678610, at \*5 (N.D. Fla. Nov. 8, 2010) (first alteration added).

115. *Id.* (denying preliminary injunction of electioneering communications law).

116. Iowa Right to Life Comm., Inc. v. Smithson, No. 4:10-cv-00416, 2010 WL 4277715, at \* 16 (Oct. 20, 2010 S.D. Iowa) (citations omitted). *But cf.* Nat’l Org. for Marriage v. McKee, 723 F. Supp. 2d

Iowa court cited *Doe* when applying intermediate scrutiny to disclosure.<sup>117</sup>

A challenge to Hawaii's disclosure statute was similarly unsuccessful. The Federal District Court for the District of Hawaii noted that after *Citizens United* "[i]n essence, corporations are free to speak, but should do so openly."<sup>118</sup> The court concluded that a plaintiff corporation should be subject to disclosure laws because "[i]t actively participates in our democracy; it is not unconstitutional to require it to comply with campaign spending laws that are substantially related to important government interests."<sup>119</sup> The Hawaii case also relied in part on *Doe* when applying intermediate scrutiny to disclosure.<sup>120</sup>

### C. Issue Advocacy Is Back in the Mix

The Ninth Circuit in one of the earlier circuit court decisions after *Citizens United* noted that disclosure may be constitutionally applied to some issue advocacy. In a case about the disclosure that could be required around the funding of ballot initiative fights, the appellate court noted: "[T]he [Supreme] Court affirmed and reiterated the importance of disclosure requirements—even requirements that apply to issue advocacy—to the government's interest in informing the electorate." The Ninth Circuit continued, "Like the requirements in *Citizens United*, Washington State's political committee disclosure requirements . . . are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears."<sup>121</sup>

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245, 267 (D. Me. 2010) ("[Maine's] regulation requiring twenty-four-hour disclosure of any independent expenditure over \$250 at any time is unconstitutionally burdensome.").

117. Iowa Right to Life Comm., Inc., 2010 WL 4277715 at \*13.

118. Yamada v. Kuramoto, No. 10-00497 JMS/LEK, 2010 WL 4603936, at \*1 (D. Haw. Oct. 29, 2010); see also *id.* at \*20 ("[T]he disclaimer provision for an electioneering-communication advertisement all withstand constitutional challenge. These Hawaii provisions promote disclosure—a value endorsed, embraced and extended in *Citizens United*.").

119. *Id.* at \*16.

120. *Id.* at \*11.

121. Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010) (citation omitted).

Although ballot initiatives are different from candidate elections, the Ninth Circuit found there was still the voters' informational interest in knowing who was behind a ballot campaign, arguing:

In the ballot initiative context . . . where express and issue advocacy are arguably 'one and the same,' any incidental regulation of issue advocacy imposes more limited burdens that are more likely to be substantially related to the government's interests. Because regulation of issue advocacy in the ballot context is virtually indistinguishable from regulation of express advocacy (an admittedly appropriate enterprise), such regulation is more closely related to the government's interest in informing the electorate.<sup>122</sup>

The Ninth Circuit went on to state that issue advocacy could be constitutionally subject to disclosure after *Citizens United*. The court wrote: "[E]ven if [the plaintiff's] proposed communications constitute unadulterated issue advocacy, its argument has been foreclosed by the Supreme Court[] . . . [And] [g]iven . . . *Citizens United*, . . . the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupported."<sup>123</sup>

A federal district court in Maine agreed with the Ninth Circuit approach that issue advocacy may be properly subjected to disclosure after *Citizens United* because it "rejected the idea that 'disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.' . . . [E]ven if ads 'only pertain to a commercial transaction' and do not engage directly in political speech, government can require disclosure of 'who is speaking about a candidate.'"<sup>124</sup> The Maine District Court found that *Citizens United* provided more leeway for state governments to impose strong disclosure laws. The district court explained:

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122. *Id.* at 1018.

123. *Id.* at 1016.

124. *McKee*, 723 F. Supp. 2d at 262 (footnote call number omitted).

*Citizens United* went further than *McConnell*. It did not limit the government's informational interest to disclosures of "electioneering activity" . . . Rather, it recognized the general "public . . . interest in knowing who is speaking about a candidate shortly before an election"—even if the speech is only a commercial for a film about a candidate.<sup>125</sup>

As discussed above, *Citizens United* was quite expansive in its handling of federal disclosure law, and lower courts are applying this expansive understanding to state laws. As the district judge in Maine explained, "In *Citizens United*, this 'informational interest alone' was 'sufficient' to justify a disclosure requirement. Maine's statute treating statements about a clearly identified candidate in the limited period before an election is similarly justified . . . ."<sup>126</sup>

The Maine court also stated that challenges to Maine's disclaimer laws were foreclosed by the Supreme Court's holdings in *Citizens United* upholding federal disclaimer requirements: "*Citizens United* has effectively disposed of any attack on Maine's attribution and disclaimer requirements. . . . According to the Supreme Court, . . . [t]hey are justified by the governmental interest in providing information to the electorate and permitting the electorate to make informed choices."<sup>127</sup> Thus, on-ad disclaimers, like more detailed reporting that campaigners make directly to the state, also enjoy *Citizens United*'s protection.

Like other lower courts, the district court in Maine recognized that the *WRTL II* functional equivalency test was summarily rejected in *Citizens United*<sup>128</sup> and that disclaimers on issue advocacy were back in play:

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125. *Id.* at 265–66.

126. *Id.* at 266 (footnote call number omitted).

127. *Id.* at 267.

128. *Id.* ("Indeed, *Citizens United* refused to import the 'express advocacy and its functional equivalent' test into disclosure and disclaimer rules.").

Whether they deal with express advocacy or not, “the public has an interest in knowing who is speaking about a candidate shortly before an election.”

The requirement that these communications include disclosure of whether the candidate authorized the message and the identity of the person or group that made or financed the message is tied directly to the state’s informational interest and provides voters with immediate insight into whose interests a candidate may serve. The impositions are minimal, given the important interests involved.<sup>129</sup>

Maine’s district court is part of the growing trend of extending *Citizens United*-style disclosure to issue ads and finding them constitutional.

In Hawaii, a federal district court also acknowledged that issue advocacy could be constitutionally subject to disclosure requirements after *Citizens United* and the Ninth Circuit’s *Brumsickle*. This court found, “Stated another way, that some issue advocacy may fall within a disclosure requirement is not necessarily fatal to the regulation itself. [The] Government may impose reasonable disclosure requirements . . . .”<sup>130</sup>

A federal district court in Illinois came to a similar conclusion when reviewing Illinois’ new disclosure law, which was passed in the wake of the Governor Rod Blagojevich campaign finance scandal and impeachment. The court explained:

*Citizens United* . . . expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent. Even as to an advertisement that “only pertains to a commercial transaction” and did not engage directly in political speech . . . the express advocacy rule does not apply to registration requirements,

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129. *Id.* (footnote call numbers omitted).

130. *Yamada v. Kuramoto*, No. 10-00497 JMS/LEK, 2010 WL 4603936, at \*10 (D. Haw. Oct. 7, 2010); *id.* at \*18 (“Essentially, disclosure requirements can apply to issue advocacy, so long as the exacting scrutiny test is otherwise met.”).

including related reporting, recordkeeping, and disclosure requirements.<sup>131</sup>

Like many other federal district courts facing election-eve challenges, the court in Illinois rejected the plaintiff's request for a preliminary injunction in *Center for Individual Freedom v. Madigan*.<sup>132</sup>

The tide may have even turned in favor of disclosure in South Carolina, which is in the Fourth Circuit and therefore has the most hostile circuit precedent to contend with. In a 2010 challenge to South Carolina's PAC definitions, as well as to disclosure of South Carolina's version of electioneering communications, the court struck the PAC definition as being overbroad under *NCRL III* but declined to strike the remaining disclosure requirements under *Citizens United*.<sup>133</sup> The district court wrote approvingly of the disclosure law even though the South Carolina definition covered forty-five days instead of thirty days before a primary as well as non-broadcast ads. The district court in South Carolina concluded:

South Carolina's definition of "influence the outcome of an elective office" does reach communication channels, including direct mail and e-mail, that the federal government has previously chosen not to regulate. However, the Supreme Court's recent ruling in *Citizens United* indicates that South Carolina may be constitutionally permitted to require some level of disclosure on organizations based on the dissemination of a communication that "promotes or supports a candidate or attacks

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131. *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (citation omitted).

132. Many of these election-eve suits from 2010 were started as requests for preliminary injunctions. This may have been a strategy that backfired. The plaintiffs may have thought judges might have been more willing to enjoin laws that they characterized as burdensome directly before an actual election. However, most judges took the opposite approach, stating it would be disruptive to the state and the election to change the rules of the game so close to election day.

133. Because most disclosure in South Carolina was effectuated through the PAC reporting requirements, striking this part of the law has rendered the rest of the South Carolina disclosure law largely a nullity until the legislature chooses to adjust the statute.

or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate . . . .”<sup>134</sup>

This indicates that lower courts are keeping an open mind when considering the constitutionality of disclosure after *Citizens United*, even in South Carolina where the disclosure law encompasses more non-magic-word political advertisements than BCRA.

### III. THE OLD EXCEPTIONS TO DISCLOSURE STILL APPLY

#### A. *The De Minimis Exception to Disclosure*

Courts have long held that disclosure should be excused where it only captures *de minimis* spending in elections.<sup>135</sup> This *de minimis* exception still applies after *Citizens United*, which involved a multi-million dollar film production. Most recently, the Tenth Circuit was quite unsympathetic to a disclosure law in Colorado that reached the actions of a few neighbors seeking to fight a local annexation. As the court noted, “It is unlikely that the Colorado voters who approved the disclosure requirements . . . were thinking of the [plaintiff neighbors].”<sup>136</sup> The Tenth Circuit held Colorado’s disclosure law was unconstitutional as applied to a group of six neighbors who raised less than \$2,000 in cash in a ballot measure fight.<sup>137</sup> The court said that when balancing the public’s right to know against the plaintiffs’ associational rights, there was not a sufficient state interest to justify the burden on association:

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134. S.C. Citizens For Life, Inc. v. Krawcheck, No. 4:06-cv-2773-TLW, 2010 WL 3582377, at \*18 (D.S.C. Sept. 13, 2010).

135. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (invalidating disclosure for handmade leaflets in a ballot measure campaign); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993) (striking down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as \$1, a practice known as “first dollar disclosure”). For a discussion of *McIntyre*, see Robert F. Bauer, *Not Just a Private Matter: the Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38 (2007).

136. *Sampson v. Buescher*, 625 F.3d 1247, 1254 (10th Cir. 2010).

137. *Id.*

[T]he burden on Plaintiffs' right to association imposed by Colorado's registration and reporting requirements cannot be justified by a public interest in disclosure. The burdens are substantial. The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado's constitution, the Campaign Act, and the Secretary of State's Rules Concerning Campaign and Political Finance. . . . As the Supreme Court recently observed . . . : "Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."<sup>138</sup>

One aspect of the case that the Tenth Circuit found weighed heavily against upholding disclosure was that the dollar amounts involved were so small and most of which were spent on attorneys' fees to comply with the law.<sup>139</sup> As the Tenth Circuit noted, "The expenditures in this case . . . are sufficiently small that they say little about the contributors' views of their financial interest in the annexation issue."<sup>140</sup> Therefore the court concluded, "[T]he financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not non-existent, in light of the small size of the contributions."<sup>141</sup>

However, the court of appeals in *Sampson* took pains to note they were not excusing big spenders on ballot measures from disclosures. Instead, the court articulated a narrow exception to *de minimis* spending:

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138. *Id.* at 1259–60.

139. *Id.* at 1260 n.5 (cash contributions for the committee were \$1,426 and \$1,178 were spent for attorneys' fees).

140. *Id.* at 1261.

141. *Id.*



We do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures. The case before us is quite unlike ones involving the expenditure of tens of millions of dollars . . . . We say only that Plaintiffs' contributions and expenditures are well below the line.<sup>142</sup>

In other words, the state clearly still has the ability to regulate persons or entities that make large expenditures on ballot measures. The Tenth Circuit's approach in *Sampson* followed the reasoning of a pre-*Citizens United* case from the Ninth Circuit that concluded the lower the amount of money spent in a political battle, the more diminished the state's interest in disclosure is.<sup>143</sup>

#### B. The Harassment Exception to Disclosure

*Buckley* made clear that members of despised minority parties could request exemptions from otherwise applicable campaign finance disclosure laws on the theory that the exposure of their contributing members might endanger them. So far, the only Supreme Court case to actually grant such a harassment exemption was to the Socialist Workers Party in 1982.<sup>144</sup>

In *Citizens United*, the Supreme Court held open the door for future challenges based on actual, demonstrable harassment, but it did not find a risk of harassment plausible in *Citizens United*'s particular case. *Citizens United* had argued to the Court that disclosure requirements would chill donations to their organization "by exposing donors to retaliation."<sup>145</sup> The Supreme Court acknowledged that there was a harassment exception to disclosure:

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142. *Sampson*, 625 F.3d at 1261.

143. *See Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind *de minimis* expenditure in a ballot measure context and stating "the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level").

144. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982); *see also* 35 Op. Fed. Election Comm'n 5 (2009-01), <http://www.fec.gov/pdf/record/2009/may09.pdf> (granting the Socialist Workers Party and its affiliates an exemption from federal reporting requirements through 2012).

145. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010).

“[We] recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.”<sup>146</sup> While the harassment exception remained intact, however, the Supreme Court found the harassment exception inapplicable to Citizens United as a group. As the Court explained, there had been no credible showing of harassment: “Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.”<sup>147</sup>

*Doe v. Reed* also clearly reaffirms that a harassment exception on disclosure is also available in the electoral context of disclosing ballot petition signatories. The *Doe* plaintiffs asserted that they would face harassment if the state of Washington released the names of who signed the petition to get Referendum 71 on the ballot. As the Supreme Court framed the case:

Plaintiffs explain that once on the Internet, the petition signers’ names and addresses “can be combined with publicly available phone numbers and maps,” in what will effectively become a blueprint for harassment and intimidation. . . .

. . . [W]e have explained that those resisting disclosure can prevail under the First Amendment if they can show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.”<sup>148</sup>

Plaintiffs in *Doe* asserted that harassment was more likely given the ability to aggregate information using modern technology. Justice

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146. *Id.*

147. *Id.*

148. *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (last alteration in original).

Alito in his concurrence and Justice Thomas in his dissent were alarmed by this risk of harassment to petition signers.<sup>149</sup>

However, the Justices in *Doe* were deeply split as to what quantum of proof a group or individual would have to show to take advantage of the harassment exception to disclosure. In particular, most of the examples of potential harassment proffered by plaintiffs and their amici did not come from Washington at all, but rather from California. In Justice Alito's concurrence, he argued that a low level of proof should be required to assert a harassment exception to disclosure to avoid a chilling effect:

[S]peakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. . . . [S]peakers could rely on a wide array of evidence to meet that standard, including "specific evidence of past or present harassment of [group] members," "harassment directed against the organization itself," or a "pattern of threats or specific manifestations of public hostility." . . . [And] "[n]ew [groups] that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views."<sup>150</sup>

But other Justices did not agree with Justice Alito's lax approach to the harassment exception. Justice Scalia, by contrast, argued that there is no right to anonymous speech enshrined in the Constitution.<sup>151</sup> Meanwhile, Justices Sotomayor, Stevens and Ginsburg argued that a high standard of proof would be appropriate for those asserting harassment exceptions to disclosure in electoral

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149. *Id.* at 2823 (Alito, J. concurring) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case."); *id.* at 2845 (Thomas, J. dissenting) ("the state of technology today creates at least some probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed.").

150. *Id.* at 2823 (Alito, J., concurring) (third, fifth, and sixth alteration in original).

151. *Id.* at 2837 (Scalia, J., concurring) ("For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.").

contexts. These three stated, “[A]ny party attempting to challenge particular applications of the State’s regulations will bear a heavy burden. . . . Case-specific relief may be available . . . in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control.”<sup>152</sup> These Justices were concerned that too lax a standard for the harassment exception might tie state regulators’ hands in knots.

Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory . . . disclosure requirement[s] . . . . [C]ourts . . . should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process.<sup>153</sup>

Justice Stevens was particularly pointed in his concurrence that a high level of proof should be required before a state’s disclosure law was not applied to a given circumstance: “I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech. A statute ‘is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are.’”<sup>154</sup> Justice Breyer joined Justice Stevens in this opinion.<sup>155</sup>

Justice Thomas in his dissent laments the fact that the Court cannot articulate a clear standard for evidence to satisfy the harassment exception to disclosure. He questioned:

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152. *Id.* at 2829 (Sotomayor, Stevens and Ginsburg, JJ., concurring).

153. *Id.*

154. *Id.* at 2831–32 (Stevens, J., concurring) (quoting *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914)) (footnote call number omitted).

155. *Doe*, 130 S. Ct. at 2829.

What sort of evidence suffices to satisfy this apparently more relaxed, though perhaps more elusive, [reasonable probability] standard? Does one instance of actual harassment directed toward one signer mean that the “reasonable probability” requirement is met? . . . The Court does not answer any of these questions, leaving a vacuum to be filled on a case-by-case basis.<sup>156</sup>

But the Court could not come to a consensus on how a group would prove that they were subject to a risk of harassment going forward—thereby giving little guidance to the lower courts that will have to resolve this issue in future cases. The Court may have another opportunity to decide this issue if *Doe*’s related as-applied challenge comes before the Court.

Like the Supreme Court, which held the harassment exception to disclosure did not apply to *Citizens United*, the Ninth Circuit, reviewing a challenge to Washington’s disclosure laws, held that the plaintiffs had not demonstrated any evidence of harassment to warrant as applied relief from disclosure to referendum campaign finance disclosure laws. The Ninth Circuit held, “[The plaintiff] Human Life does not provide any evidence to support an as-applied challenge . . . . It does not, for example, explain how the Disclosure Law impinges upon its associational freedoms.”<sup>157</sup>

Pre-*Citizens United* cases from the lower courts have largely not granted harassment exceptions to campaign finance disclosure. For example, a case in Maine from 2009 about a gay marriage ballot initiative fight noted that plaintiffs had no evidence of harassment in Maine:

[T]he plaintiffs have not made a colorable claim that their First Amendment rights of free association are threatened by harassment that might follow disclosure. . . . [N]or is there a record here indicating a pattern of threats or specific

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156. *Id.* at 2845 (Thomas, J., dissenting).

157. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1021–22 (9th Cir. 2010).

manifestations of public hostility towards them or showing that individuals or organizations holding similar views have been threatened or harmed.<sup>158</sup>

In a much more contentious case out of California's ballot initiative battle over gay marriage, which did have evidence of isolated harassment of supporters of California's Proposition 8 (Prop. 8), which defined marriage as being between one man and one woman, the district court still found that a group supporting heterosexual marriage was not "vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP. Proposition 8 supporters['] . . . belief in the traditional . . . marriage . . . have not historically invited animosity."<sup>159</sup> In the Prop. 8 case, the Federal Court for the Eastern District of California found that the harassment exemption was meant for minorities, not powerful majorities: "[T]he Supreme Court created an exception not for the majority, but for those groups in which the government has a diminished interest."<sup>160</sup>

Furthermore, even though certain Prop. 8 supporters had been subject to harassment, including physical intimidation, the district court was unpersuaded that an injunction of the California disclosure law should be issued because the harassment that had been alleged was properly a matter for the criminal authorities.<sup>161</sup>

[T]he Court strongly condemns the behavior of those who resort to violence, and/or other illegal behavior . . . .

Those responsible for threatening the lives of supporters of Proposition 8 are subject to criminal liability. . . . Those mailing white powder to organizations are subject to federal prosecution. . . . [T]here are appropriate legal channels through which to

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158. *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 n.74, 212–13 (D. Me. 2009) (upholding reporting requirements for ballot questions affecting nonprofit corporations that are not PACs).

159. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009).

160. *Id.* at 1216.

161. This case was on going on the merits in the district court at the time this article went to press.

rectify and deter the reoccurrence of such reprehensible behavior.<sup>162</sup>

Rather, the court found that the plaintiffs in *ProtectMarriage* were trying to shield themselves from any response to their actions including perfectly legal and peaceful boycotts:

Plaintiffs' exemption argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.<sup>163</sup>

The court refused to grant a preliminary injunction of California's disclosure law even in the face of demonstrable harassment against certain supporters of Prop. 8. Litigation over the harassment exception is likely to rage on for years. It is possible that the exception may remain a narrow one for despised minority parties like the Socialist Workers Party. Or it is possible that the exception could be expanded to anyone showing a reasonable probability of harassment including victorious majorities.<sup>164</sup>

#### IV. POLICY TAKE-AWAYS FOR STATE DISCLOSURE LAWS

Of course, disclosure laws are not the only policy response to increased political spending.<sup>165</sup> But disclosure is the primary means

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162. *ProtectMarriage.com*, 599 F. Supp. 2d at 1217–18.

163. *Id.* at 1217.

164. For a more in depth discussion of the harassment exception see Mike Wakefield, *Compelled Disclosure in the Wake of California's Proposition 8: Exploring the Applicability of Buckley's Minor Party Exemption to the Majority*, 25 J.L. & POL. 375, 377 (2009) ("Ultimately, this paper concludes that Protectmarriage.com and similar groups will struggle to show that the alleged constitutional harm suffered by their contributors outweighs the government's interest in compelled disclosure.").

165. For an alternative policy suggestion see John L. McCormack, *Justice and Truth in Political Discourse*, 36 LOY. U. CHI. L.J. 519, 533 (2005) ("[T]he author suggests that it may be appropriate to consider whether advertising and public relations specialists should be regulated when they are employed to promote political candidates or views. Lawyers are restricted by codes of professional

left for regulating independent spending within the campaign finance context.<sup>166</sup> For states that already have robust disclosure laws on the books, *Citizens United* and *Doe v. Reed* provide state attorneys general with new tools to help defend these laws from facial as well as most as-applied challenges. Lower courts are already applying these new standards to uphold a gamut of state disclosure laws ranging from ballot measures to candidate elections, and from express advocacy to issue advocacy.

For states that wish to freshen up their disclosure laws to make sure that the laws are capturing the way modern campaigns are waged, *Citizens United* and *Doe v. Reed* provides considerable leeway for lawmakers to require more disclosure of more types of political advertisements than ever. In other words, the Supreme Court just expanded the constitutional bounds for requiring disclosure of the funding of election-related speech, and states should use this license to expand their disclosure laws accordingly.

State legislatures still need to do their proverbial homework when adopting a new campaign finance disclosure law, by holding committee hearings and gathering evidence in the official legislative record of why older disclosure laws have been evaded by bigger spenders or why new categories of coverage are necessary for local conditions. In particular, the pre-*Citizens United* reasoning may be revived in a hostile circuit, and in order to successfully defend a new disclosure law, states will need to have a particularly strong legislative record as to why they are covering non-broadcast ECs. Law makers should do their best to augment the legislative record with empirical evidence instead of relying on anecdotal evidence.

To deal with the harassment exemption to disclosure, states could adopt a similar tactic to the FEC, which issues advisory opinions that exempt entities alleging a demonstrable risk of harassment. The state

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ethics from lying to courts and third parties in the course of representing clients. A good start to fixing the problem would be considering somewhat similar restrictions on mass persuasion professionals when they are hired to work in political arenas.”).

166. For more detailed policy suggestions see Ciara Torres-Spelliscy, *Transparent Elections After Citizens United* (Brennan Center 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1776482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776482).



regulator who administers the state's campaign finance laws could likewise grant requested exemptions from disclosure.

Finally, state lawmakers should remember that they are trying to capture the “bigger fish” and larger spenders with their campaign finance disclosure laws. Therefore, they should set disclosure thresholds at reasonable levels. A reporting threshold set close to one dollar is likely to be struck down by a court worried that the *de minimis* actions of a few citizens may be captured and chilled.<sup>167</sup> Furthermore, given the nearly non-stop litigation over campaign finance laws, any new legislation should be sure to contain a severability clause so that hostile courts cannot destroy an entire campaign finance regime just because one small part offends their sensibilities. Furthermore, states have the greatest constitutional protection when they regulate non-magic word political advertisements if those ads air close to an election.

The tide has turned in favor of campaign finance disclosure and *WRTL II*'s brief reign of destruction of reporting requirements is over. The new jurisprudence provides states with an increased ability to change their laws post-*Citizens United*, especially in the twenty-four states—which thanks to the decision—now have corporations and unions spending in elections for the first time in decades.<sup>168</sup>

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167. *Id.* at 13 (“Disclosure laws should not trap the unwary or entangle tiny groups of people spending relatively small amounts of money.”).

168. As one author laments, “The fact that wealthy entities are already versed in the use of manipulative messaging highlights our need to increase governmental efforts to counteract this harmful influence. Unfortunately, the *Citizens United* decision does more than to give corporate interests a place at the table. It gives them a place at the head of the table and a bullhorn.” Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech after Citizens United*, 31 CARDOZO L. REV. 2365, 2392 (June 2010).