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Constitutional Law—The Erosion of Political Anonymity and Its Chilling Effect on Freedom of Association: Reconsidering the Constitutionality of the Mandated Public Disclosure of Individuals' Political Donations

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CONSTITUTIONAL LAW—THE EROSION OF POLITICAL ANONYMITY AND ITS CHILLING EFFECT ON FREEDOM OF ASSOCIATION: RECONSIDERING THE CONSTITUTIONALITY OF THE MANDATED PUBLIC DISCLOSURE OF INDIVIDUALS' POLITICAL DONATIONS

I. INTRODUCTION

Imagine the government placing you on a watchlist to monitor and record your political affiliations.[1] Consider the ramifications of the government keeping track of the candidates or groups that you support and then publishing that information on the World Wide Web for all to see.[2] One does not have to stray far into his or her imagination to realize these scenarios; they are a reality in America today whenever someone chooses to donate more than $200 to a political campaign for a federal election.[3]

Compelled public disclosure of personal identifying information of those engaged in political speech is unconstitutional. The Supreme Court of the United States has repeatedly recognized that state action that has a chilling effect on freedom of association is equally as unconstitutional as state action outright prohibiting protected speech.[4] The aggregation and subsequent publication of data concerning citizens' political affiliations are perhaps two of the most patently obvious cases of government action that has the potential to curb freedom of association. Historically, government lists of political opponents have laid a bedrock for tyranny and provided avenues for the oppression of political, religious, and racial minorities.[5] Federal law that requires the maintenance and administration of databases recording individuals' political beliefs and preferences runs afoul of the

1. *See* 52 U.S.C. § 30104(b)(3)(A) (2018) (requiring government collection and public disclosure of all donors and their personal identifying information who donate over $200 to a federal election campaign).

2. *See, e.g.*, Nick Gillespie, *Does Mozilla Dumping Its CEO Over Prop 8/Anti-Gay-Marriage Stance = McCarthyism?*, REASON (April 6, 2014, 12:39 PM), https://reason.com/2014/04/06/does-mozilla-dumping-its-ceo-over-prop-8.

3. 52 U.S.C. § 30104(b)(3)(A) (2018).

4. *See, e.g.,* Bates v. City of Little Rock, 361 U.S. 516, 523–24 (1960).

5. *See, e.g.,* Talley v. California, 362 U.S. 60, 64 (1960) ("Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."); NAACP v. Ala. *ex rel* Patterson, 357 U.S. 449, 462 (1958) ("[C]ompelled disclosure of [political affiliations] . . . [is akin to the] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands."); Am. Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 981 (9th Cir. 2004) (discussing that "[e]ven the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.") (quoting *Talley*, 362 U.S. at 64–65).

American tradition of anonymity in political activism and advocacy.[6] In order to preserve a competitive political marketplace and safeguard the speech that the First Amendment intended to most robustly protect, the Supreme Court must reconsider the constitutionality of compelled public disclosure laws.

Part II of this note discusses the history of political anonymity and its role in First Amendment jurisprudence. Part III argues that strict scrutiny must be applied to any law compelling the disclosure of individuals' political contributions because of disclosure's burden on free speech and freedom of association. Part IV discusses how compelled disclosure creates a chilling effect that restricts individuals' freedom of speech and association and how the disclosure requirement is akin to impermissible government compelled speech. Part V considers the costs of these burdens by examining data and anecdotes showing that compelled disclosures lead to harassment, intimidation, and retaliation against those who hold minority or controversial political views. Lastly, Part VI proposes that the enforcement of the anti-bribery laws already in effect provides a way for the government to sufficiently protect the integrity of America's elections without burdening the First Amendment.

II. ANONYMITY IS AS AMERICAN AS APPLE PIE — A HISTORY OF THE COURT'S BALANCING OF ANONYMOUS SPEECH AND THE FIRST AMENDMENT

Campaign finance restrictions are not newfound phenomena; Congress first sought to regulate campaign financing with the Tillman Act in 1907.[7] The seminal piece of legislation, however, came in 1971 with the Federal Election Campaign Act (FECA), which has since been amended several times.[8] Even though the intention of these laws was to weed out corruption in national elections, inherent in the regulations is the unmasking of individuals' private political beliefs.[9] Political affiliations do not simply tell of one's political party membership; they can reveal the most personal and intimate details of one's personal life—ranging from religious beliefs to sexual orientation.[10]

Anonymous speech played an important role in the efforts to establish the Republic. It was used to encourage candid debate amongst the colonists,

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6. *See, e.g. Talley*, 362 U.S. at 64; *Patterson*, 357 U.S. at 462; *Heller*, 378 F.3d at 981.

7. THE HERITAGE GUIDE TO THE CONSTITUTION 89 (David Forte & Matthew Spalding eds. 2d 3d. 2014) (discussing Tillman Act of 1907, 34 Stat. 864 (1907)).

8. *Id.*

9. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 52 U.S.C. § 30104(b)(3)(A) (2018)).

10. *See Talley*, 362 U.S. at 64.

as well as to protect those colonists' identities from the Crown.[11] The Federalist Papers were published under a pseudonym, "Publius."[12] Anonymous publications continued after the ratification of the Constitution, including efforts to defend and criticize certain aspects of the document.[13] The Supreme Court had not considered a question of anonymous speech until *Lewis Publishing Co. v. Morgan* during World War I.[14] A newspaper's editors and shareholders wished to remain anonymous but also sought to qualify for a less costly type of postage to mail out the newspaper.[15] The Court held that the government had an interest in unmasking the editors and shareholders of the newspaper, and that the unmasking was "incidental" to the newspaper gaining the special second-class postage status.[16] In vindicating an effort by the state to mimic the tactics of King George III against the colonies, the Court established in *Lewis Publishing Co.* that it was permissible for the government to require citizens to bargain away their First Amendment rights in order to receive certain benefits.[17]

Over forty years later, the Court considered anonymity and disclosure of political identity in *United States v. Harriss*, in which it upheld a law requiring lobbyists to register with the government before becoming involved with any political efforts.[18] The Court acknowledged that "as a practical matter . . . [the statute acts] as a deterrent to [unincluded lobbyists] exercis[ing] [their] First Amendment rights," but the Court also found that the restriction was "too remote [from an individual's rights] to require striking down [the] statute."[19] Consequently, the Court once again favored the government when balancing the government's interests with citizens' fundamental rights, and the prospect of preserving political anonymity that the Founders sought to protect in the First Amendment appeared to be a long lost hope.[20]

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11. *See, e.g.*, Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Speech During the Constitutional Debate*, 28 AM. JOURNALISM 35, 53 (2011) (discussing how the founders' efforts would have been substantially inhibited in their efforts without the safeguard of anonymity).

12. Chesa Boudin, Note, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2153 (2011).

13. *See generally* George H. Carr, *Application of the U.S. Supreme Court Doctrine to Anonymity in the Networld,* 44 CLEV. ST. L. REV. 524 (1996).

14. *See* 229 U.S. 288 (1913).

15. *Id*. at 304.

16. *Id*. at 315.

17. *See id*.

18. 347 U.S. 612, 625 (1954).

19. *Id.* at 626.

20. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (explaining that "there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

However, the Court vindicated the First Amendment's protection of political anonymity in *NAACP v. Ala. ex rel. Patterson*.[21] There, the State of Alabama attempted to compel the National Association for the Advancement of Colored People (NAACP) to disclose its membership lists before it could qualify under the state's business corporation laws.[22] In a unanimous opinion, the Court struck down the law and held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association."[23] This foundational case recognized that compelled disclosure of political affiliation violates the First Amendment's protection of freedom of association.[24] The Court considered this issue again two years later and, relying heavily on the reasoning of *Patterson*, reiterated that compelled disclosure of political affiliation is unconstitutional.[25]

When the Supreme Court struck down a statute that required the names and addresses of authors to be printed on any political handbills distributed in the town in *Talley v. California*, it was the first time the Court acknowledged the close relationship between anonymity and freedom of speech.[26] Writing for the majority, Justice Black noted that "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified . . . [because] identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[27] The Court's reasoning in *Talley* laid the foundation for subsequent cases that challenged laws for being excessively burdensome on freedom of association.[28] These subsequent cases almost exclusively involved political speech and association and proved prescient by noting the consequences of individuals' private political affiliations.[29]

As the Supreme Court continued to expand the protections afforded under the First Amendment, it was not long before campaign finance laws

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21. 357 U.S. at 466.
22. *Patterson*, 357 U.S. at 451.
23. *Id.* at 462.
24. *See id.*
25. Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).
26. Talley v. California, 362 U.S. 60, 65 (1960).
27. *Id.*
28. *See, e.g.,* Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 70 (1961); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297 (1961); Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978); Donohoe v. Duling, 465 F.2d 196, 205 n. 2 (4th Cir. 1972) (Winter, J., dissenting); Am. Civil Liberties Union of New Jersey v. New Jersey Election Law Enforcement Comm'n, 509 F. Supp. 1123, 1126 (D.N.J. 1981).
29. James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 195, 218–19 (2008).

were subjected to similar challenges.[30] In *Buckley v. Valeo*, the plaintiffs challenged a federal law regulating both anonymity in campaign donations and contribution limits.[31] It challenged, *inter alia,* the Federal Election Campaign Act's requirement that a candidate disclose the identity of any person who donates $100 or more to his or her campaign.[32] The Court conceded that the requirement was a serious inhibition on the freedom of speech: "[w]e are not unmindful that the damage done by disclosure of the associational interests of the minor parties and their members and to supporters of independents could be significant."[33] However, the Court upheld the law by finding a compelling government interest in preventing corruption or the appearance of it,[34] despite conceding that "[t]here could well be a case . . . where the threat to the exercise of the First Amendment is so serious [that] the state interest furthered by disclosure [is] so insubstantial that the [disclosure] requirement cannot be constitutionally applied."[35] This left the door open for further challenges of compelled disclosure laws.

The next challenge came in *McIntyre v. Ohio Election Commission*,[36] and its holding solidified the protection of anonymous speech in First Amendment jurisprudence.[37] The plaintiff in *McIntyre* challenged an Ohio statute that prohibited the distribution of anonymous campaign literature advocating for the election or defeat of any candidate or the adoption or defeat of any particular issue.[38] Violators were fined $100.[39] In a 7-2 opinion, the Court found the Ohio statute unconstitutional, holding that the ability to speak anonymously is an important aspect of political advocacy because a person's decision whether or not to engage in political speech "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy

30. If the Court was willing to grant free speech protections to pornography, it should be willing to recognize that political speech, which is at the heart of the First Amendment, deserves similar robust protections. *See* McConnell v. Federal Election Comm'n, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part) ("Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography . . . would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect.").

31. 424 U.S. 1, 6–7 (1976).

32. *Id.* at 74–76.

33. *Id.* at 71 (internal citations omitted).

34. *Id*. at 69–70.

35. *Id.*

36. 514 U.S. 334 (1995).

37. Jason Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92, 103 (Winter 2012-2013).

38. *McIntyre*, 514 U.S. at 338 n. 3.

39. *Id*.

as possible."[40] Disclosing individuals' associations can contribute to pervasive instances of political harassment and threats, and protecting Americans from involuntary disclosure of their political affiliations is the only way to guard against that.[41] When balancing the interest of the government with the fundamental rights of the citizenry, a greater weight must be afforded "to the value of the free speech than the dangers of its misuse."[42]

Nevertheless, when faced with an issue implicating similar interests in *Doe v. Reed*, the Supreme Court declined to extend its reasoning in *McIntyre* to a Washington law requiring the disclosure of identifying information for those signing direct referendum petitions.[43] In *Doe*, the court held that the state had a sufficient interest in preventing fraud and discarding invalid signatures, finding specifically that disclosure "helps prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and 'bait and switch' fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue."[44] In his dissent, Justice Thomas explained how "the Washington Public Records Act severely burdens [First Amendment] rights and chills citizens' participation in the referendum process."[45] He decries the majority's reasoning as a departure from the precedent set in previous decisions holding that anonymity is paramount in the political process.[46] However, the majority was unpersuaded and found that the state had a compelling interest to disclose the identities of individuals who signed the direct referendum petitions, distinguishing, in part, a direct referendum from other aspects of the electoral process.[47]

Citizens United v. Federal Election Commission has recently become the focus for those both opposed to and in favor of lesser restrictions in campaign finance.[48] In *Citizens United*, the Court tackled the question of whether individuals organized and acting in groups are afforded the same First Amendment protections as an individual contributing to a political cause by himself.[49] Analyzing the history and importance of individuals organizing to advocate for certain positions, the Court recognized "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[50] In its holding, the ma-

40. *Id*. at 341–42.
41. *Id*. at 357 ("Anonymity is a shield from tyranny of the majority.").
42. *Id.*
43. 561 U.S. 186, 200–01 (2010).
44. *Id*. at 198–99.
45. *Id*. at 229 (Thomas, J., dissenting).
46. *Id.* at 232.
47. *Id.* at 198–99, 201 (accepting the state's argument that weeding out potential fraud was a compelling interest sufficient to burden the plaintiffs' First Amendment rights).
48. 558 U.S. 310 (2010).
49. *Id*. at 319.
50. *Id*. at 357.

jority discussed the unlikelihood that individual political donations contribute to a rampant pervasiveness of fraudulent electioneering or corruption—the *sine qua non* of the argument by those defending compelled disclosure laws.[51] Absent this compelling governmental interest, which the Court cited in previous cases as the dispositive reason for upholding other restrictions on political contributions, further challenges to these laws should no longer fail on the specious claims of limiting nefarious political influence.[52]

III. CONSTITUTIONAL CONSIDERATIONS

Laws that impose cavalier regulations and restrictions on campaign contributions unquestionably burden the First Amendment rights of free speech and freedom of association.[53] Strict scrutiny applies to laws that burden "core political speech."[54] Exacting scrutiny, sometimes referenced in First Amendment cases, effectively operates as strict scrutiny.[55] For a law burdening political contributions to withstand a challenge, it "must advance a sufficiently important state interest and employ means closely drawn to avoid unnecessary abridgment of First Amendment freedoms."[56]

A. Courts Must Apply Strict Scrutiny When Analyzing Compelled Disclosure Laws

Allegations of corruption are repeatedly cited as the primary need for the individual disclosure requirement.[57] The Supreme Court has recognized

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51. *See id.*

52. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 71 (1976); *see also Citizens United*, 558 U.S. at 480 (Thomas, J., dissenting in part) in which Justice Thomas stated in part that:

> Congress may not abridge the right to anonymous speech based on the simple interest in providing voters with additional relevant information. In continuing to hold otherwise, the Court misapprehends the import of recent events that some *amici* describe in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. (internal quotations and citations omitted).

53. McCutcheon v. FEC, 572 U.S. 185, 196–97 (2014).

54. McIntyre, 514 U.S. at 347 ("When a law burdens core political speech, we apply exacting scrutiny, and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.") (internal quotations omitted).

55. First Nat. Bank v. Bellotti, 435 U.S. 765, 786 (1978).

56. Free & Fair Election Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 763 (8th Cir. 2018). As compared to the traditional strict scrutiny test that requires that a statute be narrowly tailored to serve a compelling state interest to overcome a First Amendment challenge. *See, e.g.,* Republican Party of Minn. v. White, 536 U.S. 765, 765 (2002).

57. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 Geo. L.J. 1443, 1466–70 (2014).

that preventing the corruption, or the appearance of it, is the only state interest that can support a limitation on campaign contributions.[58] To justify the burden on First Amendment rights that disclosure requirements create, the government must demonstrate a substantial risk that campaign contributions give rise to the "direct exchange of an official act for money" or the appearance of such.[59] However, any evidence reflecting the pervasiveness of such corruption is wanting. Not only that, there is no empirical or anecdotal suggestion otherwise that these types of disclosure requirements would quell such corruption if it was in fact reality.[60] Mere conjecture that a possibility of corruption exists is insufficient to justify a law burdening the First Amendment.[61] Actual evidence of corruption is required because mere "[r]eliance on a generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle."[62]

Often, proponents of campaign finance reform claim that *Buckley* affords the government the prerogative to impose whatever restrictions may be necessary if it can articulate an interest in preventing corruption.[63] However, *Buckley* is no example to cite in favor of onerous campaign finance restrictions—it actually struck down a majority of the restrictions challenged in that case as violative of the First Amendment.[64] Even if the government could demonstrate a substantial risk of *quid pro quo* corruption, or the appearance of *quid pro quo* corruption resulting from contributions made to political campaigns, the involuntary public disclosure of an individual's political affiliations is not narrowly tailored enough to avoid unnecessary abridgment of First Amendment freedoms.[65]

To the chagrin of some supporters of campaign finance restrictions, the issue is not split along traditional liberal or conservative lines as demonstrated by *Buckley* where two of the plaintiffs, Senator James L. Buckley

58. McCutcheon, 572 U.S. at 192 (citing Davis v. FEC, 554 U.S. 724, 741 (2008)); *see also* FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985)).

59. McCutcheon, 572 U.S. at 192; *see also* Free & Fair Election Fund, 903 F.3d at 764.

60. *See* Jeffery Milyo, *Do Campaign Contributions Corrupt Politics?*, INDEPENDENT INSTITUTE (Oct. 25, 1999), https://www.independent.org/news/article.asp?id=448 (suggesting that lobbying efforts persuade politicians far more than campaign donations do).

61. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000).

62. Citizens United v. FEC, 558 U.S. 310, 359 (2010).

63. *See, e.g.,* Brief for Respondent at 37–38, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

64. Buckley v. Valeo, 424 U.S. 1, 39–59, 143 (1976). The case struck down provisions that limited expenditures by candidates on their own behalf, that limited total expenditures in various campaigns, and that limited the amount that any individual could spend, independently of, but relative to, a candidate. *Id*. at 143.

65. Doe v. Reed, 561 U.S. 186, 246–37 (2010) (Thomas, J., dissenting) (explaining that Washington's disclosure laws are not narrowly tailored because of less restrictive means that were in place to achieve the same ends).

and Senator Eugene McCarthy, represented both major political parties.[66] Both Buckley and McCarthy were able to run successful campaigns as underdog politicians challenging incumbents only because of the support of well-funded donors.[67] Accordingly, they saw the 1974 amendments to FECA as an attempt by Congress to protect incumbents, not to curb corruption in federal elections.[68] As Senator—and now Judge—Buckley discussed in his book, *Saving Congress From Itself*, "[i]ncumbents enjoy enormous advantages over challengers," and for there to be a healthy democracy, there needs to be competition in the political marketplace, which can only be accomplished by having enough capital to run a campaign.[69] They saw FECA as covert way to protect incumbent politicians under the guise of preserving electoral integrity.[70]

Even though there is bipartisan support of FECA—including its compelled disclosure requirements—opposition to it also crosses party lines. Senator Buckley claims the best protection against corruption that may stem from heightened or limitless contribution limits is the compelled disclosure requirement; yet, he recognizes that the disclosure law as written sets the minimum amount far too low and impermissibly burdens the electorate's First Amendment freedoms.[71] Furthermore, Justice Scalia famously claimed, in an interview after *Citizens United*, that any concerns over corporate contributions should be quelled, or at least mitigated, because of the compelled disclosure requirement.[72] However, as this note will show, a law that is burdensome on the First Amendment cannot withstand judicial scrutiny just because it may be a prudent policy choice or enjoys bipartisan support.[73]

When it comes to the First Amendment, the fit of the regulation is of utmost importance—regardless of whether a law is subject to strict or mere-

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66. Hon. James L. Buckley, SAVING CONGRESS FROM ITSELF 72–73 (2014). Senator Buckley was the first third-party candidate to be elected to the Senate in forty years, and Senator McCarthy challenged Lyndon Johnson in the 1968 Democratic presidential primary, causing the incumbent president to withdraw from the race—both of whom only acquired the means to do so by committed individual donors. *Id.*

67. *Id*.

68. *See id*. at 73.

69. *Id*.

70. *See id*.

71. *Id*. at 75–77.

72. Interview with Antonin Scalia, Assoc. Justice, Supreme Court of the United States, in Washington, D.C. (July 19, 2012) [hereinafter Scalia Interview].

73. *See, e.g.*, Satellite Broad. and Commc'ns Ass'n v. FCC., 275 F.3d 337, 356 (4th Cir. 2001) ("If a regulation places even incidental burdens on speech without yielding some genuine benefit, it must be struck down."); Morrill v. Weaver, 224 F. Supp. 2d 882, 900 (E.D. Pa. 2002)
(If a law "unconstitutionally burdens core First Amendment expression and association . . . it must be struck down.").

ly exacting scrutiny.[74] Laws limiting campaign contributions must therefore employ means "narrowly tailored to achieve the desired objective."[75] FECA's compelled disclosure, however, inhibits far more expressive conduct than necessary for any conceivable corruption-fighting purpose.[76] Because the Supreme Court has rejected the argument that the mere speculation that corruption may occur is a sufficient interest to uphold a law that treads upon First Amendment rights, the proffered concerns of potential corruption are too attenuated to justify this type of burden.[77]

Voter's privacy has long been recognized as a fundamental aspect of Americans' exercising their right to vote.[78]*k*"[T]he respected tradition of anonymity in the advocacy of political causes . . . is best exemplified by the [use of the] secret ballot . . . to vote one's conscience without fear of retaliation."[79]*k*Even though a donation is not a vote, the two are so closely related that revealing one would be tantamount to revealing the other; when one donates to a politician, it is almost certain that a vote for that politician will follow.[80]

B. Compelled Disclosure of One's Political Affiliations Is Akin to Unconstitutional Compelled Speech

The government may not force individuals to espouse a certain viewpoint or idea.[81] Inherent in the First Amendment's protection of the freedom of speech is the right for the individual to voluntarily choose what to say and how he says it without government force or fear of the government criminal-

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74. McCutcheon v. FEC, 572 U.S. 185, 218 (2014).

75. *Id.* (quoting Bd. of Trustees of State Univ. of N.Y. v. Fox*,* 492 U.S. 469, 480 (1989)) (internal quotations omitted).

76. *See* 52 U.S.C. § 30104(b)(3)(A) (considering the evidence of the chilling effect that compelled disclosure has on protected political speech, statutes expressly preventing a *quid pro quo* exchange of money for a particular vote or policy position—e.g. federal anti-bribery laws—would be the appropriately narrowly tailored way to prevent the corruption that the compelled disclosure law claims to combat).

77. McCutcheon, 572 U.S. at 218 ("This sort of speculation, however, cannot justify the substantial intrusion on First Amendment rights at issue in this case."); Free & Fair Election Fund v. Mo. Ethics Comm'n, 903 F.3d 759, 764 (8th Cir. 2018) ("The transfer ban, however, does little, if anything, to further the objective of preventing corruption or the appearance of corruption. The Commission does not provide any real-world examples of circumvention along the lines of its hypothetical.") (internal quotations and citations omitted).

78. Burson v. Freeman, 504 U.S. 191, 206 (1992) ("[A]ll 50 states, together with numerous other Western democracies . . . [secure the right of] a secret ballot . . . in order to serve the . . . *compelling interest* [of] preventing . . . intimidation.") (emphasis added).

79. McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 343 (1998).

80. Fred Bernstein, *An Online Peek at Your Politics*, N.Y. TIMES (Oct. 4, 2000), https://www.nytimes.com/2000/10/04/opinion/an-online-peek-at-your-politics.html.

81. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

izing that choice.[82] Even in times of war, the First Amendment still prohibits the government from compelling individuals to publicly express a political viewpoint.[83] When questions of compelled speech arise, the deciding factor is the voluntariness of the speech, not its sincerity.[84] Accordingly, when the government compels someone to publicly express an idea that he or she has no desire to reveal, it is impermissibly compelled speech.[85]

The government compels someone to speak publicly about his or her beliefs when it mandates the disclosure of political contributions, which "in itself . . . seriously infringe[s] on privacy of association and belief guaranteed by the First Amendment."[86]*k*There is no readily distinguishable characteristic between political donations and political membership: "the invasion of privacy of belief may be as great when the information sought concerns [political donations] as when it concerns the joining of organizations."[87] Compelling individuals to publicize their political affiliations forces them to engage in speech that may prove to be against their own interests. Noting the chilling effect that those disclosures may have on participation in the political process, courts have recognized the potential for harassment, intimidation, and retaliation that could stem from individuals having their prior-political affiliations examined and scrutinized.[88]

Compelled disclosure affords those who want to be involved in political activism with two options: submit to the publication of your political affiliations or do not participate in political speech at all.[89] This is all too similar to the monarchical license to speak imposed on the colonists by the Crown that the First Amendment intended to protect against.[90]*k*"[T]he inter-

82. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

83. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion o*r force citizens to confess by word or act their faith therein*.") (emphasis added).

84. *Id* at 641–42.

85. *See id*.

86. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

87. *Id*. at 66.

88. *See, e.g.,* DeGregory v. Att'y Gen. of N.H., 383 U.S. 825, 828–29 (1966) (holding that a professor could refuse to disclose political associations because the "realm of political and associational privacy protected by the First Amendment" was not overcome by a compelling state interest); Pleasant v. Lovell, 876 F.2d 787, 795 (10th Cir. 1989) (protecting from disclosure advocacy concerning modification to tax laws); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 384, 388 (D.C. Cir. 1981) (protecting documents related to "political expression and association," including communications regarding decisions to support or oppose political candidates).

89. *See* 52 U.S.C. § 30104(b)(3)(a).

90. Talley v. California, 362 U.S. 60, 64–65 (1960) ("The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the

est in having anonymous [political speech in] the marketplace of ideas unquestionably outweighs *any* public interest in requiring disclosure as a condition of entry," which suggests that any burden on political speech that leads to disclosure is unconstitutional on its face.[91]

IV. THE REALIZATION OF COSTS FROM COMPELLED DISCLOSURE

The Institute for Justice, a public interest law firm, conducted a study in 2007 to determine what the effect might be on an individual's decision to donate after being made aware of the disclosure requirements.[92] The study found that eighty percent of respondents supported the general idea of public disclosure for those who contribute to a political campaign.[93] However, upon respondents' learning that their names and addresses would be included in that information, support dropped to forty percent.[94] Only twenty-four percent supported employers' names being included in the disclosure.[95] Lastly, and most telling of the chilling effect that compelled disclosure creates, sixty percent of respondents said that they would think twice about donating to a political movement upon learning that they were compelled to disclose their names and addresses to the public.[96] Respondents cited various reasons for their desire not to have their political affiliations publicized, including fear of retaliation, which demonstrates that disclosure laws could potentially discourage more than half of the citizenry from becoming politically active.[97]

More recently, a study similarly found that sixty-two percent of Americans have political views that they are afraid to share.[98] Though Republicans make up the vast majority of individuals who feel the need to hide their po-

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lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers . . . [causing the Founders to] frequently [have] to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.").

91. McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 342 (1998) (emphasis added). Although the Court appears to limit this specific holding to literary works, its reasoning can equally apply to other forms of political speech.

92. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform,* Institute for Justice (March, 2007), https://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf.

93. *Id*. at 7.

94. *Id*.

95. *Id*.

96. *Id*.

97. *Id* at 8.

98. Emily Ekins, *Poll: 62% of Americans Have Political Views They're Afraid to Share*, Cato Institute (July 22, 2020), https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share. In 2017, 58 percent of Americans had political views that they were afraid to share. *Id*.

litical views (seventy-seven percent), fifty-nine percent of independents and fifty-two percent of Democrats share this fear.[99] This creates a pervasive practice of self-censorship among Americans, which appears to be somewhat well-founded.[100] For example, the survey found that twenty-two percent of Americans would support firing a business executive who donates to Joe Biden's campaign, while thirty-one percent would support firing a business executive who donates to Donald Trump's campaign.[101] Among those who identify as "strong liberals," support for firing a business executive who donates to Trump increases to fifty percent, while thirty-six percent of "strong conservatives" would support similar retribution for a business executive who donates to Biden.[102]

As a result of what appears to be a growing trend of retaliation based on political affiliation, thirty-two percent of employed Americans fear that the revelation of their political opinions would result in either "missing out on career opportunities or losing their jobs."[103] The study notes that this statistic is particularly worrisome "given that most personal campaign contributions to political candidates are public knowledge and can easily be found online."[104] These concerns cross party lines: thirty-eight percent of Republicans, thirty-one percent of independents, and twenty-eight percent of Democrats feel that simply holding certain political opinions could negatively impact their careers.[105]*k*

Although surveys like these cannot precisely reflect the actual consequences of such laws, real world examples of retaliation and harassment show that the survey revealing respondents' aversions to disclosure was not unsubstantiated.[106] Take, for example, some of the most well-known instances of political unmasking over the last decade. Stop Huntington Animal Cruelty (SHAC) targeted Gigi Brienza, a donor to the John Edwards campaign in 2004, by releasing her name and address on a list of targets because of her employer's contract with Huntington Labs.[107] The FBI—which was investigating the target list because the FBI considered SHAC to be "one of the most serious domestic terrorism threats" in 2005—confirmed that SHAC pulled Brienza's personal identifying information from the FEC's website.[108]

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99. *Id*.
100. *See id*.
101. *Id*.
102. *Id*.
103. *Id*.
104. Ekins, *supra* note 98.
105. *Id*.
106. *See, e.g.*, McConnell v. FEC, 251 F. Supp. 2d. 176, 227–29 (D.D.C. 2003).
107. Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST (July 1, 2007), https://www.washingtonpost.com/wpdyn/content/article/2007/06/29/AR2007062902264.html.
108. *Id*.

During the campaign for Proposition 8 in California (a referendum legalizing gay marriage), state law required the disclosure of any individual donating over $100 to the cause opposing the proposition, which consequently led to many supporters suffering "property damage, or threats of physical violence or death."[109]

Furthermore, a list of attendees of a fundraiser for President Trump in Hollywood was publicized in an attempt to make sure they are willing to be "publicly proud" of their support, and Representative Juaquin Castro's social media post of Trump donors in San Antonio resulted in those targeted having their businesses boycotted and families harassed.[110] Inherent in the compelled disclosure of political donations is the fact that donors are now open to retaliation for their private political beliefs. This *unwanted* release of information is made possible solely by the government's compilation and publication of their names coupled with their politics.[111] These examples are simply illustrative and not exhaustive of the retaliation and harassment that individuals face from public disclosure of political donations. This illustrative list, however, should be sufficient to convince a court of "a reasonable probability that the compelled disclosure of personal information will subject [all donors] to threats, harassment, or reprisals from either Government officials or private parties," which should lay a convincing foundation for prevailing in an effort to resist disclosure.[112]

Neither size nor popularity of a political movement should factor into its need for anonymity because "whether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter."[113] "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of

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109. Citizens United v. FEC, 558 U.S. 310, 481 (2010) (Thomas, J., concurring in part and dissenting in part).

110. *See, e.g.*, Caitlin O'Kane, *Debra Messing Demands Attendee List for Beverly Hills Trump Fundraiser, President Hits Back*, CBS NEWS (Sept. 2, 2019), https://www.cbsnews.com/news/trump-fundraiser-beverly-hills-debra-messing-demands-attendee-list-for-fundraiser-event-president-hits-back-today/; *see also* Michael Brice-Sadler & Alex Horton, *Joaquin Castro Tweeted the Names of Top Trump Donors. Republicans Say it will Encourage Violence.,* WASH. POST (Aug. 7, 2019), https://www.washingtonpost.com/politics/2019/08/07/joaquin-castro-tweeted-names-top-trump-donors-republicans-say-it-will-incite-violence/.

111. *See* 52 U.S.C. § 30104(b)(3)(A) (2018). Though many individuals are fully content with publicly exclaiming their political affiliations, the unconstitutional chilling effect of disclosure concerns those who do not want their political opinions publicly known. Thus, public dissemination of private political affiliations is solely a result of the compelled disclosure law if someone chooses not to reveal his or her affiliations otherwise. *See* 52 U.S.C. § 30104(b)(3)(A).

112. Doe v. Reed, 561 U.S. 186, 200 (2010) (internal quotations and alterations omitted).

113. Gibson v. Fla. Legis. Investigation Comm'n, 372 U.S. 539, 570 (1963) (Douglas, J., concurring).

freedom of association, particularly where a group espouses dissident beliefs,"—and in today's political climate many view any opposing view as dissident.[114] Because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance," it is important that courts recognize the growing volatility and aggressiveness present in today's political climate.[115] Consider:

> A soldier who donates to pro-gay causes may risk being discharged under the military's Don't Ask, Don't Tell policy. A union member or corporate employee may risk ostracism or be denied advancement if he or she contributes to candidates or causes not in line with those of management. Businessmen and other professionals may not want to alienate potential customers, and those whose careers depend on reputation and avoiding controversy, such as doctors, ministers, or journalists, may not wish to have their political views publicly advertised. The risk of retaliation is particularly acute for individuals who contribute to unpopular or unconventional causes and candidates.[116]

In one of the first challenges to a disclosure law, the Court discussed the difficulties that minority political parties face in particular:

> The District Court found "substantial evidence of both governmental and private hostility toward and harassment of SWP [Socialist Workers Party] members and supporters." Appellees introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring states, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership. Although appellants contend that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that "private hostility and harassment toward SWP members make it difficult for them to maintain employment."[117]

However, minority political movements are no longer the only groups facing this type of harassment stemming from publicized political affiliations.[118]

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114. NAACP v. Ala. *ex Rel* Patterson, 357 U.S. 449, 462 (1958).
115. Talley v. California, 362 U.S. 60, 65 (1960).
116. Bopp, *supra* note 24, at 218–19 (internal quotations and footnotes omitted).
117. Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 98–99 (1982).
118. *See, e.g.*, O'Kane, *supra* note 96.

In *McConnell v. FEC*, the district court detailed anecdotes of these real world consequences, including individuals having to contribute less than the amount that triggered disclosure because of fear of retaliation by employers, neighbors, and others.[119] Furthermore, individuals reported their property being vandalized "after their names were disclosed" for contributing to an anti-union cause.[120] The Supreme Court has recognized the reality of retaliation stemming from political affiliation and noted that attempts at intimidation, which were only able to be carried out as a result of public disclosure laws, were a "cause for concern."[121]

As the popularity of the internet grows, access to data on private individuals' political donations is even more readily available and easily accessible. Cases before the inception of the internet warned of the widespread dissemination of donor information and of the dangers that such easily accessible information may pose for those unprotected.[122] Considering this, the burden on free speech now certainly outweighs the danger of misuse, cutting against any balancing test that has typically weighed in favor of the government.[123] Courts cannot simply ignore the increased availability of the information revealed under the compelled disclosure laws and the growing trend to harass, intimidate, and retaliate against those who hold different pollical beliefs. The ability to access these records is far easier than those who passed the law could ever imagine.

When the compelled disclosure law was passed, records were only accessible in person at the Federal Election Commission headquarters.[124] Today, records of citizens' political contributions are maintained on the Federal Election Commission's website, accessible by anyone, at any time, free of charge.[125] Justice Thomas has suggested that these online disclosure records are maintained to "enable private citizens and elected officials to implement

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119. McConnell v. FEC, 251 F. Supp. 2d 176, 227–29 (D.D.C. 2003).

120. *Id*. at 228.

121. Citizens United v. FEC, 558 U.S. 310, 370 (2010); *see also* Hollingsworth v. Perry, 558 U.S. 183, 195–196 (2010) (finding that petitioner's concerns about public disclosure of supporters of Proposition 8 were "substantiated . . . [because of] incidents of past harassment.").

122. *See, e.g.,* McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 340–42 (1995); Buckley v. Valeo, 424 U.S. 1, 71 (1976) (both discussing the risks that may accompany disclosure of an individual's political affiliations to anyone who wishes to discover such information).

123. McIntyre, 514 U.S. at 357.

124. Compelled disclosures were required before the Federal Election Commission had a website for maintaining and publicizing records. *See* Pub. L. No. 96-187, § 302, 93 Stat. 1339 (1980) (first establishing the disclosure requirement); *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, Title V, § 502, 116 Stat. 115 (2002) (first requiring the FEC to create and maintain a website twenty-two years after compelled disclosure became law, thirty-one years after the enactment of the initial Federal Election Campaign Act).

125. 52 U.S.C. § 30112(a)–(b) (2012).

political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights."[126]

However, focus on the enhanced burdens caused by the growth of the internet alone undermines the fundamental constitutional issue that the compelled disclosure law creates. Even without the online database of donors' personal information, the mere collection and publication of this information in any form is constitutionally suspect.[127] Concerns about the government obtaining lists revealing individuals' political affiliations arose long before the proliferation of the internet.[128] Though online publication of this information certainly increases the burden that politically active citizens face in advocating for their beliefs, it is not a necessary factor for rendering the compelled disclosure requirements unconstitutional.[129]

V. ANTI-BRIBERY LAWS BETTER SERVE THE GOVERNMENT'S PROFFERED INTERESTS IN MAINTAINING ELECTORAL INTEGRITY

In general, campaign finance laws are premised on the idea that without limiting the amount of money in politics both the citizenry and the politicians will be unduly influenced.[130] However,

> [w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured . . . [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[131]

More directly to the point of disclosure, when the government's regulatory or administrative interests can easily be satisfied short of full disclosure, the government cannot force individuals to disclose their political beliefs.[132]

Federal law prohibiting bribery of elected federal officials already serves as the best deterrent to corruption and is a perfect example of an easy way that the government can accomplish its goals of maintaining electoral integrity without trampling on the First Amendment.[133] A federal law pro-

126. Citizens United v. FEC, 558 U.S. 310, 483 (2010) (Thomas, J., concurring in part) (emphasis in original).

127. *See* Talley v. California, 362 U.S. 60, 64–65 (1960).

128. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

129. *See id*.

130. Scalia Interview, *supra* note 68.

131. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (internal quotations and citations omitted).

132. *See, e.g.,* Shelton v. Tucker, 364 U.S. 479, 490 (1960).

133. *See* 18 U.S.C. § 201(a)–(c) (2012) (prohibiting "directly or indirectly . . . [giving, offering, or promising] anything of value to any public official or person who has been se-

hibiting individuals from bribing elected officials in an attempt to influence the officials satisfies any compelling government interest of rightly keeping elections free of *quid pro quo* corruption.[134] Moreover, enforcement of federal anti-bribery law will prohibit actual corruption without risking the suppression of innocent political speech.[135] These laws directly serve the function that supporters of the mandatory disclosure law claim will be defeated in its absence.[136] If the fear is that excessive political contributions are akin to paying off politicians in return for political favors, then anti-bribery statutes will still address true instances of bribery.[137] Under the current federal bribery law, it is already unlawful for anyone to give money to a public official with the intent of influencing that official or candidate to do or not do something in his official capacity as a condition of receiving that payment.[138] The prohibition of bribery directly addresses the fear that the compelled disclosure requirement is claimed to address, and it does so without impermissibly restricting innocent political speech.[139] The "free functioning of our national institutions" is not in peril by ensuring anonymity in political speech so long as the bribery statutes are enforced.[140]

If a person donates to a specific candidate's campaign with the intent of influencing that candidate to perform a specific task when he or she is elected as a condition of that donation, that donor would face criminal penalties under the bribery statute, not the campaign finance statute.[141] Because the government's compelling interests can be satisfied short of disclosing donors' identities, the compelled disclosure laws must fail a First Amendment review.[142]

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lected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent to influence any official act; or to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person.").

134. *See, e.g.*, Annabi v. United States, No. 10-CR-007 (CM), 2018 WL 3756455, at *9 (S.D.N.Y. July 20, 2018) (denying motion to vacate conviction for bribery of a public official).

135. *See id*.

136. Buckley v. Valeo, 424 U.S. 1, 71 (1976) (discussing the government's interest in preventing the "buying" of elections as a compelling reason for disclosure laws); *see also Annabi*, 2018 WL 3756455, at *9 (denying motion to vacate conviction for bribery of a public official).

137. *See* 18 U.S.C § 201(a)–(c) (2018) (prohibiting public officials from receiving anything of value in an attempt to influence an official act).

138. *Id*.

139. *See id*.

140. *Cf*. *Buckley*, 424 U.S. at 66.

141. *See id*.

142. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488–90 (1960).

VI. CONCLUSION

Threats of harassment, intimidation, and retaliation were paramount in the Founders' decision to secure protections for political speech.[143] The fears expressed by those suspicious of public disclosure laws are far from an exaggerated "parade of horribles."[144] As demonstrated, it is a reality for Americans holding minority or controversial political views across the political spectrum. A burdensome law on a fundamental right like that of free speech must only withstand a challenge if it serves a compelling interest for the government and has been narrowly tailored to advance that compelling interest.[145] The government, however, fails to overcome this level of scrutiny with regard to disclosure laws.

Laws that are more narrowly tailored are already enforced and accomplish the goals that compelled disclosure is claimed to advance.[146] Moreover, these laws do so without a capacious restriction on individuals' First Amendment rights. A prohibition on compelled disclosure does not foreclose Americans' ability to announce their financial support of candidates publicly. Nor does it suggest that individuals will be free from discrimination based on their political views. It simply ensures that the government is not unmasking the political beliefs of private citizens without their consent and that no one is discouraged from participating in the political marketplace because of fear of reprisal. Accordingly, when faced with a challenge to a law compelling the public disclosure of Americans' political affiliations, the Supreme Court should not hesitate to invalidate it.

*Scout Snowden**

143. *See, e.g.*, Talley v. California, 362 U.S. 60, 64–65 (1960).

144. The "parade of horribles" is a term first coined in *Shapiro v. United States* and subsequently used in a litany of court opinions to describe the often-exaggerated predictions made by parties of what would happen if their arguments did not prevail. 335 U.S. 1, 55, 68 (1948) (Frankfurter, J., dissenting).

145. McIntyre v. Ohio Election Com'n, 514 U.S. 334, 347 (1995).

146. *See, e.g.*, 18 U.S.C. § 201(a)–(c).

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