No. 11-1952 (L)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CENTER FOR INDIVIDUAL FREEDOM, INC.;

Plaintiff/Appellee/Cross-Appellant,

and

WEST VIRGINIANS FOR LIFE, INC.; ZANE LAWHORN

Plaintiffs/Appellees,

v.

Natalie H. Tennant, et al.,

Defendants/Appellants/Cross-Appellees,

Appeal from the United States District Court
for the Southern District of West Virginia

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, WEST VIRGINIA CITIZENS FOR CLEAN ELECTIONS, LEAGUE OF WOMEN VOTERS OF WEST VIRGINIA, WEST VIRGINIA CITIZEN ACTION GROUP, AND THE OHIO VALLEY ENVIRONMENTAL COALITION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-1952 Caption: Center for Individual Freedom, et al. v. Natalie H. Tennant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

League of Women Voters of West Virginia
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 11-1952 Caption: Center for Individual Freedom, et al. v. Natalie H. Tennant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

WV Citizen Action Group
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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No. 11-1952 Caption: Center for Individual Freedom, et al. v. Natalie H. Tennant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ohio Valley Environmental Coalition
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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No. 11-1952 Caption: Center for Individual Freedom, et al. v. Natalie H. Tennant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Brennan Center for Justice at NYU School of Law
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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No. 11-1952 Caption: Center for Individual Freedom, et al. v. Natalie H. Tennant, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

West Virginia Citizens for Clean Elections
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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INTEREST OF AMICI CURIAE

The Brennan Center for Justice at NYU School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice.[1] The Brennan Center's Money and Politics project works to reduce the real and perceived influence of special interest money on our democratic values and promotes and defends campaign disclosure laws around the country.

West Virginia Citizens for Clean Elections ("WVCCE") is a coalition of twenty-five organizations - encompassing labor, environmental, policy advocacy, religious, and other groups - that seeks to promote election reforms in West Virginia. The coalition recognizes the substantial influence of political contributions on our state's public policy, and the need to give citizens a greater voice.

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[1] Pursuant to Fed. R. App. P. 29(a), all parties have informed *amici* that they consent to the filing of this brief. *Amici* affirm that no counsel from a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

The League of Women Voters of West Virginia (the "League") is a grassroots, nonpartisan volunteer organization working to promote political responsibility through the informed and active participation of citizens in their government. It has a long history of supporting campaign financing disclosure laws based on its position that voters have a right to know who is paying for campaign advertising so they can make fully-informed decisions when voting.

The West Virginia Citizen Action Group ("WV-CAG") has advocated for better public policy, rights of individuals, a clean environment, and a stronger democratic process since 1974. WV-CAG's main goal is to increase the voice of the average citizen in public affairs.

The Ohio Valley Environmental Coalition, formed in 1987, is a nonprofit organization whose mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment. It has been an active leader in West Virginia Citizens for Clean Elections.

SUMMARY OF ARGUMENT

This case involves a challenge to West Virginia statutes that require disclosure of money spent to influence state elections—but that "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (internal quotation marks and citations omitted). It reaches this court after the U.S. Supreme Court, and numerous Circuit Courts of Appeals, have repeatedly upheld similar state and federal campaign finance disclosure schemes. All of these cases recognize the significant public interests served by these laws.

Not only have the courts upheld the federal disclosure provisions that were part of the Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002 ("BCRA"), they have also upheld state disclosure requirements more extensive than their federal equivalents. As *amici* explain in providing this Court with perspective on how West Virginia's legislation fits in the national context, West Virginia is one of 19 states that have enacted "electioneering communications"

definitions that go beyond BCRA (out of 21 that have enacted similar disclosure requirements for electioneering communications). The court below is the *only* court to invalidate one of these statutes for including more varieties of media used for electioneering communications than are covered under than the federal definition.

As detailed below, the lower court's faulty conclusion is the product of legal error. While the district court paid lip service to the proper "exacting scrutiny" standard of review, it in fact applied a stricter standard, failing to afford the proper deference to the reasoned and well-informed judgment of West Virginia's legislators. The court insisted that a voluminous record of supporting evidence must be included in the formal legislative history to justify these disclosure laws, even though they are far from novel or unsupported. Ultimately, the court engaged in the type of line drawing properly reserved for democratically elected lawmakers.

The court likewise ignored the controlling standard of review to strike down a provision requiring disclosure of those who

contribute non-*de minimus* amounts, $1,000 or more, that help fund certain campaign advertisements. As *amici* show, that threshold is the same or higher than was adopted by most other states with similar laws. In its place, the court imposed a failed source disclosure policy upon West Virginia—namely, a rule limiting disclosure to those who expressly earmark their contribution for use in electioneering communications. This rule mimics current federal policy, which has been wholly ineffective and is the subject of ongoing litigation. *See Van Hollen v. FEC*, 1:11-cv-00766-ABJ(D.D.C. 2011). Here, again, the court usurped the legislature's role in determining policy.

For these reasons, *amici* urge the Court to grant the State of West Virginia's appeal in its entirety. *Amici* fully support the state on all of the issues on appeal, although we confine our comments to the matters discussed above.

ARGUMENT

I. Properly Analyzed Under "Exacting Scrutiny," West Virginia's Efforts to Enhance Disclosure of Electoral Spending are Clearly Constitutional

A. Disclosure Laws Promote First Amendment Values By Educating Voters about the Sources of Political Funding and By Deterring Corruption

In case after case, the Supreme Court has upheld robust campaign finance disclosure schemes. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 84; *McConnell v. FEC*, 540 U.S. 93, 201-02 (2003); *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010); *see also Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (upholding law permitting disclosure of ballot petition signatures).[2] In so doing, the Court

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[2] The Courts of Appeals have followed suit in upholding state and federal disclosure and disclaimer requirements. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 40-41 (1st Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 697-698 (D.C. Cir. 2010); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1012-1014 (9th Cir. 2010); *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439-40 (4th Cir. 2008); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 790-92 (9th Cir. 2006); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-64 (5th Cir. 2006); *Majors v. Abell*, 361 F.3d 349, 352, 355 (7th Cir. 2004); *FEC v. Public Citizen*, 268 F.3d 1283, 1287, 1291 (11th Cir. 2001) (*per curiam*); *But see Sampson v. Buescher*, 625 F.3d 1247, 1249, 1256 (10th Cir. 2010) (acknowledging voters' well-established interest in disclosure, but granting an *as-applied* challenge to law requiring that any group of two or more persons

has repeatedly recognized that disclosure laws serve important governmental interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *see also Buckley*, 424 U.S. at 83-84. The Court underscored the importance of voters' informational interest in political transparency in *Buckley v. Valeo*, in which it emphasized that a federal disclosure rule was "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82.

More recently, in *Citizens United*, 130 S. Ct. 876, the Court—by an eight-to-one vote—embraced the federal disclosure laws established by BCRA in 2002. The *Citizens United* Court

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that accepted or made contributions or expenditures exceeding only $200 to support or oppose a ballot initiative had to register and report the names and addresses of contributors of only $20, because informational interest in such small donations was "limited").

made clear that disclosure of money in politics is an important component of our electoral process:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders 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.

130 S. Ct. at 916. Indeed, without transparency, the American public cannot properly "evaluate the arguments to which they are being subjected." *Citizens United*, 130 S. Ct. at 915 (*quoting First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)); *see also Buckley*, 424 U.S. at 14-15 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential….).

B. In Deference to the Important Public Interest in Transparent Political Spending, Courts Must Apply "Exacting Scrutiny" to Disclosure Laws

In light of the critical public interest in political transparency, the Supreme Court has repeatedly explained that courts reviewing disclosure laws should *not* employ the most rigorous "strict scrutiny," but instead should apply the more deferential "exacting scrutiny" standard. Exacting scrutiny

"requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest,'" *Citizens United*, 130 S. Ct. at 914 (*quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted)). In contrast, strict scrutiny applies to bans or direct restrictions on speech and "requires the Government to prove that the restriction 'furthers a compelling interest[,] is narrowly tailored to achieve that interest,'" *id.* at 898 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (opinion of Roberts, C.J.) (2007), and is neither over- nor under-inclusive. *See id.* at 898; 911, *Brown v. Entm't Merchs. Ass'n.*, 131 S. Ct. 2729, 2741-2742 (2011).

Exacting scrutiny applies to disclosure requirements because while "disclosure requirements may burden the ability to speak . . . they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S. Ct. at 914 (*citing Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201 (internal quotation marks and brackets omitted)). Because of this difference, states have significantly greater discretion to draft laws requiring disclosure rather than speech prohibitions. As

Justice Stevens explained in *Doe v. Reed*, exacting scrutiny requires a court to balance disclosure's "possible burden on constitutional rights" against the State's justifications for political transparency. 130 S. Ct. 2811, 2830-31 (Stevens, J., concurring in part and concurring in the judgment). And when, as here, there is "a perfectly adequate justification" for disclosure,[3] "the State need not produce concrete evidence" that the disclosure law in question is the "best way" to further the public's interest – that is, the most narrowly-tailored or least-restrictive alternative available – so long as there is "enough evidence to support the State's . . . justification." *See id; see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

There is no question that West Virginia's justifications for a robust disclosure law are well established and substantial; these justifications have repeatedly been invoked in upholding similar state and federal rules. Indeed, particular deference is due the

[3] West Virginia included extensive legislative findings in its disclosure statutes, which provide more than adequate justifications for its legislative choices. *See* W.Va. Code §3-8-1 (2011); Appellants' Brief at 14-19. These findings are supported by expert testimony, *see* Appellants' Brief at 19, and also by evidence in the public domain, *see infra.*

Legislature's judgments here, given the repeated findings by the Supreme Court and other federal courts that similar disclosure laws serve the public interest. *See e.g., Buckley*, 424 U.S. at 83; *McConnell*, 540 U.S. at 196-197.[4] Nevertheless, the district court erred by engaging in a paradigmatically legislative task,

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[4] The district court applied the wrong analysis to conclude that West Virginia's disclosure law was "underinclusive" because it applied to newspapers and periodicals but not to direct mail, *see Id*. at *93-94, when less money was spent on newspaper ads than on direct mailings in some West Virginia elections. Under exacting scrutiny, the court should have asked whether this disclosure law appropriately furthered the public's interest—not whether a broader law might do more. The Supreme Court explained in *Buckley* and elsewhere, that legislators can take an incremental approach and need not address the entirety of a problem to withstand exacting scrutiny:

> "In deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

Buckley, 424 U.S. at 105 (internal citations, quotation marks, and brackets omitted).

inappropriately substituting its own policy judgments for those of the legislature.

C. West Virginia Enacted its Current Disclosure Scheme in Response to Specific Concerns about Anonymous Spending in Its State Elections.

The need for transparency regarding who funds West Virginia elections is not an abstract concern. Recent elections in West Virginia have seen concerted efforts by narrow and undisclosed interests to influence elections, and in some cases, information about who funded these advertising blitzes remained unknown to voters through Election Day.

Such political spending by third-party organizations, many of whom never have to disclose the source of their funds, has dramatically increased since the Supreme Court's decision in *Citizens United*. Spending by outside groups jumped to $294.2 million in the 2010 federal elections, more than four times greater than the amount of such spending in 2006. Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process*, at 9 (January 2011) http://www.citizen.org/documents /citizens-United_20110113.pdf.

Of that total, groups that do not disclose their underlying funding spent nearly half of the overall amount. *Id.* at 10.

Some such organizations conceal both their funding sources and their real interests, hiding behind pseudonyms with positive or neutral resonance.[5] They mimic the names of well-known organizations and even deliberately mislead voters as to their objectives.[6] The Supreme Court has acknowledged this concern about entities running:

> [A]dvertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry) . . .

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[5] *See* Elizabeth Garret and Daniel Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Election L. J. 295, 299 (2005).

[6] For example, a group called "Concerned Taxpayers of America" targeted Oregon Congressman Peter A. DeFazio for defeat. However, there were only *two* "concerned" taxpayers behind the group, and neither was from Oregon. *See* Dan Eggen, "Concerned Taxpayers of America Supported by Only Two Donors", *Washington Post*, Oct. 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/16/AR2010101602804.html.

McConnell v. FEC, 540 U.S. 93, 197 (2003) (quoting *McConnell v. FEC,* 251 F. Supp. 2d. 176, 237 (D.D.C. 2003)).

West Virginia has experienced undisclosed political funding first hand, as recounted in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2257 (2009). The legal issues in *Caperton* arose from large scale spending by Massey Coal CEO Don Blankenship in support of victorious candidate Brent Benjamin in West Virginia's 2004 Supreme Court election. Much of Blankenship's spending flowed through an organization whose name — "And For the Sake of the Kids" — gave no inkling of the identity of its sponsor. The Supreme Court described Blankenship's spending on both broadcast and non-broadcast media::

> In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures— *for direct mailings and letters soliciting donations as well as television and newspaper advertisements*— to support Brent Benjamin.

Id. (internal punctuation and citations omitted, emphasis added).

During the 2004 election cycle, West Virginia voters were not widely aware of Blankenship's aggressive participation until *after* they had voted. In response to the ensuing public outcry, West Virginia's legislature strengthened state disclosure and disclaimer requirements in 2005, so that voters could learn about such spending before voting.

In 2006, Blankenship spent $3.7 million on electioneering communications and other independent expenditures in an unsuccessful attempt to oust 40 members of the West Virginia legislature. That was more than all West Virginia Senate candidates spent during the primary and general elections combined, and nearly as much as House candidates spent.[7] Blankenship's expenditures again involved both broadcast and non-broadcast media.[8]

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[7] Lawrence Messina, "Blankenship's Spending Exceeded all of Senate; Racetrack, Other Gambling Interests More Successful than Massey President", *Charleston Daily Mail*, Dec. 18, 2006, at P2A.

[8] Robert Rupp, Op-Ed., "Blankenship Backlash; Massey CEO Misapplied Money, Negativity in Election", *Charleston Gazette*, Nov. 17, 2006, at P5A.

Due to the State's new law,[9] Blankenship had to publicly disclose his spending on the 2006 election; which was publicly available shortly afterward.[10] Moreover, each advertisement he funded clearly displayed his name.

Thus, West Virginia voters had a clear understanding of Blankenship's 2006 spending, and could fully evaluate the candidates he supported. Indeed, news accounts, and members of both parties, partially credited the transparency stemming from the new disclosure law passed in 2005 for Blankenship's failure to "win" all but one of his targeted races.[11]

Clearly, West Virginia legislators acted to remedy gaps in transparency that created information deficits for voters. Both broadcast and non-broadcast media lacked transparency,

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[9] *See* W. Va.Code § 3-8-2b(a)(2011); W. Va. Code § 3-8-2b(b)(2011); W. Va. Code §3-8-2b(e)(2011).

[10] The West Virginia Secretary of State's documentation of electioneering communications made by Blankenship and others during the 2006 election is available at http://apps.sos.wv.gov /elections/ecie/list.aspx?type=EC&year=2006.

[11] *See, e.g.*, Scott Finn, "Blankenship Hurt GOP, Chairman Says", *Charleston Gazette*, Nov. 9, 2006, at P1C; Robert Rupp, Op-Ed., "Blankenship Backlash; Massey CEO Misapplied Money, Negativity in Election", *Charleston Gazette*, Nov. 17, 2006, at P5A.

including "newspaper advertisements." *See Caperton,* 129 S. Ct. at 2257. The lower court's failure to credit this experience, some of which was recognized in *Caperton*, as evidence in support of West Virginia's disclosure laws is error, especially under the applicable exacting scrutiny standard. *See id.*

II. The District Court Erred in Striking Down West Virginia's Disclosure Requirements for Non-Broadcast "Electioneering Communications."

A. West Virginia and Other States are Nearly Unanimous in Requiring Disclosure of Non-Broadcast "Electioneering Communications."[12]

States have the authority and discretion to apply disclosure requirements to the types of political advertising used in their own elections. In many states—as in West Virginia—much of this state and local electioneering takes the form of advertisements that appear in media that candidates for federal office may not use extensively.[13] This is why West Virginia—like almost every

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[12] The current statute under review only addresses disclosure of advertising in newspapers, magazines and other periodicals. *See* W. Va. Code § 3-8-1a(11)(2011). However, an earlier version of this statute (enjoined by the district court in an earlier preliminary injunction decision, which was issued prior to the Supreme Court's decisions in *Citizens United, Doe v. Reed, and Caperton*) also covered direct mailing and other forms of non-broadcast media. *See* CFIF v. Tenant, Civil Action No. 1:08-cv-00190, 2011 U.S. Dist. LEXIS 78514, at *40-44. The same legal principles argued here apply to all of these forms of communications; this Court should broadly recognize West Virginia's authority to require disclosure of spending on all of the types of non-broadcast communications that are common in state and local elections.

[13] *See generally* W.Va. Code §3-8-1 (1)-(3), (7)-(12)(2011). West Virginia's legislative findings note that its state legislative and voting districts are smaller than its congressional districts; non-

other state to adopt a definition of "electioneering communication" inspired by the federal definition adopted in BCRA[14]—has defined electioneering communications to include at least some forms of non-broadcast media—even though the federal definition applies only to broadcast advertising. Indeed, it would have been surprising had West Virginia not made this decision: 19 of the 21 states to require disclosure of spending for "electioneering communications" include non-broadcast media in that definition.[15] Seventeen of those states, including West Virginia, include print advertising in their definition of "electioneering communications," and 16 states require the disclosure of spending on direct mail campaigns.[16]

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broadcast media are used to target relevant election audiences effectively, in these smaller districts, including newspapers and newspaper inserts, magazines and other periodicals; independent expenditures to influence campaigns in West Virginia increasingly use non-broadcast media; and a failure to regulate non-broadcast media would permit those desiring to influence elections to avoid the disclosure principles in West Virginia's law. Id.

[14] *See* Addendum for text of 2 U.S.C. § 434(3) (West 2011).

[15] *See* Appendix for a list of these states and the media covered by their respective disclosure laws.

[16] West Virginia had a similar requirement, which was removed from the definition of "electioneering communications" by

The district court's unnecessary and misguided search for additional evidence in the legislative record to support West Virginia's definition of electioneering communications reveals a failure to afford the judgment of West Virginia's legislature the appropriate deference required under exacting scrutiny. West Virginia (like those 18 other states) adapted federal standards to its own local conditions. As illustrated by the substantial testimonial record provided by the State in this litigation and the legislative findings in the statute, West Virginia legislators were well aware of how to adapt those standards to their elections.[17]

B. The District Court Erred in Demanding Additional Evidence and Fact-Finding from West Virginia's Legislative History.

Every other federal court to review a state "electioneering communications" definition has applied the proper legal analysis, and has upheld state definitions that go beyond the federal, broadcast-only definition.[18] This is unsurprising given the

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the legislature in 2010 in response to the preliminary injunction. *See* Appellants' Brief at 8-9 CFIF, 2011 U.S. Dist. LEXIS at *89.

[17] *See* Appellants' Brief 13-20.

[18] Federal courts in Florida, Hawaii, Illinois and Colorado have all upheld the constitutionality of state disclosure laws that, like

important public interest in transparency, and is entirely consistent with recent Supreme Court precedent.

In addition to embracing disclosure of money in politics generally, the *Citizens United* Court explained that the type of media used for political advertising was irrelevant to its constitutionality. 130 S. Ct. at 891 ("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.") The court below engaged in precisely this sort of impermissible line-drawing by finding that West Virginia's statute was overbroad for including non-broadcast media.[19]

West Virginia's law, extend beyond the federal definition in BCRA. *See Nat'l Org. for Marriage, Inc. v. Roberts*, 753 F. Supp. 2d 1217, 1219 (N.D. Fla. 2010); *Yamada v. Kuramoto*, Civil No. 10-00497 JMS/LEK, 2010 U.S. Dist. LEXIS 120795 at *15 (D. Haw. Oct. 29, 2010); *CRLC v. Davidson*, 395 F. Supp. 2d 1001, 1011 (D. Colo. 2005). The most recent of these, *CFIF v. Madigan*, C.A. No. 10-04383 (N.D. Ill. Nov. 3, 2011), was litigated unsuccessfully by one of the same plaintiffs that brought the present case.

[19] The court found the inclusion of periodicals "overbroad" because the state had not claimed that "large amounts of money are being spent for print electioneering communications." *Id.* at *89. Again, the relevant question is whether that disclosure requirement bears a "substantial relationship" to the interests West Virginia seeks to protect. *See Buckley*, 424 U.S. at 82-83. Print

The court acknowledged that federal courts in Florida and Hawaii have upheld disclosure statutes similar to West Virginia's, but it casually dismissed those decisions because they "presumably rest[ed] on sufficient legislative findings to justify the breadth of the regulations at issue." CFIF, 2011 U.S. Dist. LEXIS at *89. The district court's presumption is incorrect. In fact, neither opinion even questions the validity of including non-broadcast media in the definition of electioneering communications, even though those courts were plainly aware that the challenged laws include communications beyond the sweep of BCRA in their respective definitions. *See Nat'l Org. for Marriage, Inc. v. Roberts*, 753 F. Supp. 2d at 1218 (noting that plaintiff filed suit because it intended to send out a direct mailing); *Yamada,* Civil No. 10-00497 JMS/LEK, 2010 U.S. Dist. LEXIS 120795 (D. Haw. Oct. 29, 2010), at *8-100 (finding that plaintiff had standing because it had purchased newspaper

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electioneering communications are certainly in use in West Virginia and neither the Supreme Court nor the Constitution require that a state preserve a statutory gap of any size through which money from undisclosed contributors flows until *after* it sees a torrent of money from those evading other disclosure requirements moves through it.

advertisements during previous election cycle and wished to do so in the future). Nor have *other* district courts to consider this issue questioned the inclusion of non-broadcast media in "electioneering communications." *See CRLC Inc.*, 395 F. Supp. 2d at 1008 (indicating plaintiff's communications had historically included voter guides and prerecorded phone messages); *Madigan*, No. 10-C-4383, *slip op.* at 17-19 (discussing disclosure of Internet communications).

A review of the legislative history in each of these states shows that although their formal documentation of legislative proceedings is more extensive than that found in West Virginia, that documentation does not reflect substantive fact-finding regarding the definition of "electioneering communications."[20] Their legislative records do not contain information "justify[ing] the breadth of the regulations at issue" or facts showing how the inclusion of each type of media "bears a substantial relationship to

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[20] It is simply not the practice of the West Virginia legislature to include formal fact finding in its records of legislative deliberation. *See* CFIF, 2011 U.S. Dist. LEXIS at *13 Fn.6 ("The West Virginia Legislature does not provide any type of formal legislative history . . . ."); s*ee generally* Journal of the House of Delegates and Journal of the Senate.

the stated purpose of regulating electioneering communications." 2011 U.S. Dist. LEXIS 78514, at *89-90. For example, in Hawaii, the record did not even address the definition of "electioneering communication"[21] and there is no fact-finding in the bill reports.[22] Colorado's electioneering communication law originated from a voter initiative to amend the state constitution, rather than from the legislature, and thus lacks any legislative history.[23] The records in Florida[24] and Illinois[25] were similarly devoid of factual

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[21] *See e.g.,* Haw. State Legislature, HB2003 HD3 SD2, available at http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2003&year=2010.

[22] *See* Haw. State Legislature, Stand. Com. Rep. Nos. 404-10, 666-10, 2978.

[23] The Colorado 2002 Ballot Information Booklet distributed by the Legislative Council of the Colorado General Assembly provides a detailed description of the initiative and its impacts, but it also does not include any evidence regarding the definition of "electioneering communications." 2002 Ballot Information Booklet – Analysis of Stateview Ballot Issues (Draft), Legis. Council of CO Gen. Assemb., Research Pub. No. 502-1 (September 10, 2002).

[24] The legislative staff analysis of Florida's disclosure bill observed that the state's revised definition of "electioneering communication" included print media—but presents only a brief legal analysis of the definition, without any fact-finding regarding the extent of the use of various media for electioneering communications in Florida or any evidentiary justification for the inclusion of print media in the definition. *See* House of Representatives Staff Analysis H1207-H1207(d), Governmental Affairs Policy Committee (EDCA) (Mar. 10, 2010).

evidence supporting their chosen definition of "electioneering communications."

In short, the court below distinguished decisions from other district courts based on a completely unfounded assumption about the extent of legislative history or evidentiary fact-finding justifying the laws at issue in those decisions.[26] In fact, although the court dismisses the legislative findings in the preamble to West Virginia's disclosure statute as "conclusory" and "anecdotal," *CFIF,* 2011 U.S. Dist. LEXIS 78514, at *97, these findings provide far more support for the inclusion of non-broadcast

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[25] The legislative record of Illinois does not address the meaning of "electioneering communication" and the record does not reflect any formal fact finding on this issue, notwithstanding that the bill was the subject of spirited debate. *See e.g.,* Senate Journal, State of Illinois, 96th Gen. Assemb., 70th Legislative Day, at 192-211 (Oct. 29, 2009), *available at* http://www.ilga.gov/senate/journals/96/2009/SJ096070R.pdf; Senate Journal, State of Illinois, 96th Gen. Assemb., 71th Legislative Day, at 46-82 (Oct. 30, 2009), *available at* http://www.ilga.gov/senate/transcripts/strans96/09600071.pdf; Transcription Debate, 96th Gen. Assemb., House of Representatives, at 75-182 (Ill Oct. 29, 2009), *available at* http://www.ilga.gov/house/transcripts/htrans96/09600081.pdf.

[26] The fact that so many states have enacted statutes that go beyond BCRA itself provides insight; a large number of state legislatures have found disclosure of the funding for some types of non-broadcast communications to be substantially related to their state's, and the public's, interests.

communications in the definition of "electioneering communications" than can be found in either the formal legislative history or the statutes of Florida, Hawaii, Colorado or West Virginia. *See* W.Va. Code §3-8-1(2011); Appellants' Brief at 14-19; *compare* Fla. Stat. § 106.011 *et seq.*(2011)*;* 2010 Hi. ALS 211; ILCS 5/9-1 *et seq.*(2011); C.R.S.A. Const. Art. XXVIII, § 6 (2011).

Nor is there any legal basis for requiring West Virginia to create the type of substantive—and perhaps voluminous—record desired by and insisted upon by the court, particularly in light of the number of states which have made similar judgments and the extensive federal record illustrating the value of disclosure.[27] The

[27] The Supreme Court has specifically found, for example, that states may rely on federal fact-finding and legal analysis when evaluating their own campaign finance laws. In *Nixon v. Shrink Missouri Government PAC*, the Supreme Court upheld Missouri's contribution limits. 528 U.S. 377, 381-82, 391 (2000). Like West Virginia, the state did not even maintain legislative records; the Court took as sufficient a legislator's affidavit and news reports regarding fears of corruption. *Id.* at 393-94. The Court found that the case did "not present a close call," and that Missouri also was entitled to rely upon its law's federal counterpart to justify enactment. *Id.* at 393.

district court also failed to recognize that the legislature's decision may rest upon notice of information in the public domain.[28]

The district court erred in expecting West Virginia to produce a much more substantial record, perhaps approximating the vast federal record on disclosure. It should have, instead, deferred to the State's considered and well-founded legislative judgment of the means to achieve goals repeatedly recognized by federal courts as constitutionally sufficient to support disclosure requirements.

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[28] Courts, when reviewing a statute, may evaluate not only the formal legislative history of a statute, but also "the historical context of the statute" and "the specific sequence of events leading to passage of the statute." *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). Here, the legislature was well aware of the political spending described in in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2257 (2009). Moreover, the sequence of amendments to the West Virginia disclosure statute indicates that the legislature considered the decisions of this court and others, reflecting well-informed legislative deliberation. *See e.g., CFIF,* Civil Action No. 1:08-cv-00190, U.S. Dist. LEXIS 78514, at *8 -*21, *71-72, *100; Appellants' Brief at 3-9.

III. The District Court Erred in Substituting its own Judgment Regarding the Public's Interest in the Underlying Sources of Political Funding for that of the West Virginia Legislature.

The district court also failed to show proper deference to the West Virginia legislature regarding the state's source disclosure provision, W. Va. Code § 3-8-2b(b)(5)(2011). Pursuant to this law, when an organization spent over $5,000 on electioneering communications during the calendar year, or over $1,000 within 15 days of an election, it was required to reveal the names and addresses of each person who donated over $1,000 to it.[29] Here, too, the proper question for the district court was whether the law satisfies exacting scrutiny. *See, supra,* Sec. I.B.

In reaching the wrong answer to this question, the district court again ignored the teachings of *Buckley*. While discussing the possible burden created by a supposedly low threshold for reporting contributions, the *Buckley* Court observed that where to

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[29] Although this sum would nowhere be considered trivial, among the states and District of Columbia, West Virginia's median household income ranks 50 out of 51. *See* U.S. Census Bureau, *New American FactFinder*, *2006-2010 American Community Survey*, *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

draw the "line" in disclosure laws is "a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Buckley*, 424 U.S. at 84. Recently, the First Circuit upheld a disclosure provision under Maine's election laws that set the reporting threshold at only $100, noting that it has "granted judicial deference to plausible legislative judgments as to the appropriate location of a reporting threshold, and [has] upheld such legislative determinations unless they are wholly without rationality." *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60-61 (1st Cir. 2011), quoting *Buckley*, 424 U.S. at 83 (internal citations and quotations omitted). Here, the West Virginia legislature, well aware of the ways that big third-party spenders can shield their identities under organizational fronts, properly decided that, when an organization spends significant amounts to influence state elections, voters are entitled to know the identity of the group's significant financial backers.

As with the definition of "electioneering communications" discussed above, *see infra* § II.A, West Virginia's legislative judgment is entirely consistent with the approach of other states.

Most of the states that require disclosure of electioneering communications also require the disclosure of underlying contributions similarly, so that voters may truly follow the money behind independent electioneering campaigns. Furthermore, among states requiring such disclosure, only California (much more populous than West Virginia, wealthier, and home to some of the costliest elections in the nation)[30] set a threshold for disclosing contributions higher than West Virginia's $1,000 limit; while West Virginia is not alone among states in adopting the $1,000 threshold — North Carolina does so too — many states, including Alaska, Hawaii, Idaho, Maryland, Ohio, Oklahoma, Utah and Washington, set much lower thresholds or required disclosure of *all* contributions regardless of size.[31]

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[30] *See, e.g.,* William Welch, *California: Jerry Brown wins costliest governor race in U.S.*, USA Today, Nov. 3, 2010, *available at* http://www.usatoday.com/news/politics/2010-11-02-ca-governor_N.htm?loc=interstitialskip.

[31] *See, e.g.,* Alaska Stat. § 15.13.040(d)-(e) (requiring disclosure of contributions made for electioneering communications without any minimum thresholds); Cal. Gov't Code § 85310(a), (b) (requiring disclosure for electioneering communications above $50,000, including information on contributions above $5,000); Colo. Const. art. 28 § 6(1) (requiring disclosure for electioneering communications above $1,000, including information on

Additionally, the district court improperly *presumed* that W. Va. Code § 3-8-2b(b)(5)(2011) would burden or discourage speech without any record evidence: "It is apparent to the Court that requiring the disclosure of corporate or organizational contributors' personal information can be quite burdensome . . . ." *CFIF*, 2011 U.S. Dist. LEXIS 78514, at *166. But the Supreme

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contributions above $250); Haw. Rev. Stat. § 11-341(a), (b)(6) (requiring disclosure for electioneering communications above $2,000, including information on *all* underlying contributions); Idaho Code Ann. § 67-6630 (requiring disclosure by *any* person who makes an electioneering communication, including information on contributions above $50); Md. Code Ann., Election Law, § 13-307(b), (e)(5) (requiring disclosure for electioneering communications above $10,000, including information on contributions above $51); Mass Gen. Laws ch. 55, § 18F (requiring disclosure for electioneering communications above $250, including information on contributions above $250); N.C. Gen. Stat. § 163-278.81(a), (b)(5) (requiring disclosure for electioneering communications above $10,000, including information on contributions above $1,000); Ohio Rev. Code Ann. § 3517.1011(D)(1) (requiring disclosure for electioneering communications above $10,000, including information on contributions above $200); Okla. Stat. tit. 74, ch. 62, app. 257 § 10-1-16(c)(1), (2) (requiring disclosure for electioneering communications above $5,000, including information on contributions above $50); Utah Code Ann. § 20A-11-101(12)(a), 901(2)(b)(ii) (requiring disclosure of electioneering communications above $10,000, including information on contributions above $100); Wash. Rev. Code § 42A.17.305(1) (requiring disclosure for "any" electioneering communication, including information on contributions above $250).

Court has repeatedly refused to create exceptions to generally-constitutional disclosure regimes without strong evidence of likely injury. *See Buckley*, 424 U.S. at 71-72 (citing *NAACP v. Alabama*, 357 U.S. 449, 458 (1958) and *Bates v. Little Rock*, 361 U.S. 516, 523 n. 9 (1960)) (rejecting as-applied challenge to disclosure requirement by minor parties and independents due to insufficient evidence of threats or harassment); *McConnell* , 540 U.S. at 200-201 (rejecting challenge to disclosure because there was no evidence of alleged injury); *Doe v. Reed*, 130 S. Ct. at 2820-21 (rejecting challenge to mandated disclosure of referendum petition signers because signers failed to establish that intimidation would likely occur with the majority of referendum petitions).

In addition to applying the wrong legal standard, the district court prescribed a faulty policy in place of the law chosen by West Virginia's elected legislature. Specifically, the court declared that only those donors who expressly earmarked their contributions for use in political advertising would be required to disclose their identities, as if this was sufficient to satisfy West Virginia's

important and legitimate interests, as described in *Citizens United*, *Buckley, McConnell, Doe v. Reed, inter alia.*

This holding was incorrect as a matter of law, and extremely ill advised as a matter of policy. First, even if West Virginia's source disclosure statute were unconstitutional—which it is not—the court should have given the State the chance to devise a solution before mandating its own policy preference. *See e.g., Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988) ("It is now established beyond challenge that upon finding a particular standard, practice, or procedure to be contrary to either a federal constitutional or statutory requirement, the federal court must grant the appropriate state or local authorities an opportunity to correct the deficiencies."); *Alexander S. v. Boyd*, 876 F. Supp. 773, 803-04 (D. S.C. 1995); *see also Faulkner v. Jones,* 10 F.3d 226, 240 (4th Cir. 1993) (Hamilton, J., dissenting).

Second, the court's "solution" has already shown itself to be wholly ineffective and inadequate in furthering the informational interest of voters. In 2007, an amendment to the FEC rules added a similar earmarking provision to federal law—with the effect of

almost completely gutting the prior federal disclosure regime. *See* Symposium, *Citizens United at Age One: Panel Discussion #2: The Impact of Citizens United on Corporate Expenditures in the 2010 Midterm Elections*, 26 J.L. & Pol. 575, 584 (2011) (remarks of former Federal Election Commission Chair Trevor Potter). As a result, "[i]n 2006, 97% of reports identified the donors or funders. In 2010, it was 31% . . . [A]nd in 2012, that will be maybe 1%." *Id.* at 584.

Today, it is "easy for many organizations that spend significant sums on electioneering communications to avoid disclosing their donors," simply by declining to earmark donations for specific electioneering communications." Richard Briffault, Two Challenges for Campaign Finance Disclosure After *Citizens United* and *Doe v. Reed*, 19 Wm. & Mary Bill Rts. J. 983, 985 (footnotes omitted).

Even the FEC has recognized the current rule's ineffectiveness, acknowledging that

> [P]ersons making electioneering communications disclosed the sources of less than 10% of the $79.9 million in electioneering communications made in

> 2010, that the ten persons spending the most on electioneering communications during that period disclosed the sources of approximately 5% of the funds used for their electioneering communications, and that only three of those ten persons disclosed the sources of at least some of the funds they spent on electioneering communications.

Van Hollen v. FEC, Defendant's Answer, 1:11-cv-00766-ABJ (June 21, 2011) (D.D.C. 2011), available at http://www.fec.gov/law/litigation/van_hollen_fec_answer.pdf. The FEC also admitted that the "U.S. Chamber of Commerce reported spending more than any other person on electioneering communications in 2010…." *Id.* Yet, the U.S. Chamber of Commerce discloses *none* of its donors. *See* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 26 NEXUS: Chap. J. L. & Pol'y 59, 91 (2011).

By forcing the same earmarking rule upon West Virginia, the district court's decision threatens to destroy the effectiveness of the State's disclosure regime, thereby sacrificing the integrity

and transparency of its elections and the First Amendment rights of its voters seeking to make informed choices.

In short, the district court's substitution of its own policy judgment for that of the Legislature was legal error.

CONCLUSION

For the reasons explained herein, *amici* urge the Court to grant the State of West Virginia's appeal in its entirety.

Respectfully submitted,

APPENDIX

STATE	STATUTES DEFINING ELECTIONEERING COMMUNICATIONS	DEFINITION EXPANDS ON BCRA BY INCLUDING COMMUNICATIONS OUTSIDE BROADCAST MEDIA	DEFINITION INCLUDES PRINT MEDIA	DEFINITION INCLUDES DIRECT MAIL	NOTES
AK	ALASKA STAT. § 15.13.400(3), (5)	Y	Y	Y	
AZ	ARIZ. REV. STAT. ANN. § 16-901.01(A)	Y	Y	Y	
CA	CAL. ELEC. CODE § 304; CAL. GOV'T CODE § 85310	Y	Y	Y	
CO	COLO. CONST. art. 28 § 2(7)(a)	Y	Y	Y	
CT	CONN. GEN. STAT. § 9-601b(a)(2)	Y	Y	N	
FL	FLA. STAT. § 106.011(18)(a)	Y	Y	Y	
HI	HAW. REV. STAT. § 11-341(c)	Y	Y	Y	
ID	IDAHO CODE ANN. § 67-6602(f)(1)	Y	Y	Y	
IL	10 ILL. COMP. STAT. 5/9-1.14(a)	Y	N	N	
ME	ME. REV. STAT. tit. 21-A § 1014(1), (2-A)	Y	Y	Y	

STATE	STATUTES DEFINING ELECTIONEERING COMMUNICATIONS	DEFINITION EXPANDS ON BCRA BY INCLUDING COMMUNICATIONS OUTSIDE BROADCAST MEDIA	DEFINITION INCLUDES PRINT MEDIA	DEFINITION INCLUDES DIRECT MAIL	NOTES
MD	MD. CODE ANN., Election Law, § 13-307(3)(i)	N	N	N	
MA	MASS GEN. LAWS ch. 55, § 1	Y	Y	Y	
NC	N.C. GEN. STAT. § 163-278.6(8j)	Y	N	Y	
OH	OHIO REV. CODE ANN. § 3517.1011(A)(7)	N	N	N	
OK	OKLA. STAT. tit. 74, ch. 62, app. 257 § 1-1-2	Y	Y	Y	
SC	S.C. CODE ANN. § 8-13-1300(31)	Y	Y	Y	Definition includes all advertising broadcast over television or radio; direct mail; and "any paid advertisement that costs more than five thousand dollars" in any other communication medium.

STATE	STATUTES DEFINING ELECTIONEERING COMMUNICATIONS	DEFINITION EXPANDS ON BCRA BY INCLUDING COMMUNICATIONS OUTSIDE BROADCAST MEDIA	DEFINITION INCLUDES PRINT MEDIA	DEFINITION INCLUDES DIRECT MAIL	NOTES
SD	S.D. CODIFIED LAWS § 12-27-17	Y	Y	Y	Definition includes any communication costing $1,000 or more "that is disseminated, broadcast, or otherwise published within sixty days of an election."
UT	UTAH CODE ANN. § 20A-11-101(12)	Y	Y	Y	
VT	VT. STAT. ANN. tit. 17, § 2891, 2893	Y	Y	Y	
WA	WASH. REV. CODE § 42.17.020 (effective until Jan. 1, 2012); Wash. Rev. Code § 42A.17.005(19) (effective Jan. 1, 2012)	Y	Y	Y	
WV	W. VA. CODE ANN. § 3-8-1A(11)	Y	Y	N	

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

December 28, 2011 /s/ David S. Turetsky
David S. Turetsky

CERTIFICATE OF SERVICE

I, **David S. Turetsky**, do hereby certify that on the 28th day of December, 2011, the Brief of *Amicus Curiae* was hereby electronically filed using the ECF/CM system with hard copies to follow by overnight courier to the Clerk of the United States Fourth Circuit Court of Appeals.

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ADDENDUM

2 U.S.C. § 434(3) (West 2011).

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which--

(I) refers to a clearly identified candidate for Federal office;

(II) is made within--

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.