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# Transparent Elections after *Citizens United*

*By Ciara Torres-Spelliscy*

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## EXECUTIVE SUMMARY

Where do disclosure laws stand post-*Citizens United*? What does the 2010 U.S. Supreme Court ruling mean for state-based laws? And are disclosure laws constitutionally sound?

This report examines these questions and urges transparency through modest changes to state-based election laws. The report finds that recent Supreme Court decisions reaffirm the constitutionality of disclosure—and show an ongoing need to promote transparency in the money in politics realm.

The first part of the report offers a primer on campaign finance laws in 2011. In case after case, the U.S. Supreme Court has upheld the constitutionality of both disclaimers and disclosures for two types of political ads: (1) independent expenditures which expressly advocate for or against a candidate and (2) electioneering communications.

The second part of the report shows an urgent need for states to improve their disclosure laws in the wake of the *Citizens United* decision. In 24 states, new political players are now allowed into elections. Yet even in states that were not directly affected by the recent Supreme Court ruling, there is an urgent need to ensure that extant disclosure laws are in step with the way modern elections are conducted. Moreover, this report shows that states focus not only on spending by candidate committees and political parties, but also on outside spending by interest groups which is done independently of candidates or parties.

The third section explores the Constitutional interests states have in providing the voting public with robust disclosure of the sources of money in politics including:

- The Voter Informational Interest in Candidate Elections;
- The Anti-Corruption Interest in Candidate Elections;
- The Anti-Circumvention Interest in Candidate Elections;
- The Electoral Integrity Interest in Ballot Initiatives; and
- The Due Process Interest in Judicial Elections.

Policy suggestions are laid out in part four of this report. First, mimicking the campaign finance reporting that is required in federal elections, states should adopt laws to capture the funders of independent expenditures. Second, states should adopt disclosure for electioneering communications (or what are often known as "sham issue ads"). However, these disclosure laws should be crafted carefully to avoid capturing tiny political expenditures in state elections. Third, states can consider adopting disclosure laws that are more expansive than federal laws. For example, the federal law does not currently regulate electioneering communications that appear in print. But states may have many valid reasons for requiring disclosure of non-broadcast sham issue ads.

Given the expanded use of non-profits to veil political spending, states need to take a hard look at whether their current disclosure laws capture this type of spending adequately. Examples from California and Minnesota show how states might tackle this thorny issue through reporting requirements. An example from Connecticut also shows how states may achieve transparency through the use disclaimers which name top funders in the political ad itself.

Finally, this report encourages accountability for corporate political spending through modest changes to states' corporate laws in addition to changes to their elections laws. These changes could include requiring companies to provide shareholders with a comprehensive list of political spending on a periodic basis and/or allowing shareholders the ability to vote on a corporation's future political budget.

## Conclusion

This report concludes that the *Citizens United*, *Doe,* and *Caperton* cases reaffirm both the constitutionality of disclosure and the continuing need for transparency around who is funding election battles. Consequently, states have wide latitude to require disclosures not only from classic political committees, but also any entity funding independent expenditures or electioneering communications in future state elections.

## INTRODUCTION – THE POST-*CITIZENS UNITED* LEGAL LANDSCAPE

> "The diffusion of information … at the bar of public reason, I deem [one of] the essential principles of our government, and consequently [one of] those which ought to shape its administration."
>
> –Thomas Jefferson, First Inaugural Address, 1801

Disclosure of campaign spending is fully constitutional. Over the past three decades, the U.S. Supreme Court, as well as lower courts, have repeatedly and consistently upheld state and federal laws requiring disclosures of who is spending money in politics.

But one recent change in campaign finance law makes disclosure laws in the 50 states all the more important. For the first time in decades, corporations and unions can now spend freely in federal elections and certain state elections, all due to *Citizens United v. FEC*. This single Supreme Court decision changed the law in more than 20 states that previously had banned this type of political spending.

In the wake of *Citizens United*, states should anticipate an uptick in corporate and/or union-sponsored political ads in state elections. Furthermore, policy makers should realize that political spending by corporations and unions may not be done directly. Instead, to hide their involvement in elections, these groups may spend through intermediaries such as nonprofit organizations. Therefore, states may need to adapt their existing campaign finance laws to fully capture who is funding political ads in state races.

There are two basic types of campaign finance disclosure: (1) entity-wide and (2) event-triggered disclosure. Entity-wide disclosure requires a full accounting of every dollar in and every dollar out of the entity. This type of disclosure applies to political committees, including candidate committees and party committees. Meanwhile, event-triggered disclosure is prompted by the purchase of certain classes of political advertisements. Since others have written about entity-wide disclosure, this report focuses on the proposed changes in event-triggered disclosure requirements by outside groups—such as corporations, unions, and nonprofits—that purchase political advertisements.

Each state has a unique disclosure regime, so each state needs to do an assessment of what improvements it needs after *Citizens United*. As a baseline, here are some standard requirements that every state should have in place: (1) timely and clear disclosure from (a) political committees (including candidate and party committees); (b) any entity that pays for independent expenditures; (c) and any entity that pays for electioneering communications; as well as (2) "stand-by-your-ad" disclaimers on the face of political ads, listing the ad's top donors.

This report will start with a primer of campaign finance law, then it will discuss why disclosure laws should be strengthened in light of *Citizens United* and the secretive 2010 election. Next, it will explore the overwhelming constitutionality of disclosure under the most recent campaign finance jurisprudence. Finally, this report will offer state policy solutions for new disclosure laws.

# I. CAMPAIGN FINANCE DISCLOSURE IN A NUTSHELL

To understand what types of political ads can be constitutionally regulated at the state level, one must first understand federal disclosure laws. The Supreme Court has said repeatedly that election ads about federal candidates can be regulated, but ads about generic national policy choices cannot.[1] But the confusion about what can and cannot be regulated persists. This report will attempt to lessen that confusion, but let's begin with a few basic definitions. There are two types of election advertisements that can be constitutionally regulated at the federal level: "independent expenditures" and "electioneering communications."[2]

What are federal independent expenditures? In layman's terms, they are political ads, produced independently of a candidate, that say clearly and unequivocally, in so many words, "Vote Quimby!" (or alternatively, "Don't Vote Quimby!"). Independent expenditures contain "magic words of express advocacy," which come from a 1976 Supreme Court case, *Buckley v. Valeo*'s footnote 52, which listed examples of words that would render an ad subject to regulation under the Federal Election Campaign Act (FECA). The *Buckley* list includes: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."[3] A basic rule of thumb is if an ad says the word "vote" and shows or names a federal candidate, but was produced independently of a candidate, it is an independent expenditure and can be regulated regardless of the medium used or the day in the election cycle. This means its sponsors can be required to file with the Federal Election Commission (FEC), revealing the name of the sponsor and the source of the ad's funding.[4] "Vote Quimby!" ads can also be subject to source restrictions, such as the prohibition on foreign money in federal elections, so long as Quimby is a candidate for federal office.

*Buckley* upheld FECA's disclosure requirements for independent expenditures, but limited this disclosure to the magic words express advocacy.[5] As a result, from 1976 to 2002, hundreds of millions of dollars of corporate and union treasury funds—money that could not legally be used to influence elections at the time—poured into federal campaign ads through the "sham issue ad" loophole.[6] These ads feature a candidate close to an election but avoid *Buckley*'s magic words. To plug this loophole, and other federal loopholes, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), which created a new category of ads—called electioneering communications—which are subject to regulation and disclosure.

What are electioneering communications? Under federal law, "electioneering communications" are defined as "any broadcast, cable, or satellite communication that . . . refers to a clearly identified candidate . . . within 60 days before a general election . . . or within 30 days before a primary. . . [and that] can be received by 50,000 or more persons [in the candidate's constituency]."[7] If Bob is a candidate for federal office, these ads do not have to contain express advocacy words like "Vote for Bob." But in laymen's terms, an electioneering communication is typically an ad that trashes the candidate on election eve. In other words, these are the "Bob is the Devil and every policy Bob stands for is wrong" TV and radio ads that run in the 60 days before a general election or 30 days before a primary. Once an ad is deemed a federal electioneering communication, it is subject to federal disclosure requirements, including reporting to the government within 48 hours of funds being obligated to buy the ad. The Supreme Court upheld disclosure of electioneering communications both in *McConnell v. FEC* and in *Citizens United v. FEC* by a vote of eight to one.

To sum up, when it comes to ads about federal candidates, government can regulate the "Vote Quimby!" ads in any media at any time, and the "Bob is the Devil!" broadcast ads if those ads air in weeks running up to an election. As federal law stands now, any ad falling outside these two categories is beyond the reach of the FEC's regulation. Should Congress broaden the definition of electioneering communications, then more political ads may be subject to regulation in the future.

Of course, the question of how to regulate election ads is not unique to the federal government. In the 50 states, as political spenders continue to find creative ways to evade disclosure requirements, regulators also struggle to give their electorates transparency. However, state-level regulation is more multifaceted because 39 states must contend with judicial elections, and half of states allow for ballot initiatives, neither of which has a federal analog. Consequently, one of the perpetual questions for state election regulators is: "Are federal regulations a floor or a ceiling?" This is an issue where lower courts have split. This report will also attempt to show where the courts are heading on this question of the permissible scope of state regulations.

REFORM MAY TAKE ONE STEP AT A TIME, ADDRESSING ITSELF TO THE PHASE OF THE PROBLEM WHICH SEEMS MOST ACUTE TO THE LEGISLATIVE MIND.

Since 2002, 17 states adopted regulations of electioneering communications. Some were quite similar to the federal approach, and some were more inclusive in that they covered more days on the calendar, applied to ballot measures as well as candidates, or included additional media, such as print advertisements and other common channels of communication. Providing coverage of non-broadcast ads is appropriate because a significant portion of political ads in low-dollar state elections are not broadcast, due to the considerable expense in many media markets.[8] Moreover, the Supreme Court indicated that current federal rules are only a floor, and not a ceiling, on what could potentially be regulated. As the Supreme Court noted, "[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[9]

## II. THE RENEWED NEED FOR UP-TO-DATE STATE DISCLOSURE LAWS

Why do many states need to update their campaign finance disclosure laws? The general election in 2010 shows what can and does go wrong when out-of-date campaign finance laws collide with sophisticated modern campaign techniques. Leading up to the 2010 general election, news articles chronicled how little disclosure there was of independent spending in the federal election.[10] One report found more than one-third of the spending in the federal race was "dark."[11] Much of this undisclosed spending in the federal election was done through social welfare organizations (501(c)(4)s) and trade associations (501(c)(6)s).[12] (These two types of tax-exempt nonprofits are allowed to do a certain amount of partisan politicking, unlike 501(c)(3)s which are not permitted to do any partisan politicking). This hidden spending also occurred in state elections in 2010, albeit at a smaller scale.[13]

Many states' disclosure laws simply have not kept pace with the way modern political campaigns are conducted. Too many states have laws based on the outdated premise that candidates and political parties are the primary spenders in an election. This can be true. But increasingly, outside groups—including out-of-state groups—who wish to drive the outcomes of elections, will fund media blitzes, including broadcast political ads whose cost can dwarf the spending of the candidate herself. Many states have not adapted to the many ways political spenders spend. Some states lack a clear definition of independent expenditures or do not require reporting of independent expenditures. Some states are very good about requiring reporting of independent expenditures, but do not capture "sham issue ads." This latter group of states should borrow and adapt the federal definition of electioneering communications.

Before *Citizens United*, 24 states barred either union or corporate political expenditures.[14] *Citizens United* rendered these laws unconstitutional. Consequently, corporations and unions have a new right to spend in states where they were previously barred. Also, corporations and unions are no longer restricted to spending through transparent political action committees (PACs). Therefore, in approximately half of the states, the number of entities that could potentially fund future political ads has jumped significantly, while transparency is on the wane.

States need to grapple with the fact that political spending may not continue to go through political committees. Therefore, a reporting regime that only captures PAC spending may miss the lion's share of political spending. Trade associations, which themselves were required to use a PAC in many states pre-*Citizens United*, have also been unleashed. Here there is a multiplier effect. On the one hand, corporations are free to pay unlimited money to trade associations directly from their corporate treasuries. And, on the other hand, trade associations themselves can spend an unlimited amount directly from the trade association's treasury on political ads. Because of their tax status, donors to trade associations are presumptively confidential under tax reporting regulations. In other words, these nonprofits report the sources of their money to the IRS, but statutorily the IRS is not permitted to share this information with the public. As a result, if state campaign finance disclosure laws do not capture this political spending, the public cannot rely on the IRS to disclose spending by 501(c)(4)s and 501(c)(6)s. Consequently, states need to be explicit that nonprofits, including trade associations, are also subject to reporting, and those underlying donors who fund political ads will be reported. These campaign finance reports will allow the press to collect information about candidates and their supporters and to shine light on contributions.

States do not have to have dark elections where no one can tell the source of political spending. As will be discussed in more detail below, Minnesota changed its laws after *Citizens United* to provide transparency around political spending by corporations.[15] During the 2010 governor's election in Minnesota, the public learned before the election that corporate donors Target, 3M, and Best Buy all provided indirect funding of a particular candidate for governor.[16] This allowed the public to take this financial support into account when assessing the candidates.[17] As it turns out, the candidate supported by the corporate donations lost in a very close election.[18] Meanwhile, shareholders in these companies were also able to demand accountability for this spending.[19]

STATES DO NOT HAVE TO HAVE DARK ELECTIONS WHERE NO ONE CAN TELL THE SOURCE OF POLITICAL SPENDING.

States need to examine their disclosure laws to see if they are capturing the type of political spending that is currently happening. If their laws are out of date, *Citizens United* provides an opportunity to revisit and revise them. Improving disclosure laws reflects the desire of the electorate as well. An overwhelming majority of Americans want full disclosure of campaign contributors—92 percent, according to a *New York Times-CBS News* poll taken the week before the 2010 general election.[20] However, adapting state laws post-*Citizens United* should be done with care. The same groups and their lawyers who brought suits challenging other campaign finance laws, like *Wisconsin Right to Life II* and *Citizens United,* are also targeting campaign finance disclosure, and they are likely to continue their efforts to challenge old and new disclosure laws.[21] Therefore, states need to update their disclosure laws with care to survive constitutional challenge.

# III. THE CONSTITUTIONAL JUSTIFICATIONS FOR DISCLOSURE

The good news for reform-minded legislators (as well as state attorneys general defending disclosure laws) is that, in a range of cases, the Supreme Court has endorsed disclosure of political spending. As early as the middle of the twentieth century, the Supreme Court permitted mandatory lobbyist disclosure of "direct communications with members of Congress on pending or proposed federal legislation."[22] The Supreme Court held that there was a state interest in allowing legislators to evaluate lobbying pressures by providing "information from those who for hire attempt to influence legislation."[23]

The Supreme Court has made clear that the state has constitutionally important and compelling interests in requiring those who fund political ads to reveal their true identity to the voting public. In the campaign finance context specifically, since *Buckley*, the Court has consistently recognized that disclosure of political spending serves three distinct state interests: It (1) "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office;" (2) "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "[is] an essential means of gathering the data necessary to detect violations of the contribution limitations."[24] These are known as the voter informational interest, the anti-corruption interest, and the anti-circumvention interest, respectively, which will be discussed in greater detail below. Furthermore, when political spending is done by a corporation, shareholders have an interest in transparency. In addition, there is also the interest in the integrity of ballot measures (identified in *Doe v. Reed*), and the special due process interests in transparency in state judicial elections (identified in *Caperton v. Massey*).

## Voter Informational Interest in Disclosure

The key state interest served by campaign finance disclosure laws is informing the public who paid for a given political ad so that the voter can take that information into account while assessing the ad and its argument about the upcoming election. As the Supreme Court noted in 2010 in *Citizens United*, campaign finance disclosure enables an informed electorate to weigh the political ads they view in an election cycle: "The First Amendment protects political speech; and disclosure permits citizens … to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[25] The Court indicated that federal campaign finance disclosures "help citizens make informed choices in the political marketplace."[26] In particular, disclosure of who is funding political speech may reveal the affiliations of the politicians who benefit, or as the Supreme Court wrote, citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."[27]

*Citizens United* also acknowledged that twenty-first century technology makes campaign finance information instantaneously available for average citizens and is therefore all the more empowering, noting "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide… citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[28]

The Supreme Court in *McConnell* was particularly persuaded by the voters' informational interest in knowing who was funding political ads so they could make informed decisions at the ballot box. The Court commented specifically on the subterfuge of outside groups seeking to influence elections, and emphasized the importance of competing First Amendment values that lead voters to make knowledgeable decisions at the ballot box:

> BCRA's disclosure provisions require [] organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections.… Curiously, Plaintiffs want to preserve the ability to run these advertisements 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), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). . . .[29]

The Supreme Court further noted that "the required disclosures … would perform an important function in informing the public about various candidates' supporters before election day."[30] Both *Citizens United* and *McConnell* relied primarily on the voter informational interest to uphold BCRA's disclosure requirements for electioneering communications.

## Anti-Corruption Interest in Disclosure

Writing on the heels of the Watergate scandal, which involved hidden illegal cash campaign contributions,[31] the Supreme Court in *Buckley* held that disclosure serves a potent anti-corruption interest. As the Court noted: "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election."[32] The availability of this campaign finance information enables the public to police the actions of elected officials *vis a vis* their political funders. As the Court argued, "A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[33]

The Court in *Buckley* deferred to Congress' judgment that disclosure was needed to prevent some of the quid pro quo campaign finance abuses that had come to light during the investigations of the Nixon White House. As *Buckley* concluded, "Congress could reasonably conclude that full disclosure during an election campaign tends 'to prevent the corrupt use of money to affect elections.'"[34] *Buckley* also noted that information is a weapon for good governance: "We have said elsewhere that 'informed public opinion is the most potent of all restraints upon misgovernment.'"[35]

## Anti-Circumvention Interest in Disclosure

The Supreme Court also noted that disclosure of campaign finance served an anti-circumvention interest. As the Court found, "[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations."[36] The Court rightly noted that it would be well neigh impossible to enforce other campaign finance laws like contribution limits unless political spending was transparent.

Circuit courts have likewise found an anti-circumvention interest in disclosure. For example, as the D.C. Circuit wrote in *SpeechNow*, "[R]equiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals."[37] The *SpeechNow* plaintiffs appealed their loss on disclosure to the Supreme Court.[38] The Supreme Court denied SpeechNow's petition for certiorari, thereby leaving the D.C. Circuit's endorsement of disclosure intact.[39]

The Ninth Circuit also embraced the governmental interest in anti-circumvention when reviewing the Washington State Disclosure Law. The Ninth Circuit noted the law "addresses the 'hard lesson of circumvention' that has historically plagued the campaign finance context. … *McConnell*, 540 U.S. at 176 ('Experience under the current law demonstrates that Congress' concerns about circumvention are not merely hypothetical.')."[40]

## Electoral Integrity Interest in Disclosure

In addition to the three governmental interests in disclosure in candidate elections listed above from *Buckley*, the Supreme Court has added the state's interest in the integrity of the ballot measure process in *Doe v. Reed*. Here, the Court upheld a Washington State law allowing for public disclosure of the names of petition signatories against the plaintiff's facial challenge. The Court said that Washington State's disclosure of these names helped the government to maintain the integrity of the election process. As Chief Justice Roberts wrote: "The State's interest in preserving the integrity of the electoral process is undoubtedly important. States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."[41]

The Supreme Court was particularly solicitous when it came to the power of the state to protect its elections from fraud and from the resulting cynicism by the electorate. As the Chief Justice noted, "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It drives honest citizens out of the democratic process and breeds distrust of our government."[42] But as the Supreme Court also made clear in *Doe v. Reed*, rank fraud was not the only interest implicated by disclosure. In *Doe,* the Court found that the state's interest "extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake…."[43] As the Supreme Court noted in *Doe v. Reed*, disclosure is necessary within the referendum process to ensure only legally sufficient ballot measures are placed before the electorate for a vote. As *Doe* noted: "Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process."[44]

THE LOGIC OF *CITIZENS UNITED* AND *DOE V. REED* STAND FOR SIMILAR PRINCIPLES—THAT ELECTIONS ARE SPECIAL CIRCUMSTANCES WHERE A RIGHT TO ANONYMOUS SPEECH MUST GENERALLY GIVE WAY TO GOVERNMENTAL INTERESTS IN THE OVERALL INTEGRITY OF THE DEMOCRATIC PROCESS OF ELECTING CANDIDATES ON THE ONE HAND, OR PUTTING A REFERENDUM TO A PUBLIC VOTE ON THE OTHER.

The logic of *Citizens United* and *Doe v. Reed* stand for similar principles—that elections are special circumstances where a right to anonymous speech must generally give way to governmental interests in the overall integrity of the democratic process of electing candidates on the one hand, or putting a referendum to a public vote on the other. Lower courts have been quick to pick up the new pro-disclosure language from *Citizens United* and *Doe* to uphold disclosure laws before the 2010 election. Two Circuit Courts have upheld state and federal disclosure laws.[45] Also, seven federal district courts across the country have upheld state disclosure laws post-*Citizens United* and *Doe* against election eve-challenges in 2010.[46] Again and again, in state after state, federal courts have come to nearly the identical conclusion that campaign finance disclosure laws are perfectly constitutional.

## Due Process Interest in Disclosure in Judicial Elections

Because Article III federal judges are appointed, states have one kind of election that lacks a federal analog: state judicial elections. In 39 states, judges—or in some states, Supreme Court Justices—are elected either directly in partisan elections, nonpartisan elections, or retention elections.[47] This gives states an additional reason to have robust disclosure laws in place for all elections. As the Supreme Court explained in *Caperton v. Massey*, when a litigant spends a particularly large amount in a judicial race, the elected judge may be constitutionally required to recuse himself from cases involving that litigant in the interest of due process. However, a litigant may not know when to make a *Caperton* motion requesting recusal unless he knows for certain that the opposing party bankrolled the judge's election campaign.[48]

In sum, *Caperton* provides litigants with a procedural due process right to request recusal of a financially interested judge and defines the understanding of these financial interests broadly as including campaign contributions and independent expenditures. As Justice Kennedy wrote for the majority, concluding that the West Virginia Supreme Court Justice in question was compelled to recuse himself from a decision involving a litigant who made very large political expenditures in support of his judicial election campaign, "We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[49] Justice Kennedy explained that when judges are elected, they must be cognizant of whether campaign contributors are a source of bias.[50]

Importantly, the Court looked beyond CEO Blankenship's direct contribution to candidate Benjamin's campaign committee.[51] Blankenship contributed $1,000, the maximum amount allowed under West Virginia law, to candidate Benjamin, which he was required to disclose.[52] Blankenship additionally contributed nearly $2.5 million to a political organization registered under § 527 of the federal tax code called "And for the Sake of the Kids," which spent the money on independent expenditures in opposition to Benjamin's opponent.[53] Blankenship also spent more than half a million dollars in independent expenditures that he was required to disclose because they were electioneering communications.[54] In the opinion, Justice Kennedy quoted from campaign finance disclosure reports filed with West Virginia. Without disclosure of such expenditures, it would not have been apparent to the Supreme Court or the parties in the case that millions in campaign money had come from the opposing litigant.[55] Thus, the *Caperton* due process right to recusal of a potentially biased elected judge is utterly dependent on the adequacy of disclosure of who pays for political advertisements in judicial elections, including independent expenditures and electioneering communications.

# IV. POLICY SUGGESTIONS

With very different disclosure laws in place, each state needs to assess what improvements are needed in light of current, local conditions. After holding legislative hearings to establish the spending patterns in state elections, states should consider adopting disclosures of who is sponsoring independent expenditures and electioneering communications, regardless of tax status, as well as the sponsors' underlying funders. Below are policy suggestions for covering the most likely outside spending in a state election. Model bills can be found at the Campaign Disclosure Project.[56]

## Independent Expenditures Disclosure

Independent expenditures are advertisements that support or oppose a candidate for office by using *Buckley v. Valeo*'s "magic words" of express advocacy.[57] As explained earlier, these ads must be produced independently of candidates; otherwise they risk being deemed illegal campaign contributions. Under Supreme Court precedence, political ads that are coordinated with a candidate are deemed to be contributions to that candidate's campaign. States can adopt a similar definition of independent expenditures to the federal definition, which applies to advertisements that (1) expressly advocate the election or defeat of a candidate and (2) are produced without coordination with a candidate. If it does not already have one, the state should also add a clear definition of "coordination."

Even though federal law has regulated independent expenditures for decades, there are still states, including large states like New York, where these ads remain essentially unregulated. In these states, independent ads promoting or denigrating candidates for state office bombard voters, but groups can fund these ads without disclosing their spending.[58] Therefore, any state that is considering new disclosure requirements for political ads should include disclosure of those who fund independent expenditures over a certain dollar threshold. These independent expenditure sponsors should report their identity to the state and report underlying donors who funded the ad over a certain dollar threshold.

Setting thresholds for disclosure should be calibrated to local conditions. For example, a state could adopt the federal reporting thresholds of $250 dollars. However, it should be noted that the federal thresholds were set in the 1970s and have never been adjusted for inflation. Thresholds could be higher in high-cost states and lower in low-cost states. Disclosure laws should not trap the unwary or entangle tiny groups of people spending relatively small amounts of money. Courts are increasingly hostile to disclosure regimes that capture "small fish" who spend very little money on a political ad, like a small stack of leaflets. With that in mind, legislators should set thresholds designed to capture the lion's share of spending in a state. Gathering legislative testimony from political consultants about the actual amounts spent on political ads will help legislators craft thoughtful disclosure thresholds.

Courts have long held that disclosure should be excused where it only captures *de minimis* spending in elections.[59] This *de minimis* exception still applies after *Citizens United*. Most recently, the Tenth Circuit was quite unsympathetic to a disclosure law in Colorado affecting the actions of a few neighbors seeking to fight a local annexation. As the Court argued, "It is unlikely that the Colorado voters who approved the disclosure requirements … were thinking of the [plaintiff neighbors]."[60] The Tenth Circuit found Colorado's disclosure law unconstitutional as applied to a group of six neighbors who raised less than $2,000 in cash in a ballot measure fight.[61] The Court said that when balancing the public's right to know against the plaintiffs' associational rights, there was not a sufficient state interest to justify the burden on association: "[T]he burden on Plaintiffs' right to association imposed by Colorado's registration and reporting requirements cannot be justified by a public interest in disclosure. The burdens are substantial. The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements."[62]

One aspect of the case the Tenth Circuit found weighed heavily against upholding disclosure was the dollar amounts involved were so small and most of which were spent on attorneys fees to comply with the law.[63] As the Tenth Circuit noted, "The expenditures in this case …are sufficiently small that they say little about the contributors' views of their financial interest in the annexation issue."[64] Therefore, the Court concluded, "[T]he financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not non-existent, in light of the small size of the contributions."[65]

However, *Sampson* took pains to note they were not excusing big spenders from disclosures. Instead the court articulated a narrow exception to *de minimis* spending. "We do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures. The case before us is quite unlike ones involving the expenditure of tens of millions of dollars… We say only that Plaintiffs' contributions and expenditures are well below the line."[66] In other words, the state clearly still has the ability to regulate persons or entities that make large political expenditures.

The Tenth Circuit's approach followed that of the Ninth Circuit, which concluded that the lower the amount of money spent in a political battle, the more diminished the state's interest in disclosure is. The Ninth Circuit held that "the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level."[67]

### Electioneering Communications Disclosure

After addressing disclosure from sources of independent expenditures, states should tackle the sham issue ad loophole. To close that reporting loophole, states may adopt the federal definition of electioneering communications, which was upheld by both *McConnell* and *Citizens United*.

As discussed above, after *Buckley* but before *McConnell*, the courts, as well as the FEC and several states, only allowed regulation of political ads using *Buckley*'s magic words of express advocacy. This allowed those who wanted to spend on political ads without disclosure (or other types of campaign finance regulations) to do so by placing candidates into so-called "sham issue ads."[68] These ads typically contained all of the same attributes as a classic campaign ad, but they lacked *Buckley*'s magic words. As discussed above, BCRA closed this loophole and the Supreme Court upheld BCRA's disclosure provisions twice. After 2002, several states acted quickly to adopt "electioneering communications" definitions, but the remaining 33 states could still regulate in this area.

### 1. *Federal Definition of Electioneering Communications*

Under federal law, the term "electioneering communication" encompasses any broadcast, cable, or satellite communication that costs at least $10,000 and

> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within-
> > (aa) 60 days before a general, special, or runoff election …; or
> > (bb) 30 days before a primary …; 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[,]

and that can be received by 50,000 or more persons in the candidate's constituency.[69] The candidate is considered to be "clearly identified" if his or her name or picture appears in the communication or if his or her identity is "apparent by unambiguous reference."[70] States may adopt this federal definition of electioneering communications. For example, some states, like Ohio, virtually copied the electioneering communications definition used by Congress in BCRA.[71]

### 2. *Beyond the Federal Definition of Electioneering Communications*

However, states do not have to import a carbon copy of the federal definition of electioneering communications into their laws—and many states have already parted ways with the federal model. Some states cover longer time periods than BCRA does, or include disclosure requirements for spending on ballot measures as well as candidates.[72] "Electioneering communications" has been defined by at least 13 states to include some forms of non-broadcast communications—including, among other media, billboards, pamphlets, mass direct mail, and paid print advertising—where such communications are targeted at the relevant election, appear close in time to an election, clearly identify a candidate, and cost more than a specified threshold.[73]

The Supreme Court signaled in *Citizens United* that it would not distinguish campaign finance laws based on the medium used to transmit a political message. As Justice Kennedy wrote: "Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."[74] Furthermore, the

Supreme Court stated that federal disclosures could be constitutionally applied to both broadcast ads (a push technology where the passive viewer is subject to the ad just by turning on the TV) as well as video-on-demand (a pull technology where the viewer affirmatively chooses to watch the film). This indicates that states have broader latitude than before to expand disclosure laws to cover non-broadcast as well as classic broadcast political ads. It should be noted that the expansion of electioneering communications into non-broadcast has met with a certain degree of resistance from certain lower courts pre-*Citizens United*, but this hostility appears to be subsiding after *Citizens United*.[75]

### *3. Functional Equivalence of Express Advocacy is Not Required for Disclosure Laws*

States should also be aware that disclosure laws—even electioneering communications laws—do not need to contain *WRTL II*'s "functional equivalence of express advocacy" language to be constitutional. In *Citizens United*, the plaintiff argued that it could escape federal disclosure requirements because its ads and its film were not the functional equivalent of express advocacy. The Supreme Court rejected the plaintiff's attempt to impose *WRTL II*'s functional equivalence of express advocacy test on disclosure: "[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."[76]

The Court also indicated that even commercial speech can be covered by campaign finance disclosure requirements if candidates are featured directly before an election. As Justice Kennedy noted: "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. [And] the informational interest alone is sufficient to justify application of [BCRA's disclosure requirements] to these ads."[77] So, in many ways, *Citizens United* has simplified at least one aspect of campaign finance disclosure law. Instead of having to add a cumbersome definition of the "functional equivalence of express advocacy" to existing law, states can adopt bright line electioneering communications definitions that are similar in structure to BCRA.

### *4. Length of a Political Ad Does Not Matter*

Interestingly, the Supreme Court in *Citizens United* upheld the application of BCRA's disclosure and disclaimers not only to the group's short 10-second ads, but also to its feature length film, "Hillary: The Movie." As Justice Kennedy wrote: "We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression."[78] Again this indicates that even if a political ad takes the form of a two-hour infomercial that is broadcast on a cable network at 2 a.m., states still have an interest in regulating it if it discusses a candidate directly before an election.

### 5. *Include Time Limits for Electioneering Communications*

While the Supreme Court upheld applying disclosure to Citizens United's film and ads, the fact that these ads were on the eve of an election appeared important to the Court. It is difficult to predict whether future courts will find laws capturing state electioneering communications more than 60 days before an election constitutional. Certain courts pre-*Citizens United* invalidated state electioneering communication laws that applied months before an election. The Fourth Circuit invalidated part of North Carolina's campaign disclosure law pre-*Citizens United* because the state's definition did not "explicitly limit[] its scope to either specific people or a specific time period"[79] and could therefore apply outside of BCRA's more limited 60-day window. The Fourth Circuit was not alone in worrying about the temporal scope of electioneering communication regulations. In Utah, a federal district court was particularly critical that one of the ads captured by Utah's disclosure law ran seven months before an election instead of within 60 days of an election, as required by BCRA.[80]

However, after *Citizens United*, one federal district court held that states may have a bit more flexibility around electioneering communications time frames. A federal district court wrote approvingly about a South Carolina disclosure law even though the definition covered 45 days instead of 30 days before a primary, as well as broadcast and non-broadcast ads.[81] At this point, it is unclear how far the lower courts will allow states to push the temporal limit on electioneering communications. However, one approach to avoid this objection is for states to adopt BCRA's timeframes, which kick in 30 days before a primary and 60 days before a general election.[82]

## Capture Nonprofit Spending in State Elections

As the 2010 election showed, one of the problems with how current election laws capture disclosure is they often allow one entity to hide its identity by spending through a second entity—especially if the second entity is a trade association or another type of nonprofit. But this result is not inevitable. States can adjust disclosure laws to require more transparency of underlying donors.

Nonprofits such as trade associations generally have been able to avoid disclosure at the federal level because the FEC only requires disclosure of underlying donations if they are earmarked for an ad buy.[83] But California offers another approach. Under California's Regulation 18215, "contributions" include giving money to an organization that the donor has reason to know will use those funds to make a political contribution or political expenditure.[84] This allows for transparency from trade associations as well as other nonprofits and organizations that spend more than $1,000 in California political races. Guidance from the California Fair Political Practices Commission states, "[If] [m]embers of a trade association designate 10 percent of their annual dues to an account for the purpose of making political expenditures to various candidates and measures … [, then] the trade association [is] qualified as a general purpose committee once it received $1,000 or more in a calendar year…"[85]

California structures its law to presume that donors to political spenders will be subject to disclosure. The Alliance for Justice offers the following more detailed explanation of mechanics of California's law:

> In many cases, a person will give money to an organization without knowing whether or not it will be used for political purposes. In California, however, after an organization has made one or more political contributions or expenditures totaling $1,000 or more in a calendar year, donors are presumed to be on notice that their donations may be used by the organization to make political contributions or expenditures. This initial contribution or expenditure threshold is known as the "first bite of the apple." For the remainder of the year in which it made the contribution or expenditure, and for the following four years, donors to the organization are presumed to know that money they give to the organization may be used for political contributions or expenditures.[86]

The upshot of California's approach is that any organization that takes in $1,000 in political donations in a calendar year is subject to reporting requirements.[87] California applies this approach to any money coming into the entity that is spent on politics, including membership dues. This places the presumption in the right place—that donors to entities who make political expenditures are themselves making or subsidizing political donations, which should be subject to disclosure.

Another approach to enhance disclosure was adopted by Minnesota in 2010 after *Citizens United*. Under Minnesota's new law, a corporation may support independent political expenditures in one of two ways: It may contribute to an existing independent expenditure political committee or fund, or it may make its own independent expenditures. If a corporation contributes to an independent expenditure committee or fund, then its contributions will be publicly disclosed so that voters and shareholders can adequately review that political act.[88] In other words, either corporations make independent expenditures themselves and report this fact or they can contribute to independent expenditure committees, which must report underlying donors. Either way, the Minnesota law ensures transparency. The Minnesota approach is currently being litigated.[89]

### Disclaimers

Disclaimers are the words on the face of a political ad that provide attribution of the source of the ad. Candidate disclaimers can also take the form of claiming authorization for the ad. For example, words on political ads such as "paid for by the XYZ PAC" or "I'm John McCain and I approved this message" are two types of disclaimers. The point of these disclaimers is to help the viewer to sort out who is behind the message. Unfortunately, the use of front groups with misleading or benign sounding names has undermined the usefulness of disclaimers.

Simple disclaimer rules requiring disclosure of big funders could curb the abuse of front groups. As the Brennan Center noted in Congressional testimony, front groups can be incredibly misleading to the voting public:

> In a recent Colorado ballot measure election, for example, a group called "Littleton Neighbors Voting No" spent $170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. When the disclosure reports for these groups were filed, it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart, and not a grass roots organization.[90]

But without disclaimers naming top funders, ads produced by a benign sounding name easily mislead the public.

Disclaimers on the face of political ads were also approved by the Supreme Court in *Citizens United* as useful heuristic devices for the voting public: "The disclaimers required by [BCRA] 'provid[e] the electorate with information,' and 'insure that the voters are fully informed' about the person or group who is speaking … At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."[91] This holding gives states wide latitude to impose similar on-ad disclaimers. Enhanced "stand-by-your-ad" disclaimers are another way to ensure political spending through nonprofits is transparent. An enhanced disclaimer would include the name of top donors in addition to the name of the ad's sponsor.

DISCLAIMERS ON THE FACE OF POLITICAL ADS WERE ALSO APPROVED BY THE SUPREME COURT IN *CITIZENS UNITED* AS USEFUL HEURISTIC DEVICES FOR THE VOTING PUBLIC.

In the wake of *Citizens United*, Connecticut changed its law to allow corporate independent expenditures, but also to require more robust disclosure. One notable innovation Connecticut adopted was a requirement to list top five funders in political ad disclaimers.[92] The Connecticut statute states, "[S]uch communication shall also bear upon its face the words 'Top Five Contributors' followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication."[93] Other states should adopt this common sense approach in order to provide the public with a quick snapshot of the money behind a given political advertisement.

### Shareholder Interest in Disclosure

Finally, states should also keep in mind that *Citizens United* has an impact not just on campaign finance law, but also on corporate law as well. One of the ways states can provide more transparency to the public is by not only adapting their campaign finance laws, but also by adapting their corporate laws.[94]

The *Citizens United* Court emphasized that shareholders have a distinct interest in robust disclosure in addition to the interest they may also possess as registered voters. As the Court explained: "[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations [accountable] …. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits."[95]

> FOR EXAMPLE, A STATE COULD CHANGE ITS CORPORATE LAW TO REQUIRE DOMESTIC CORPORATIONS TO PUBLICLY DISCLOSE TO ITS SHAREHOLDERS A LIST OF ALL POLITICAL DONATIONS AND EXPENDITURES IN THE PAST QUARTER.

For example, a state could change its corporate law to require domestic corporations to publicly disclose to its shareholders a list of all political donations and expenditures in the past quarter. Furthermore, states can change their corporate law to enable board members or shareholders to vote to authorize future political expenditures.[96] This too is envisioned by *Citizens United*, which stated that shareholders should be able to hold managers accountable for political spending though the mechanisms of "corporate democracy."[97] Making modest changes to the corporate law may have a significant impact increasing transparency.

## CONCLUSION

The case law is solidifying behind the ability of states to require reasonable reporting about money in politics. The multiple state interests in disclosure around candidate elections include *Buckley*'s voter information interest, anti-corruption interest, the anti-circumvention interest, and the *Caperton* due process interest. But no less important are the *Doe* interest in ballot measure integrity and shareholders' interest in transparency around corporate spending. All told, states can draw on these overlapping state interests to justify robust disclosure.

The Supreme Court's recent decisions in *Citizens United*, *Doe,* and *Caperton* reaffirm both the constitutionality of disclosure and the continuing need for transparency around who is funding election battles. Consequently, states have wide latitude to require disclosures not only from classic political committees, but also any entity funding independent expenditures or electioneering communications in future state elections.

## ENDNOTES

[1]*See Citizens United v. FEC*, 130 S.Ct. 876 (2010); *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007) (WRTL II); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[2] The underlying legal definitions of these four words have become intricate over time. This intricacy was born of two parents (1) evasion and (2) litigation. As legislators attempted to write laws that would regulate election ads in the 1970s and 1980s, clever ways were devised to avoid regulation by creating ads that technically evaded the definition of "election ads." The resulting ads are commonly known as "sham issue ads." As regulators strove to keep up with those evading campaign finance laws, the campaign finance definitions expanded and grew more detailed. Meanwhile, lawsuits challenging various aspects of campaign finance law created even more nuanced distinctions as courts tried to give legislators guideposts about what was and was not out of constitutionally bounds.

[3] *Buckley*, 424 U.S. at 44, n.52.

[4] There are many loopholes in the FEC's reporting regime. For example, most nonprofit spenders can evade federal disclosure of underlying donors, if the nonprofit lacks earmarked contributions. *See* Ciara Torres-Spelliscy, "Hiding Behind the Tax Code" (forthcoming NEXUS CHAPMAN'S JOURNAL OF LAW & PUBLIC POLICY 2011).

[5] Brennan Center for Justice at NYU School of Law, "The Impact of *FEC v. Wisconsin Right to Life, Inc.* on State Regulation of 'Electioneering Communications' in Candidate Elections, Including Campaigns for the Bench" (Feb. 2008), http://www.brennancenter.org/page/-/Democracy/Impact%20of%20WRTL%20II%20on%20State%20Regulation.pdf?nocdn=1.

[6] CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 10-11 (Brennan Center 2001), http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf; *see also McConnell v. FEC*, 540 U.S. 93, 197 (2003) (finding political advertising sponsors often hid behind misleading names, such as "Citizens for Better Medicare" [the pharmaceutical industry] or "Americans Working for Real Change" [business groups opposed to organized labor]).

[7] 2 U.S.C. § 434(f)(3)(A)-(C).

[8] Ciara Torres-Spelliscy, Kahlil Williams & Thomas Stratmann, "Electoral Competition and Low Contribution Limits" 9 (Brennan Center 2009) ("In 2006, [state assembly] incumbents in states with individual limits over $2,000 collected contributions of $172,000, on average, while challengers collected $37,000. This is a difference of $135,000. But in states with limits of $500 or less, incumbents collected, on average, $48,000 in contributions, and challengers collected $11,000.").

[9] *McConnell*, 540 U.S. at 207-08 (quoting *Buckley*).

[10] *See* for example, T.W. Farnam & Dan Eggen, "Interest-group spending for midterm up fivefold from 2006; many sources secret," WASHINGTON POST (October 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664_pf.html; Mike McIntire, "Hidden Under a Tax-Exempt Cloak, Private Dollars Flow," NEW YORK TIMES (Sept. 23, 2010), http://www.nytimes.com/2010/

09/24/us/politics/24donate.html?pagewanted=1; Michael Crowley, "The New GOP Money Stampede," TIME (Sept. 16, 2010), http://www.time.com/time/printout/0,8816,2019509,00.html#; Kristin Jensen & Jonathan D. Salant, "Republican Groups Use Hidden Money to Overcome Democrats' Cash" BLOOMBERG BUSINESS WEEK (Sept. 21, 2010), http://www.businessweek.com/bwdaily/dnflash/content/sep2010/db20100921_184373.htm.

[11] The Public Advocate for the City of New York, "*Citizens United* and the 2010 Midterm Elections" (Dec. 2010), http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf. By "dark," I mean that the public could not determine who the underlying funders of the ad were beyond the named sponsor.

[12] Taylor Lincoln & Craig Holman, "Fading Disclosure Increasing Number of Electioneering Groups Keep Donors' Identities Secret" (Public Citizen Sept. 15, 2010), http://www.citizen.org/documents/Disclosure-report-final.pdf (reporting only one third of the independent spending in the 2010 election named underlying donors); Peter H. Stone, "Campaign Cash: The Independent Fundraising Gold Rush Since 'Citizens United' Ruling," (Center for Political Integrity Oct. 4, 2010), http://www.publicintegrity.org/articles/entry/2462/.

[13] Rick Haglund, "Shadow Groups Dominate Political Ads," THE CENTER FOR MICHIGAN (Sept. 30, 2010), http://www.thecenterformichigan.net/truth-squad-special-report-shadow-groups-dominate-political-ads/ (detailing secretive spending in the 2010 Michigan governor's race); Ed Tibbetts, "Anonymous Donors Fund Iowa Campaign Ad Attacks," QUAD CITY TIMES (June 2, 2010), http://qctimes.com/news/local/article_ab896c9e-6eb6-11df-a51d-001cc4c002e0.html (detailing secretive spending in 2010 Iowa governors race); Lee Bergquist & Patrick Marley, "Governor's Race Benefits from Indirect Donations", MILWAUKEE JOURNAL SENTINEL (July 29, 2010), http://www.allbusiness.com/government/elections-politics-politics-political-parties/14865110-1.html (Wisconsin and the influence of indirect money); Patrick Marley, "Outside Groups Raising Big Money in Governor's Race", MILWAUKEE JOURNAL-SENTINEL (July 28, 2010), http://www.jsonline.com/news/statepolitics/99513454.html; Sharon Theimer, "Outside Money Gushing into State, Local Races Too", ASSOCIATED PRESS (Oct. 28, 2010), http://www.cleveland.com/nation/index.ssf/2010/10/outside_money_gushing_into_sta.html (general information about outside spending including Wisconsin and Colorado); Jillian Jorgensen, "NH Flooded with Ads Funded by National Groups", EAGLE TRIBUNE (Oct. 13, 2010), http://www.eagletribune.com/newhampshire/x935814902/NH-flooded-with-ads-funded-by-national-groups/print, (outside groups in New Hampshire).

[14] *See* National Council on State Legislatures, "Life After *Citizens United*" (Oct. 19, 2010), http://www.ncsl.org/default.aspx?tabid=19607 (listing states that previously banned corporate and/or union electioneering communications before *Citizens United*).

[15] Jeremy Herb, "Minnesota a model in disclosure law", MINNEAPOLIS STAR-TRIBUNE (Oct. 11, 2010), http://www.startribune.com/politics/local/104747019.html.

[16] MN Forward, Minnesota Campaign Finance and Public Disclosure Board Report of Receipts and Expenditures for Independent Expenditure Committees and Independent Expenditure Funds (Sept 14, 2010), http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/C/41035.pdf; Patrick Caldwell, "3M among corporations giving to pro-Emmer group MN Forward", THE MINNESOTA INDEPENDENT (Sept. 22, 2010), http://minnesotaindependent.com/71084/pro-emmer-group-mn-forward-draws-futher-corporate-contributions-including-3m; Jackie Crosby, "Donation backlash still haunts Target", MINNEAPOLIS STAR-TRIBUNE (Aug. 16, 2010), http://www.startribune.com/politics/state/100666564.html.

[17] James Walsh, "Judge Won't Block Campaign Finance Law," MINNEAPOLIS STAR-TRIBUNE (Sept. 20, 2010), http://www.startribune.com/politics/state/103349914.html.

[18] Pat Doyle, "A bruising campaign, an uncertain future for Emmer," MINNEAPOLIS STAR-TRIBUNE, (Dec. 8, 2010), http://www.startribune.com/politics/local/111566659.html.

[19] Tom Hamburger & Jennifer Martinez, "Target feels backlash from shareholders," L.A. TIMES, (Aug. 19, 2010), http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820.

[20] Megan Thee-Brenan, "Americans Want Disclosure and Limits on Campaign Spending," NEW YORK TIMES (Oct. 28, 2010).

[21] *See* David D. Kirkpatrick "A Quest to End Spending Rules for Campaigns," NEW YORK TIMES (Jan. 24, 2010).

[22] *United States v. Harriss*, 347 U.S. 612 (1954) (considering the Federal Regulation of Lobbying Act and upholding a narrowed application of the Act).

[23] *Id.* at 625.

[24] *Id*. at 67.

[25] *Citizens United v. FEC*, 130 S. Ct. at 916.

[26] *Id*. at 914 (internal quotations omitted).

[27] *Id*. at 916 (quoting *McConnell*, 540 U. S. at 259 (opinion of Scalia, J.)).

[28] *Id*. at 905-06.

[29] *McConnell*, 540 U.S. at 196-97 (*quoting McConnell*, 251 F. Supp. 2d at 237) (internal citations omitted).

[30] *Id*. at 201 (internal citations and quotations omitted).

[31] *See* Jill Abramson, "Return of the Secret Donors," NEW YORK TIMES (Oct. 16, 2010) (detailing secret donors to the Nixon White House), http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html.

[32] *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (internal citation omitted).

[33] *Id*.

[34] *Id*. (quoting *Burroughs v. U.S.*, 290 U.S. at 548).

[35] *Id.*, 424 U.S. at 66 n. 79 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

[36] *Id.*, 424 U.S. at 67-68.

[37] *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010).

[38] *Id.*, *cert. denied sub. nom.*, *Keating v. FEC*, No. 10-145, 2010 WL 4272775 (U.S. Nov. 1, 2010).

[39] *Id.*

[40] *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1011-12 (9th Cir. 2010).

[41] *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010) (internal citations and quotations omitted).

[42] *Id.* at 2819-20 (internal citations and quotations omitted).

[43] *Id*. (holding "That [governmental] interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is essential to the proper functioning of a democracy.") Also three Justices in *Doe v. Reed* found an anti-corruption interest in disclosure in the referendum context as well as the "election integrity" interest embraced by the majority. *Doe v. Reed*, 130 S. Ct. 2811, 2828 (2010) (Sotomayor, Stevens and Ginsburg , JJ. concurring) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788-789, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)) ("Public disclosure of the identity of petition signers…advances States' vital interests in 'preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.'").

[44] *Id.* at 2820.

[45] *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1012 (9th Cir. 2010) (upholding Washington's political committee financial disclosure requirements); *SpeechNow.org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010) (upholding ongoing disclosure requirements for organization making federal independent expenditures).

[46] *National Organization for Marriage v. Roberts*, 2010 WL 4678610, *5 (N.D. Fla. Nov. 8, 2010) (finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech"); *Yamada v. Kuramoto*, 2010 WL 4603936, *1 (D. Haw. Oct. 29, 2010) (finding that "*Citizens United* also endorsed disclosure"); *Iowa Right to Life (IRTL) v. Smithson*, 2010 WL 4277715, *3 (S.D. Iowa Oct. 20, 2010) (finding "under *Citizens United*, '[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements…'"); *Wisconsin Club for Growth v. Myse*, 2010 WL 4024932 (W.D. Wis. Oct. 13, 2010) ("plaintiffs' reliance on *FEC v. WRTL* ignores the Supreme Court's later treatment of disclosure and disclaimer regulations in *Citizens United*"); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, ---F. Supp. 2d ---, 2010 WL 3768041, *9 (D. Minn. Sept. 20, 2010) ("The law to which Plaintiffs object is, in fact, a disclosure law—a method of requiring corporations desiring to make independent expenditures to disclose their activities. Such laws are permissible under *Citizens United*."); *Center for Individual Freedom v. Madigan*, ---F. Supp. 2d ---, 2010 WL 3404973, *4 (N.D. Ill. Aug. 26, 2010) ("in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent."); *Nat'l Org. for Marriage v. McKee*, No. 09-538, --- F. Supp. 2d ---, 2010 WL 3270092, at 10 (D. Me. Aug. 19, 2010) (upholding Maine's political committee financial disclosure requirements and finding "NOM's desire to limit campaign finance disclosures to 'major purpose' groups would yield perverse results, totally at odds with the interest in 'transparency' recognized in *Citizens United*."). Also one challenge

to Rhode Island's disclosure law was dismissed because of pleading deficiencies. *National Organization for Marriage v. Daluz*, No. 10-392-ML, slip op. at 2-3 (D.R.I. Sept. 30, 2010) (dismissing complaint for violation of Fed. R. Civ. P. 8).

[47] Adam Skaggs, "Buying Justice: The Impact of *Citizens United* on Judicial Elections" 2 (Brennan Center 2010).

[48] *Caperton v. A.T. Massey Coal Co.,* 129 S.Ct. 2252 (2009).

[49] *Id.* at 2263-64 (also holding "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.").

[50] *Id.* at 2264-64.

[51] *Id.* at 2257, 2264.

[52] *Id.* at 2257; W.Va. Code §§ 3-8-12(f), -5a(a)(3).

[53] *Caperton*, 129 S.Ct. at 2257. Under federal law, 527 organizations must disclose their contributors. I.R.C. § 527(j) (2004).

[54] *Caperton*, 129 S.Ct. at 2257; W.Va. Code § 3-8-2b.

[55] Justice Scalia, in dissent, acknowledges that litigants in states that elect judges who wish to enforce the *Caperton* due process right to an unbiased judge, "will por[e] through volumes of campaign finance reports." *Caperton*, 129 S.Ct. at 2274 (Scalia, J. dissenting).

[56] Campaign Disclosure Project, "Campaign Finance Disclosure Model Law" (June 2004), http://www.campaigndisclosure.org/.

[57] *Buckley*, 424 U.S. at n. 52.

[58] Linda King, National Institute on Money in State Politics, "Indecent Disclosure Public Access to Independent Expenditure Information at The State Level" 4 (Aug. 1, 2007), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1 (finding "39 states have enacted statutory reporting requirements for state level independent expenditures, but only five of those states make such information available in comprehensive and relevant formats to the public").

[59] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (invalidating disclosure for handmade leaflets in a ballot measure campaign); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993) (striking a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as $1, a practice known as "first dollar disclosure.").

[60] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

[61] *Id.*

[62] *Id.* at 1259-60 (internal citations omitted).

[63] *Id.* at 1260 n.5 (cash contributions for the committee were $1,426 and $1,178 were spent for attorney fees).

[64] *Id.* at 1261.

[65] *Id.*

[66] *Id.*

[67] *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009).

[68] *Buckley*, 424 U.S. at 44, n. 52.

[69] 2 U.S.C. § 434(f)(3)(A)-(C).

[70] 2 U.S.C. § 31(18)(C).

[71] Including these elements: a broadcast advertisement that mention a candidate for office, costs $10,000 or more, that can reach 50,000 member of the relevant electorate, 30 days before a primary or 60 days before a general. 2 U.S.C. 434(f); 11 CFR 104.20.

[72] Elizabeth Garrett, McConnell v. FEC *and Disclosure*, 3 ELECTION L.J. 237, 239 (2004) ("A state interest in providing information to empower citizens to vote knowledgably and to combat deception can support disclosure statutes in both candidate and issue elections.").

[73] Alaska Stat. § 15.13.400 (5) (2009); Ariz. Stat. 16-901.01(A) & Ariz. Amend. Code R2-20-101 (10) Cal. Gov't Code § 85310; Colo. Const. Art . 28 sec. 2 (7)(a); Conn. Gen. Stat. Ann. § 9-601b(a)(2) (West 2009); Fla. Stat. Ann. § 106.011(18)(a) (West 2009); Haw. Rev. Stat. § 11-207.6(c) (2009); Idaho Code Ann. § 67-6602(f) (2009); 10 Ill. Comp. Stat. Ann. 5/9-1.14(a) (2010); Ohio Stat. 3517.1011 (2009); Me. Rev. Stat. Ann. tit. 21-A, § 1014(2-A) (2009); N.C. Session Law 2010-170 (2010); Okla. Stat. tit. 74, § 257:1-1-2 (2009); S.C. Code Ann. § 8-13-1300(31) (2008); Vt. Stat. Ann. tit. 17, § 2891 (2008); Wash. Rev. Code Ann. § 42.17.020 (West 2009); W. Va. Code Ann. § 3-8-1a(11)(A) (West 2010).

[74] *Citizens United*, 130 S. Ct. at 891.

[75] Before *Citizens United*, lower courts were hesitant to allow states to regulate non-broadcast electioneering communications. *See Broward Coalition of Condominiums, Homeowners Associations & Community Organizations, Inc. v. Browning*, 2008 WL 4791004, *7 (N.D. Fla. Oct. 29, 2008) (preliminarily enjoining the Florida's electioneering communication law), 2009 WL 1457972 (N.D. Fla. May 22, 2009) (permanently enjoining the electioneering portions of the Florida law because it covered non-broadcast); *Ctr. for Individual Freedom, Inc. v. Ireland*, 2008 WL 1837324 (S.D. W.Va. Apr. 22, 2008) (preliminarily enjoining West Virginia's electioneering communications to the extent it covered non-broadcast); *Ctr. for Individual Freedom,*

*Inc. v. Ireland*, Nos. 1:08-cv-00190 & 1:08-cv-01133, 2009 WL 749868 (S.D. W.Va. Feb. 12, 2009) (again enjoining West Virginia's newly-amended law to the extent it covered non-broadcast electioneering communications). But this trend appears to be changing. *See South Carolina Citizens For Life v. Krawcheck*, 2010 WL 3582377, *18 (D.S.C. Sept. 13, 2010) (refusing to enjoin South Carolina's disclosure law and noting "South Carolina's definition …does reach communication channels, including direct mail and e-mail, that the federal government has previously chosen not to regulate. However, the Supreme Court's recent ruling in *Citizens United* indicates that South Carolina may be constitutionally permitted to require some level of disclosure…").

[76] *Citizens United*, 130 S. Ct. at 915.

[77] *Id.* at 915-16.

[78] *Id.* at 916.

[79] *North Carolina Right to Life v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) *("NCRL III*").

[80] *Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F.Supp.2d 1132, 1150 (D. Utah Sept. 8, 2008) ("The Foundation ran its advertisements in April 2007, seven months prior to the general election—the only election in which the initiative was on the ballot—and long before the time frame that would fit it within the definition of an 'electioneering communication' under BCRA.").

[81] *South Carolina Citizens For Life v. Krawcheck*, 2010 WL 3582377, *17 (D.S.C. Sept. 13, 2010) (South Carolina may be constitutionally permitted to regulate even though "the South Carolina definition of 'influence' includes communications made 45 days before an election without reference to whether the election is a general or a primary election, thereby extending the window during which communications prior to a primary election may be subjected to regulation.").

[82] Ohio's law adopted the federal time frames and was upheld against a facial challenge. *Ohio Right to Life Society, Inc. v. Ohio Elections Commission*, 2008 WL 4186312, *6 (S.D. Ohio Sept. 5, 2008).

[83] According to the instructions for FEC Form 9, "[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter '0' (zero)." FEC, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements for Electioneering Communications) 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf.

[84] Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations Sec. 18215(b).

[85] California Fair Political Practices Commission, "What is a General Purpose Committee?" 1-4 (May 2009), http://www.fppc.ca.gov/ipmeetings/05-09/ch4/Ch1.pdf#search="trade association 18215".

[86] Alliance for Justice, "California Campaign Finance and Ballot Measure Guide" 12-13 (June 30, 2009), http://www.afj.org/for-nonprofits-foundations/state-law-resources-2010/california_campaign_finance.pdf.

[87] *Id*. at 12 ("Under California law, if a person gives money to an organization knowing it will be used to make political contributions or expenditures, then the donation to the organization is a political 'contribution' that may be subject to public disclosure.").

[88] Minn. Stat. § 10A.12 subd. 1a & § 211B.15, subd. 3 (2010).

[89] *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, ---F. Supp. 2d ---, 2010 WL 3768041, *9 (D. Minn. Sept. 20, 2010) (upholding Minnesota's new disclosure laws), *appeal docketed* No. 10-3126 (8th Cir. Sept. 28, 2010).

[90] "Testimony of the Brennan Center at NYU School of Law before the Committee on House Administration, U.S. House of Representatives" 9 (May 11, 2010), available at http://www.brennancenter.org/page/-/Democracy/CFR/BCtestimonyDISCLOSEact.pdf?nocdn=1; Def.'s Response Br. to Pls.' Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[91] *Citizens United*, 130 S. Ct. at 915.

[92] Connecticut Public Act No. 10-187, "An Act Concerning Independent Expenditures" (2010).

[93] *Id*. at Section 10(h)(1).

[94] Lucian Bebchuk & Robert Jackson, *Corporate Political Speech Who Decides?* 124 Harv. L. Rev. 83, 84 (Nov. 2010) (arguing for "rules that (i) provide shareholders with a role in determining the amount and targets of corporate political spending; (ii) require that independent directors oversee corporate political speech decisions; (iii) allow shareholders to opt out of—that is, either tighten or relax—each of these first two rules; and (iv) mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly through intermediaries."); Ciara Torres-Spelliscy, "Corporate Campaign Spending, Giving Shareholders a Voice" (Brennan Center 2010) (arguing for shareholder disclosure and consent).

[95] *Citizens United*, 130 S. Ct. at 916 (quoting *McConnell*, 540 U. S. at 259 (opinion of Scalia, J.)).

[96] Board approval of corporate political expenditures is the law in Missouri, Iowa, and Louisiana. The Iowa law, which was passed right after *Citizens United*, is currently the subject of on-going litigation. However, the plaintiffs in the suit lack standing to challenge the board approval portion of the law. *Iowa Right to Life (IRTL) v. Smithson*, 2010 WL 4277715 (S.D. Iowa Oct. 20, 2010).

[97] *Citizens United*, 130 S.Ct. at 911.

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