

January 2016

## Citizen's United Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Elections

Nicole L. Jones

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Nicole L. Jones, Citizen's United Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Elections, 93 Denv. L. Rev. 749 (2016).

This Note is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

**Citizen's United Round II: Campaign Finance Disclosure, the First Amendment,  
and Expanding Exemptions and Loopholes for Corporate Influence on Elections**

# CITIZENS UNITED ROUND II: CAMPAIGN FINANCE DISCLOSURE, THE FIRST AMENDMENT, AND EXPANDING EXEMPTIONS AND LOOPHOLES FOR CORPORATE INFLUENCE ON ELECTIONS

## ABSTRACT

In the wake of *Citizens United*, campaign finance regulation is in a state of flux. Disclosure regulations have rightfully taken the spotlight as a last means of regulating the influence of money on politics. With spending likely to reach record highs in the 2016 election cycle and the percentage of undisclosed spending continuing to rise, disclosure regulations are increasingly important. Reforms, however, are necessary to protect the important purpose of providing the electorate with information regarding who is attempting to influence its votes and to ensure the effectiveness of such disclosures.

This comment argues the Tenth Circuit, through its recent decision in *Citizens United v. Gessler*, further degraded the current campaign finance regulation scheme by creating yet another avenue for organizations to avoid disclosure. By granting *Citizens United* a media exemption, the court opened the door to endless challenges on a case-by-case basis. Consequently, the court posed the significant risk of expanding the set of existing loopholes to an uncontrollable level. Without proper reforms on both the federal and state level, these loopholes and exemptions will continue to be exploited, and campaign finance laws will essentially become useless.

## TABLE OF CONTENTS

INTRODUCTION .....	750
I. BACKGROUND.....	752
A. <i>Campaign Finance Regulation and the First Amendment</i> .....	752
1. Initial Legislation .....	752
2. Early First Amendment Jurisprudence Regarding Campaign Finance .....	754
3. A Shift Toward Stronger Restrictions on Campaign Finance	756
4. The Pendulum Begins to Swing .....	758
B. <i>Citizens United v. FEC and its Progeny</i> .....	759
C. <i>Legislation in Response to Citizens United v. FEC</i> .....	761
D. <i>Recent Challenges to Campaign Finance Disclosure in the Tenth         Circuit</i> .....	763
II. <i>CITIZENS UNITED V. GESSLER</i> .....	765
A. <i>Facts</i> .....	765
B. <i>Procedural History</i> .....	767

C. <i>Majority Opinion</i> .....	768
D. <i>Dissenting Opinion</i> .....	770
III. ANALYSIS .....	770
A. <i>Disclosure Becomes the New Focus</i> .....	771
B. <i>Expanding Loopholes to Disclosure</i> .....	773
1. Political Committees and Super PACs .....	774
2. Social Welfare Organizations and the Major Purpose Test ...	775
3. Issue Advocacy and Earmarking .....	776
4. Disclosure Exemptions.....	777
C. <i>The Implications of Citizens United v. Gessler</i> .....	778
1. The Refusal to Consider a Facial Challenge .....	778
2. Deterring Corruption and the Appearance of Corruption .....	780
3. Providing the Public with Valuable Information .....	783
4. Interpreting the Media Exemption and Assessing its Validity	785
IV. CLOSING LOOPHOLES, COMBATTING CORRUPTION, AND THE VALUE OF INFORMATION .....	787
A. <i>Full-Disclosure v. Anonymity</i> .....	788
1. Deregulate and Disclose.....	788
2. An Anonymous Donation System .....	790
B. <i>A More Balanced Approach</i> .....	791
1. Aggregate Data of Small Donor Information.....	792
2. Higher Thresholds, Original Source Disclosure, and Earmarking .....	793
3. Interpreting Press Exemptions.....	794
CONCLUSION .....	795

## INTRODUCTION

As one of the preeminent rights of democratic theory, the Judiciary considers the freedom of speech as “the touchstone of individual liberty,”<sup>1</sup> characterized by Justice Cardozo as “the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>2</sup> “The First Amendment affords the broadest protection to . . . political expression . . . ‘to assure (the) unfettered interchange of ideas . . . .’”<sup>3</sup> and “[d]iscussion of

1. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.2 (5th ed. 2013). Freedom of expression is one of the basic principles that our system of government is founded on. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 896 (1963) (“It represents, indeed, one of the major contributions of our political system to the democratic way of life.”).

2. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (applying the First Amendment to the

3. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC (Citizens United I)*, 558 U.S. 310 (2010). Justice Brennan coined this phrase, which would come to be quoted as the objective of protecting political speech, based on a letter of the Continental Congress in 1774. *Roth*, 354 U.S. at 484 (“The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Govern-

public issues and debate on the qualifications of candidates,”<sup>4</sup> which are integral to the system of government established by the United States Constitution.<sup>5</sup> Consequently, the freedom of speech afforded by the First Amendment has sparked bitter public controversy throughout history.<sup>6</sup> Campaign finance laws that seek to impose limits and restrictions on spending—both through contributions and expenditures—and the corresponding disclaimer and disclosure regulations frequently implicate such freedoms.<sup>7</sup> More recently, First Amendment protections have given rise to new challenges in the campaign finance arena predominately by non-profit corporations regarding disclosure regulations.<sup>8</sup>

This Comment argues the Tenth Circuit Court of Appeals’s recent decision in *Citizens United v. Gessler* (*Citizens United II*)<sup>9</sup> was wrongly decided. In its decision, the court granted the nonprofit advocacy group a preliminary injunction against Colorado’s campaign finance disclosure regulations finding that it qualified for media exemption.<sup>10</sup> By granting *Citizens United* a media exemption, the court opened the door to additional opportunities for avoiding campaign finance disclosure, which undermines the purposes and diminishes the effectiveness of such regulations.

Part I of this Comment traces the history of campaign finance laws and the major decisions that shaped the current campaign finance landscape leading up to the Tenth Circuit’s decision in *Citizens United II*. Part II provides a brief summary of the facts of *Citizens United II*, as well as the majority, concurring, and dissenting opinions. Part III analyzes how the court’s expansion of the media exemption creates an additional avenue for entities to avoid disclosure and the corresponding implications. Finally, Part IV considers campaign finance disclosure reform models and proposes a balanced approach. The proposed reforms incorporate aggregated data concerning small donors, higher thresholds and

---

ment, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.” (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774))).

4. *Buckley*, 424 U.S. at 14.

5. *Id.* *Buckley*, the landmark case that deemed provisions of the Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263, unconstitutional marks the beginning of the modern era of campaign finance jurisprudence. Cynthia L. Bauerly & Eric C. Hallstrom, *Square Pegs: The Challenges for Existing Federal Campaign Finance Disclosure Laws in the Age of the Super PAC*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 329, 351 (2012).

6. See generally Michael A. Rosenhouse, Annotation, *Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases*, 19 A.L.R. FED. 2d 1 (2007) (collecting and discussing U.S. Supreme Court cases in which the Court considered campaign finance laws that were challenged on First Amendment grounds).

7. See *id.*

8. See, e.g., *Indep. Inst. v. Gessler*, 71 F. Supp. 3d 1194, 1195, 1203 (10th Cir. 2014) (seeking declaratory judgment and injunctive relief regarding reporting and disclosure requirements for electioneering communication under Colorado law based on First Amendment protections).

9. 773 F.3d 200 (10th Cir. 2014).

10. *Id.* at 219.

more comprehensive disclosure of large donor information, increased disclosure of “social welfare” organization and super PAC donors, and refined standards regarding earmarking and media exemptions to effectively address the loopholes provided by current disclosure laws.

## I. BACKGROUND

Out of concern that corporations posed problems for democracy, campaign finance laws restricting corporate participation in electoral politics have existed since the late 1800s.<sup>11</sup> These laws have evolved into a complex set of regulations concerning campaign contributions, expenditures, and corresponding disclosures and disclaimers in an attempt to lessen the impact of the almighty dollar on political power.<sup>12</sup> This Part first discusses the history of campaign finance laws and First Amendment challenges. Second, it explores the marked change in First Amendment jurisprudence through the landmark decision in *Citizens United v. FEC (Citizens United I)*<sup>13</sup> and its progeny. Next, this Part examines legislation in response to *Citizens United I* and, lastly, it considers recent challenges to campaign finance disclosure laws leading up to the Tenth Circuit’s shift in *Citizens United II*.

### A. Campaign Finance Regulation and the First Amendment

The battle between corporate interests in participating in electoral politics and governmental interests in limiting the influence of wealth on elections has resulted in a constantly evolving body of campaign finance laws on behalf of the Legislature and shifting First Amendment jurisprudence on behalf of the Judiciary. History reveals changing viewpoints with recent developments reflecting the Judiciary’s growing partiality for the deregulation of campaign finance and stronger protection for First Amendment rights.

#### 1. Initial Legislation

In response to increased corporate spending and in fear of wealth’s potential power over politics, Congress first banned contributions from corporations to federal candidates through the Tillman Act of 1907,<sup>14</sup> and

---

11. Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 339 (2011) (discussing the history of campaign finance laws and corporate spending in elections).

12. *See id.* at 339–40 (“The ban on the use of corporate treasury funds in election campaigns is based on the idea that corporations pose a special problem for democracy.”).

13. 558 U.S. 310 (2010).

14. Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (2006), transferred to 52 U.S.C. § 30118). The Act made it unlawful for:

[A]ny national bank, or any corporation . . . to make a [money] contribution or expenditure in connection with any election to any political office . . . or for any corporation whatever . . . to make a [money] contribution . . . in connection with any election at which [P]residential and [V]ice [P]residential electors or a Senator or Representative in . . . Congress are to be voted for . . .

over the next twenty years many states followed.<sup>15</sup> In 1925, Congress enacted the Federal Corrupt Practices Act of 1925, which mandated that certain information about contributions to presidential campaign committees be reported.<sup>16</sup> In upholding these disclosure requirements, the Supreme Court concluded that the disclosure of political contributions would “prevent the corrupt use of money to affect elections.”<sup>17</sup> Years later, the Taft-Hartley Act of 1947 expanded the federal contribution ban to apply to labor unions’ independent spending.<sup>18</sup> Similarly, approximately two-dozen states enacted legislation prohibiting corporate spending in support of or in opposition to election candidates.<sup>19</sup> This focus on regulating corporate spending through campaign finance laws was born out of the idea that corporations were able to aggregate wealth, symbolized as corporate “war chests,” and that their “special ‘advantages’ in the legal realm may translate into special advantages in the market for legislation.”<sup>20</sup>

Following financing scandals in elections and based on concerns regarding the effects of the “spiraling costs of election campaigns,”<sup>21</sup> Congress enacted the Federal Election Campaign Act of 1971 (FECA). Three years later, the Federal Election Campaign Act Amendment of 1974 added more stringent disclosure requirements, contribution limits, and established the Federal Election Commission (FEC) as the administrative and

---

*Id.* at 864–65. President Theodore Roosevelt supported reform after controversy arose regarding his campaign funding, the majority of which was comprised of large donations from corporations. Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1035–36 (2011).

15. Briffault, *supra* note 11, at 339 (citing EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 127–28 (1928)). New York was the first state to pass a disclosure law that required candidates to disclose their contribution sources and campaign expenditure recipients. See Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L., ETHICS & PUB. POL’Y 383, 400 (2013) (citing An Act to Amend Title Five of the Penal Code Relating to Crimes Against the Elective Franchise, 1890 N.Y. Laws 265 § 41(d)). Shortly thereafter, Colorado, Michigan, Massachusetts, California, Missouri, and Kansas enacted similar legislation. *Id.* (citing LOUISE OVERACKER, MONEY IN ELECTIONS 289, 291–94 (1932)). By 1927, campaign disclosure laws had been enacted by all but three states. *Id.*

16. 2 U.S.C. §§ 241–48, *repealed by* Pub. L. 92-225, § 405, 86 Stat. 20 (1972) (requiring presidential campaign committees to report information, including names and addresses of contributors, to the clerk of the House of Representatives).

17. *Burroughs v. United States*, 290 U.S. 534, 548 (1934).

18. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136, 159 (1947) (codified as amended by 52 U.S.C. § 30118 (2012)).

19. See *Life After Citizens United*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/citizens-united-and-the-states.aspx> (last updated Jan. 4, 2011). Alaska, Arizona, Colorado, Michigan, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Wisconsin, and Wyoming enacted laws banning political activity by both corporations and unions. *Id.*

20. See *Citizens United I*, 558 U.S. 310, 471 (2010) (Stevens, J., concurring in part and dissenting in part) (citation omitted) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990), *overruled by Citizens United I*, 558 U.S. 310 (2010)).

21. ROTUNDA & NOWAK, *supra* note 1, § 20.51(a).

enforcement agency.<sup>22</sup> In addition, FECA provided the framework for political action committees (PACs), which allowed for federal campaign donations from corporations and unions through segregated funds.<sup>23</sup> The United States Supreme Court considered First Amendment challenges to central provisions of FECA shortly after its amendment in the seminal case *Buckley v. Valeo*.<sup>24</sup>

## 2. Early First Amendment Jurisprudence Regarding Campaign Finance

*Buckley* set the stage for the concept that “money talks.”<sup>25</sup> The opinion depended upon the precept that the inherent relation between campaign contributions and expenditures and speech placed First Amendment restrictions on funding regulations.<sup>26</sup> The Court distinguished campaign contributions from campaign expenditures reasoning that the corresponding speech interests warranted limitations on contributions but not on expenditures.<sup>27</sup> Additionally, the Court held that disclosure requirements must survive exacting scrutiny,<sup>28</sup> which requires finding a “‘substantial relation’ between the governmental interest and the information required” by the disclosure to justify infringing on First Amendment rights.<sup>29</sup> The governmental interests validated by the Court were three-fold: first, disclosure provides the electorate with information that aids voters in evaluating candidates; second, disclosure deters corruption and the appearance of corruption; and third, disclosure aids in the detection of contribution limit violations.<sup>30</sup> Regarding the potential burdens on First Amendment rights that disclosure could invoke, the *Buckley* Court

22. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 8, *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; *see S. Rep. No. 93-689*, 93rd Cong., at 1743 (1974) (“There is no question that the public appreciates the pervasive evils of our present system for campaign financing. The potentials for abuse are all too clear. Americans are looking to Congress for comprehensive, effective reform, not for halfway measures that only reach a small part of the problem or which may make some present problems even worse.”).

23. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 302(a)-(f), 86 Stat. 3, 12 (1972) (laying out the proper organization of political committees).

24. 424 U.S. 1, 6 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC (Citizens United I)*, 558 U.S. 310 (2010).

25. *See id.* at 262 (White, J., concurring in part and dissenting in part).

26. *See id.* at 19-23 (majority opinion) (discussing the potential impacts that limitations on campaign contributions would have on speech).

27. *See id.* (“In sum, although the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”).

28. *Id.* at 64-66 (citing *NAACP v. Alabama*, 357 U.S. 449, 461 (1958)) (reasoning that exacting scrutiny “is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights”).

29. *Id.* at 64.

30. *Id.* at 66-68 (relying on Congressional records that discussed the different governmental interests in disclosure).



assessed previous decisions<sup>31</sup> in crafting an exemption that would be applicable where a party could demonstrate a “reasonable probability” that disclosure would result in “threats, harassment, or reprisals.”<sup>32</sup>

Two years after *Buckley*, the Court in *First National Bank of Boston v. Bellotti*<sup>33</sup> struck down a Massachusetts law banning corporate spending in support of or in opposition to ballot propositions.<sup>34</sup> The *Bellotti* Court opined that the value of speech “in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual,”<sup>35</sup> raising doubts about the constitutionality of the corporate contribution ban. Nevertheless, these doubts did not surface until more than thirty years later.<sup>36</sup> Rather, the Court addressed the ability of corporations to make campaign expenditures, not contributions.<sup>37</sup> In *FEC v. National Right to Work Committee (NRWC)*,<sup>38</sup> the Court upheld a federal law that restricted non-stock corporations from soliciting contributions from nonmembers.<sup>39</sup> In its decision, the Court found the corrupting effects of large financial contributions and the corresponding erosion of public confidence justified the restrictions on corporate contributions, the requirement that corporations use PACs, and the restrictions on solicitations to fund PACs.<sup>40</sup>

Shortly thereafter, in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*<sup>41</sup> the Court distinguished the special advantages of the corporate structure from nonprofit corporations formed expressly for the purpose of promoting political ideas, that have no shareholders, and that do not

---

31. See *Talley v. California*, 362 U.S. 60, 64–65 (1960) (holding an ordinance that prohibited distribution of anonymous handbills was unconstitutional as abridging the freedom of speech and press because the “fear of reprisal might deter perfectly peaceful discussions of public matters of importance”); see also *Bates v. City of Little Rock*, 361 U.S. 516, 517–18, 523–24, 527 (1960) (reversing convictions for failure to comply with an ordinance requiring disclosure of contributions, “by whom and when paid,” because the disclosure “would work a significant interference with the freedom of association of their members . . . [who] had been followed by harassment and threats of bodily harm”); *NAACP*, 357 U.S. at 462–63, 466 (holding that a production order compelling disclosure of the organization’s membership was a denial of due process as a restraint upon the freedom of association because the organization had “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”).

32. *Buckley*, 424 U.S. at 74 (discussing examples of evidence that would provide sufficient proof to invoke the exemption and concluding that a blanket exemption was not required).

33. 435 U.S. 765 (1978).

34. *Id.* at 767.

35. *Id.* at 777.

36. See generally *Citizens United I*, 558 U.S. 310 (2010) (relying heavily on the *Bellotti* opinion in reasoning that the corporation contribution bans were unconstitutional).

37. See *Bellotti*, 435 U.S. at 775–95.

38. 459 U.S. 197 (1982).

39. *Id.* at 209–10.

40. *Id.* at 201–02, 207, 209–10 (“[T]he ‘differing structures and purposes’ of different entities ‘may require different forms of regulation in order to protect the integrity of the electoral process.’” (quoting *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 201 (1981))).

41. 479 U.S. 238 (1986).

accept contributions from business corporations or labor unions.<sup>42</sup> The Court reasoned that these attributes “prevent[] such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.”<sup>43</sup> In so doing, the Court held the FECA restrictions on independent spending were unconstitutional as applied to the nonprofit, non-stock corporation and, consequently, created an exception for similar entities.<sup>44</sup>

### 3. A Shift Toward Stronger Restrictions on Campaign Finance

Applying similar reasoning as in *NRWC* and *MCFL*, the Court in *Austin v. Michigan Chamber of Commerce*<sup>45</sup> upheld a Michigan law that prohibited corporate independent expenditures in support of or in opposition to candidates based on “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>46</sup> The Court reasoned that, despite its status as a nonprofit, the Michigan Chamber of Commerce did not fall under the *MCFL* exception because most of its funding came from business corporations emphasizing the exception’s narrow application.<sup>47</sup> Moreover, the Court found the laws’ media exemption from disclosure requirements justified the compelling purpose of “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>48</sup> Although the Court recognized that this unique role did not “entitle the press to greater protection under the Constitution,”<sup>49</sup> it also distinguished the press by recognizing its involvement “in the regular business of imparting news to the public.”<sup>50</sup>

Two cases challenging the constitutionality of state disclosure laws followed in *McIntyre v. Ohio Elections Commission*<sup>51</sup> and *Buckley v. American Constitutional Law Foundation (ACLF)*.<sup>52</sup> *McIntyre* involved a law prohibiting the distribution of anonymous campaign literature and an

42. *Id.* at 264.

43. *Id.* at 264–65 (“[The] government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.”).

44. *See id.* at 263–64.

45. 494 U.S. 652 (1990), *overruled by Citizens United I*, 558 U.S. 310 (2010).

46. *Id.* at 660.

47. *See id.* at 661–65 (finding the Chamber’s purposes were not inherently political, the Chamber lacked shareholders, but its “members are more similar to shareholders of a business corporation than to the members of MCFL,” and was greatly influenced by business corporations as more than three-quarters of its members were business corporations).

48. *Id.* at 666–68 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978)).

49. *Id.* at 668.

50. *See id.* (reasoning that the restriction, if applied to the news media, “might discourage incorporated news broadcasters or publishers from serving their crucial societal role” and that the “exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events”).

51. 514 U.S. 334 (1995).

52. 525 U.S. 182 (1999).

unsigned leaflet regarding a ballot initiative.<sup>53</sup> Produced with personal funds, the leaflet focused solely on a proposed tax levy.<sup>54</sup> *ACLF* involved a law that required individuals circulating petitions regarding a proposed ballot initiative to wear identification badges that included the individual's name and status as a paid or unpaid volunteer.<sup>55</sup> By finding the information required by the disclosure regulations provided little value to the voters' education and decision-making regarding the elections, while posing the threat of discouraging political activity, the Court struck down the disclosure laws as unconstitutional.<sup>56</sup>

Despite the holdings of *McIntyre* and *ACLF*, campaign finance disclosure continued to serve the important governmental interest of informing the electorate in the eyes of both the Judiciary and the Legislature.<sup>57</sup> To further "purge national politics of what [was] conceived to be the pernicious influence of 'big money' campaign contributions,"<sup>58</sup> Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), which contained several amendments to FECA.<sup>59</sup> By redefining what campaign activity was subject to regulation, the BCRA expanded *Buckley's* "'magic words' of express advocacy."<sup>60</sup> Specifically, *Buckley* determined that "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," or express advocacy, was the kind of campaign expenditures that FECA applied to.<sup>61</sup>

Consequently, the words used as examples of advocacy language, such as "vote for," "elect," "support," "defeat," and "reject" became the

53. *McIntyre*, 514 U.S. at 337.

54. *Id.*

55. *ACLF*, 525 U.S. at 200.

56. *See McIntyre*, 514 U.S. at 348, 355–57 ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."); *see also ACLF*, 525 U.S. at 197–200. "Listing paid circulators and their income from circulation 'forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts,' no more than tenuously related to the substantial interests disclosure serves . . ." *Id.* at 204 (alteration in original) (citation omitted) (quoting *Am. Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1105 (10th Cir. 1997)).

57. *See* Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 992 (2011) (noting that the Supreme Court easily upheld disclosure laws following *McIntyre* and *ACLF*).

58. *McConnell v. FEC*, 540 U.S. 93, 93 (2003) (quoting *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 572 (1957)), *overruled by Citizens United I*, 558 U.S. 310 (2010).

59. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.) (declaring that it was "[a]n Act To amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform"). The BCRA, commonly known as McCain-Feingold, also sought to eliminate "soft money" from political campaigns. Jason M. Shepard, *Campaigning as the Press: Citizens United and the Problem of Press Exemptions in Law*, 16 NEXUS: CHAP. J.L. & POL'Y 137, 140 (2010–11).

60. *See* Briffault, *supra* note 11, at 342–43 (discussing the ability to easily evade FECA's disclosure requirements under the express advocacy standard and *Buckley's* "magic words").

61. *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (*per curiam*) (footnote omitted), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United I*, 558 U.S. 310 (2010).

“magic words” of express advocacy and created a separate category of campaign activity exempt from regulation known as “issue advocacy.”<sup>62</sup> The BCRA expanded the scope of express advocacy by defining a new category termed “electioneering communications” as “(i) broadcast, cable or satellite communications (ii) that refer to a clearly identified candidate, (iii) are targeted on that candidate’s constituency, and (iv) are aired within thirty days before a primary or sixty days before a general election in which that candidate is running.”<sup>63</sup> Additionally, the application of FECA’s disclosure requirements extended to such communications.<sup>64</sup>

Shortly thereafter, *McConnell v. FEC*<sup>65</sup> involved a challenge to the BCRA to no avail—the Court upheld the constitutionality of the ban on corporate independent spending and the corresponding disclosure requirements.<sup>66</sup> *McConnell* officially closed the loophole between express advocacy and issue advocacy by finding the BCRA’s new category of electioneering communications avoided vagueness and rectified *Buckley*’s “functionally meaningless” magic words requirement.<sup>67</sup> The *McConnell* Court reaffirmed the constitutionality of the ban on corporate and union campaign spending by finding that the ability to spend through PACs provided corporations “sufficient opportunit[ies] to engage in express advocacy.”<sup>68</sup>

#### 4. The Pendulum Begins to Swing

A few years later, the departure of Justice O’Connor (who Justice Alito succeeded) marked a drastic shift in campaign finance jurisprudence<sup>69</sup> beginning with the Court’s decision in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*.<sup>70</sup> In *WRTL*, the Court reasoned that the corporate spending ban could apply to the “functional equivalent of express advocacy,” which required a communication be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

62. See *id.* at 44 n.52; see also *McConnell*, 540 U.S. at 102–03 (discussing “issue advocacy”).

63. Briffault, *supra* note 11, at 342–43 (“In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress responded by defining a new category of campaign speech—‘electioneering communications’—for purposes of the ban on corporate and union campaign expenditures as well for determining the scope of disclosure.”).

64. *Id.* at 343.

65. 540 U.S. 93 (2003).

66. *Id.* at 201–03, 219 (reasoning that because the disclosure requirements “d[id] not prevent anyone from speaking,” they were not unconstitutional (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003))).

67. See *id.* at 193–94 (“[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.”).

68. *Id.* at 203.

69. See Briffault, *supra* note 57, at 993 (discussing the “Supreme Court’s campaign finance U-turn” following the retirement of Justice O’Connor).

70. 551 U.S. 449, 481–82 (2007).

candidate.”<sup>71</sup> In adopting this test for as-applied challenges and holding that the BCRA’s electioneering communication definition was unconstitutional as applied to WRTL’s advertisements—financed with funds from its general treasury—the Court narrowed the scope of the electioneering communication’s application and constricted *McConnell*’s expansive approach to prohibition<sup>72</sup> setting the stage for *Citizens United I*.

### B. *Citizens United v. FEC and its Progeny*

In the highly controversial opinion in *Citizens United I*, the Court struck down the sixty-year federal ban on corporate independent expenditures in federal elections out of general treasury funds, overruling *Austin* and overruling the portion of *McConnell* that upheld the BCRA’s electioneering communications provisions.<sup>73</sup> *Citizens United*, a nonprofit corporation, sought exemption for its film, *Hillary: The Movie*, from classification as an electioneering communication and from the required disclosures.<sup>74</sup> The majority opinion noted the complexity of campaign finance regulation and opined that the FEC was controlling what political speech could become public.<sup>75</sup> Based on the burdensome nature of PACs, the Court declared the option to form PACs did not sufficiently allow corporations to speak and, therefore, the prohibition on corporate independent expenditures constituted an outright ban on speech.<sup>76</sup>

The Court relied heavily on *Buckley* and *Bellotti* in overruling *Austin* and stressed that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”<sup>77</sup> Addressing the media exemption, the Court noted that media corporations similarly amass large amounts of wealth through the advantages of the corporate form in finding the law invalid. Moreover, the Court stated differential treatment of a media corporation and some other corporation cannot comport with the First Amendment.<sup>78</sup> The Court did, however, uphold the disclosure and disclaimer requirements based on the importance of transparency.<sup>79</sup> Alt-

---

71. *Id.* at 466–67, 469–70 (stating that such communications would be considered the “functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”).

72. *See id.* at 460, 476–82. Rather than interpreting “electioneering communication[s]” as those “that refer to a clearly identified candidate,” the Court returned to the narrower express advocacy interpretation of the years prior to the enactment of the BCRA as an “appeal to vote for or against a specific candidate.” *Id.* at 469–70, 484 (alteration in original) (quoting 2 U.S.C. § 441b(b)(a) (2000)).

73. *See Citizens United I*, 558 U.S. 310, 365–66, 372 (2010).

74. *Id.* at 319–21.

75. *Id.* at 335–36 (stating that the “FEC has created a regime that allows it to select what political speech is safe for public consumption” resulting in “an unprecedented governmental intervention into the realm of speech”).

76. *Id.* at 337–39.

77. *Id.* at 345–56 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

78. *Id.* at 352–54.

79. *Id.* at 371 (“[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”). Only Justice Thomas dissented from the hold-

though such requirements may impose burdens on speakers, the majority opined they serve the interest of providing the electorate with information without imposing a ceiling on campaign activity or preventing anyone from speaking.<sup>80</sup> Accordingly, the Court held the requirements survived the exacting scrutiny standard and thus did not violate the First Amendment.<sup>81</sup>

A decision out of the United States Court of Appeals for the District of Columbia Circuit further shifted the campaign finance landscape in *SpeechNow.org v. FEC (SpeechNow)*.<sup>82</sup> The court held that limits on contributions to organizations that intended to make only independent expenditures were unconstitutional because such spending does not pose sufficient risks of corruption.<sup>83</sup> As a result, the super PAC was born, which would lead to significant increases in corporate spending.<sup>84</sup> Nonetheless, the court upheld the reporting and disclosure requirements as imposing a minimal burden on speech compared to the important interest of the public “in knowing who is speaking about a candidate and who is funding that speech.”<sup>85</sup>

Shortly thereafter, the Supreme Court in *Doe v. Reed*<sup>86</sup> concluded the disclosure of names and addresses of petition signers, who sought to subject legislation that extended “all but marriage” benefits to same-sex couples to a voter referendum, served the state’s interest of preserving the integrity of the electoral process by combating fraud, discovering invalid signatures, and also by promoting accountability in elections.<sup>87</sup> Justice Thomas was the sole dissenter,<sup>88</sup> but five Justices wrote concurring opinions focusing on the reasonable probability of harassment

ing that the disclosure and disclaimer requirements were constitutional. *See id.* at 480–85 (Thomas, J., concurring in part and dissenting in part).

80. *Id.* at 366 (citing *McConnell v. FEC*, 540 U.S. 93, 201 (2003), *overruled by Citizens United I*, 558 U.S. 310 (2010)); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United I*, 558 U.S. 310 (2010)).

81. *Id.* at 367–71.

82. 599 F.3d 686 (D.C. Cir. 2010).

83. *Id.* at 689, 695–96 (“[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anticorruption interest in limiting contributions to independent expenditure-only organizations.”).

84. *See, e.g.*, Bauerly & Hallstrom, *supra* note 5, at 338.

85. *SpeechNow*, 599 F.3d at 698.

86. 561 U.S. 186 (2010).

87. *Id.* at 192–93, 197–99.

88. *See id.* at 228–29 (Thomas, J., dissenting) (“In my view, compelled disclosure of signed referendum and initiative petitions . . . severely burdens those rights and chills citizen participation in the referendum process. Given those burdens, I would hold that Washington’s decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process.” (footnote omitted) (citation omitted)).

standard for exemption,<sup>89</sup> with only Justice Alito calling for a lower evidentiary burden.<sup>90</sup>

The Supreme Court again narrowed the importance of regulating campaign finance in *McCutcheon v. FEC*<sup>91</sup> by striking down the aggregate limits on contributions made to candidates, parties, and connected political committees in federal elections.<sup>92</sup> The Court reiterated that the only interest in protecting against actual or apparent corruption is that of quid pro quo corruption, a distinction that was emphasized in *Citizens United I*.<sup>93</sup> In its 5–4 decision, however, the Court opined that disclosure presents less restrictions on speech than contribution bans and provides the public with information while deterring corruption by exposing large donations.<sup>94</sup>

### C. Legislation in Response to *Citizens United v. FEC*

In response to the *Citizens United I* decision, the House of Representatives passed a bill entitled Democracy Is Strengthened by Casting Light on Spending in Elections, known as the DISCLOSE Act.<sup>95</sup> This Act increased disclosure of corporate and organizational independent expenditures by providing for the following:

- (i) disclosure of donations to nonprofits earmarked for electoral use,
- (ii) the creation of an optional Campaign Related Activity Account (CRAA) as the exclusive account for campaign spending and the disclosure of only donations above a high \$6,000 threshold to the optional CRAA, (iii) a mechanism for donors to nonprofits to provide that their funds will not be used for electoral purposes; and (iv) a requirement that if a nonprofit does not create a CRAA and undertakes independent expenditures or electioneering communications that all donations of \$600 or more to the organization would be subject to

89. See *id.* at 202 (Breyer, J., concurring); see also *id.* at 212 (Sotomayor, J., concurring) (joined by Justices Stevens and Ginsburg); *id.* at 230 (Stevens, J., concurring) (joined by Justice Breyer); *id.* at 219 (Scalia, J., concurring).

90. *Id.* at 202–04, 212 (Alito, J., concurring) (“As-applied challenges to disclosure requirements play a critical role in protecting First Amendment freedoms. To give speech the breathing room it needs to flourish, prompt judicial remedies must be available well before the relevant speech occurs and the burden of proof must be low.”).

91. 134 S. Ct. 1434 (2014).

92. *Id.* at 1448, 1456–57, 1462 (“An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a ‘modest restraint’ at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”).

93. *Id.* at 1441 (“Any regulation must instead target what we have called ‘*quid pro quo*’ corruption or its appearance.” (citing *Citizens United I*, 558 U.S. 310, 359 (2010))).

94. *Id.* at 1459–60 (recognizing that disclosure “offers a particularly effective means of arming the voting public with information” and at the same time can “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity” (quoting *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McCConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United I*, 558 U.S. 310 (2010))).

95. See generally *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act*, H.R. 5175, 111th Cong. (2010).

disclosure except for contributions from donors who had expressly directed that their donations not be used for electoral purposes.<sup>96</sup>

One commentator has suggested that because the CRAA presents attributes similar to a PAC and *Citizens United I* determined that corporations cannot be compelled to funnel their campaign spending through PACs, it would likely be subject to constitutional challenges.<sup>97</sup> Even so, the complex and controversial DISCLOSE Act was never enacted after the Senate filibustered twice.<sup>98</sup>

In similar fashion, a number of states responded to *Citizens United I* by repealing or re-writing campaign finance laws.<sup>99</sup> In the Tenth Circuit, upon the request of Governor Bill Ritter to determine the constitutionality of two provisions of the Colorado Constitution that *Citizens United I* put into question, the Colorado Supreme Court held the provisions were unconstitutional.<sup>100</sup> Moreover, the Colorado legislature enacted Senate Bill 10-203, which requires corporations and labor unions to register election campaign donations, including the identity of the donor and the amount of the donation, with an independent agency.<sup>101</sup> Under the Bill, corporations and labor unions are able to make expenditures expressly advocating for the election or defeat of a candidate and to make contributions for electioneering communications.<sup>102</sup>

Although corporations may contribute to political committees, they are prohibited from making direct corporate contributions to candidate committees and political parties.<sup>103</sup> Corporations that are formed to pro-

96. Briffault, *supra* note 57, at 1011 (footnote omitted).

97. *Id.* (proposing a solution based on the DISCLOSE Act that the author argues would be constitutional, although it would likely face constitutional challenges).

98. See Rosalind S. Helderman, *DISCLOSE Act, New Donor Transparency Law, Blocked in Senate*, WASH. POST (July 16, 2012), [http://www.washingtonpost.com/blogs/2chambers/post/disclose-act-new-donor-transparency-law-blocked-in-senate/2012/07/16/gJQAbm7WpW\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/disclose-act-new-donor-transparency-law-blocked-in-senate/2012/07/16/gJQAbm7WpW_blog.html); see also Ted Barrett, *Senate Republicans Block DISCLOSE Act for Second Straight Day*, CNN, <http://www.cnn.com/2012/07/17/politics/senate-disclose-act/> (last updated July 17, 2012).

99. See NAT'L CONF. ST. LEGISLATURES, *supra* note 19 ("In 17 of the 24 states with laws affected by the *Citizens United* decision, legislation has been introduced to amend the law.").

100. *In re Interrogatories Propounded by Governor Ritter, Jr., Concerning Effect of Citizens United v. FEC*, 558 U.S. 310 (2010) on Certain Provisions of Article XXIII of Constitution of State (*In re Interrogatories*), 227 P.3d 892 (Colo. 2010).

101. S. 10-203, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010); see COLO. REV. STAT. §§ 1-45-107.5, -109, -111.5 (2016).

102. See COLO. REV. STAT. § 1-45-107.5(2).

103. COLO. REV. STAT. § 1-45-103.7; COLO. CONST. art. XXVIII, § 3(4)(a) (2015) (held unconstitutional) ("It shall be unlawful for a corporation or labor organization to make contributions to a candidate committee or a political party, and to make expenditures expressly advocating the election or defeat of a candidate; except that a corporation or labor organization may establish a political committee or small donor committee which may accept contributions or dues from employees, officeholders, shareholders, or members.") Only the expenditure was held unconstitutional by the Colorado Supreme Court. *In re Interrogatories*, 227 P.3d at 894 ("To the extent section 3(4) . . . makes it unlawful for a corporation or labor organization to make expenditures expressly advocating the election or defeat of a candidate, it violates the dictates of the First Amendment of the United States Constitution . . .").



mote political ideas, however, are exempt from this restriction.<sup>104</sup> Several other states have enacted similar legislation in the wake of *Citizens United I*.<sup>105</sup> This new legislation, particularly the disclosure requirements, has been subject to First Amendment challenges since its enactment.<sup>106</sup>

#### *D. Recent Challenges to Campaign Finance Disclosure in the Tenth Circuit*

Soon after *Citizens United I*, the Tenth Circuit considered whether two nonprofit corporations that were formed to educate youth about political issues, including healthcare, campaign finance, the economy, and voting records of governmental representatives, constituted political committees.<sup>107</sup> In determining the applicable reporting and disclosure requirements under New Mexico law, the court also addressed whether the corporations' mailers that criticized several incumbent state legislators constituted express advocacy or its functional equivalent.<sup>108</sup> Because the organizations were not under the control of a political candidate, the court applied the "major purpose" test to determine whether the organizations operated primarily for a political purpose.<sup>109</sup>

An entity's major purpose can be determined by either examining its central organizational purpose or through a comparison of its electioneering spending with its overall spending.<sup>110</sup> Where contributions for express advocacy or to candidates represent a preponderance of the organization's expenditures, the major purpose is deemed political.<sup>111</sup> The court found that neither were satisfied and also recognized that a small dollar amount of expenditures could not constitutionally serve as a trigger, standing alone, for classification as a political committee.<sup>112</sup> Coupled with the implications of *Citizens United I*, this classification would increasingly degrade the effectiveness of campaign finance regulations and serve as a loophole to disclosure regimes.<sup>113</sup>

In *Free Speech v. FEC*,<sup>114</sup> the Tenth Circuit subsequently upheld the FEC's disclaimer and disclosure requirements as necessary to provide voters with information and "the transparency that 'enables the electorate

---

104. COLO. CONST. art. XXVIII, § 3(4)(b)(I)-(III) (2015). This exception refers to corporations like Massachusetts Citizens for Life, Inc. See generally *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 263-64 (1986).

105. See NAT'L CONF. ST. LEGISLATURES, *supra* note 19 (stating that Alaska, Arizona, Connecticut, Minnesota, North Carolina, South Dakota, and West Virginia laws enacted in response to *Citizens United I* are very similar to Colorado's law).

106. See discussion *infra* Section I.D.

107. See *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 671 (10th Cir. 2010).

108. *Id.*

109. *Id.* at 677.

110. *Id.* at 678.

111. *Id.*

112. *Id.* at 678-79 (discussing the court's previous reasoning and holding in *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1153 (10th Cir. 2007)).

113. See discussion *infra* Section III.B.

114. 720 F.3d 788 (10th Cir. 2013).

to make informed decisions and give proper weight to different speakers and messages.”<sup>115</sup> In addition, the court reasoned that the FEC’s functional equivalent and major purpose tests were essential in determining whether an organization would be subject to the reporting, disclaimer, and disclosure requirements, which it found to be more important after *Citizens United I.*<sup>116</sup>

The Tenth Circuit carved out another potential avenue for avoidance of disclosure in *Sampson v. Buescher*,<sup>117</sup> which involved a campaign committee that formed only to oppose the annexation of a neighborhood.<sup>118</sup> In *Sampson*, the court held that applying Colorado’s campaign reporting and disclosure requirements to such a committee violated the members’ rights to freedom of association.<sup>119</sup> Applying exacting scrutiny,<sup>120</sup> the court determined there was a legitimate interest in providing the public with financial disclosures, but distinguished ballot issues from candidate elections.<sup>121</sup> The court found the burdens of the disclosure requirements could not be justified by any governmental interest where a ballot-initiative committee raises or expends a small amount of money, which in this case was less than \$1,000.<sup>122</sup> The court, however, refused to draw a bright-line to mark when contributions and expenditures need not be reported by ballot-issue committees.<sup>123</sup>

In response to *Sampson*, the Secretary of State, Scott Gessler, promulgated a rule increasing the contribution and expenditure threshold for triggering the status of an issue committee from \$200 to \$5,000.<sup>124</sup> Two election watch organizations petitioned for review challenging Gessler’s authority in passing the rule.<sup>125</sup> The Colorado Supreme Court held that Gessler acted beyond his authority and that, because the rule

---

115. *Id.* at 798 (quoting *Citizens United I.*, 558 U.S. 310, 371 (2010)).

116. *Id.*

117. 625 F.3d 1247 (10th Cir. 2010).

118. *Id.* at 1261.

119. *Id.*

120. See discussion *supra* Section I.A.2.

121. See *Sampson*, 625 F.3d at 1256–59 (reasoning that the interest of facilitating detection of violations was moot by the prohibition on contribution limitations regarding ballot-issues, the interest of deterring corruption was irrelevant because “quid pro quo corruption cannot arise in a ballot-issue campaign,” and that the informational interest of reporting and disclosure requirements was “significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight”).

122. *Id.* at 1249, 1261.

123. *Id.* at 1261 (“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 on ballot issues presenting ‘complex policy proposals.’ We say only that Plaintiffs’ contributions and expenditures are well below the line.” (citation omitted) (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003))).

124. *Gessler v. Colo. Common Cause*, 327 P.3d 232, 233–34 (Colo. 2014).

125. *Id.* at 234.

promulgated conflicted with provisions upheld in *Sampson*, the rule was unlawful.<sup>126</sup>

The Colorado Supreme Court's refusal to adopt a bright-line rule became a point of frustration in *Coalition for Secular Government v. Gessler*.<sup>127</sup> The opinion declared the need to adjudicate the applicability of Colorado's campaign finance disclosure laws on a case-by-case basis "itself offends the First Amendment."<sup>128</sup> The court concluded that the informational interest in mandating minimal to virtually nonexistent contribution and expenditure disclosures could not justify the burdens that compliance placed on speech and association rights.<sup>129</sup> In doing so, the court raised the issue surrounding small entities' ability to comply with the detailed record keeping and administrative costs of disclosure obligations.<sup>130</sup> The court suggested the lack of established precedent in the Tenth Circuit posed the risk of endless litigation in contradiction to the intent of the disclosure requirements.<sup>131</sup>

## II. CITIZENS UNITED V. GESSLER

### A. Facts

Citizens United is a Virginia non-stock corporation formed for the principal purpose of promoting "traditional American values," such as limited government, national sovereignty and security, the free market economy, and strong families through grass roots efforts, advocacy, and education.<sup>132</sup> It has become well known for releasing documentaries that address political and religious topics, which are produced by Citizens United's in-house production and marketing arm Citizens United Productions.<sup>133</sup> Films are distributed through DVDs, television, online digital streaming and downloading, and theatrical release; sold for retail and wholesale bulk purchase; shown at movie theaters; licensed to television broadcasters and digital streaming companies; and occasionally made available for free screenings to educational institutions, the public, and

---

126. *Id.* at 235–38 (concluding that the court's as-applied remedy in *Sampson* did not render the provisions unconstitutional on their face).

127. 71 F. Supp. 3d 1176, 1178 (D. Colo. 2014).

128. *Id.*

129. *Id.*

130. *Id.* at 1181.

131. *See id.* at 1183 ("Unfortunately, given the Tenth Circuit's refusal 'to establish a bright line below which a ballot issue committee cannot be required to report contributions and expenditures' and the Supreme Court's election not to answer the certified questions, I must make a ruling on the specific facts of this case based on what I determine, *sui generis*, to be reasonable. I say 'unfortunately' because this state of affairs means that no precedent has been established and the stability this matter of considerable public importance so needfully requires will have to await another day or days and even more lawsuits." (quoting *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010))).

132. *See* *Citizens United v. Gessler (Citizens United II)*, 773 F.3d 200, 202 (10th Cir. 2014); *see also Who We Are*, CITIZENS UNITED, <http://www.citizensunited.org/who-we-are.aspx> (last visited Feb. 3, 2016).

133. *Citizens United II*, 773 F.3d at 202.

members of the news media.<sup>134</sup> Citizens United “advertises its films on television, in newspapers, on billboards, by electronic and regular mail, and on the Internet.”<sup>135</sup>

Citizens United produced a film titled *Rocky Mountain Heist*<sup>136</sup> with plans for distribution throughout the United States “through DVD, television broadcast, and online digital streaming and downloading,” and marketing through television, radio, and Internet advertisements.<sup>137</sup> The documentary was scheduled for release in October 2014 ahead of the Colorado General Election held on November 4, 2014.<sup>138</sup> *Rocky Mountain Heist* and the advertisements promoting the film unambiguously referred to elected Colorado officials running in the general election and included footage of participants advocating for their election or defeat.<sup>139</sup> As a result, it fell under provisions of Colorado campaign laws that require disclosure in regard to such electioneering communications and independent expenditures.<sup>140</sup> In April 2014, Citizens United sought a Declaratory Order with the Secretary of State (the Secretary) requesting a ruling that *Rocky Mountain Heist* and its marketing be exempted from the disclosure requirements for electioneering communications and independent expenditures.<sup>141</sup>

134. *Id.*

135. *Id.*

136. The film focused on the “alleged impact of various advocacy groups on Colorado government and public policy.” *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* Under Article XXVIII of the Colorado Constitution and the Fair Campaign Practices Act (FCPA), an “[e]lectioneering communication” is defined as follows:

[A]ny communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

- (I) Unambiguously refers to any candidate; and
- (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and
- (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

COLO. CONST. art. XXVIII, § 2(7)(a) (2015); *see also* COLO. REV. STAT. § 1-45-103(9) (2016). An “[e]xpenditure” is defined as follows:

[A]ny purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

COLO. CONST. art. XXVIII, § 2(8)(a); *see also* COLO. REV. STAT. § 1-45-103(10). Further, Article XXVIII and the FCPA define “[i]ndependent expenditure [as] an expenditure that is not controlled by or coordinated with any candidate or agent of such candidate.” COLO. CONST. art. XXVIII, § 2(9); *see also* COLO. REV. STAT. § 1-45-103(11).

141. *Citizens United II*, 773 F.3d at 207.

### B. Procedural History

In its request, Citizens United noted that it had been granted an exemption from the disclosure provisions of FECA<sup>142</sup> in an advisory opinion issued by the FEC in June 2010.<sup>143</sup> Citizens United used this exemption as support for its Petition for a Declaratory Order because the definitions of electioneering communication and expenditure under the federal statute are similar to Colorado's definitions.<sup>144</sup> Additionally, the press exemption under the federal statute is comparable to the media exemptions under Colorado law.<sup>145</sup> Nonetheless, the Secretary denied Citizens United's request and ruled that because it was not a broadcast facility, Citizens United's film and advertising did not fall under the media exemption.<sup>146</sup> Further, the Secretary ruled that Citizens United's communications did not qualify for the regular-business exemption, which applies

142. 52 U.S.C. §§ 30101–30126 (2012).

143. *Citizens United II*, 773 F.3d at 207 (citing FEC Advisory Op., No. 2010–08, 2010 WL 3184266 (June 11, 2010)).

144. *Id.* Compare 52 U.S.C. § 30104(f)(3)(A)(i) (defining “electioneering communication” as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within “60 days before a general, special, or runoff election” in which the candidate is seeking office or “30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate” in which the candidate is seeking office, and where a communication “refers to a candidate for an office other than President or Vice President [and] is targeted to the relevant electorate”), and 52 U.S.C. § 30101(9)(A) (defining “expenditure” to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office” and any “written contract, promise, or agreement to make an expenditure”), with COLO. CONST. art. XXVIII, § 2(7)(a), 2(8)(a), and COLO. REV. STAT. § 1-45-103(9)–(10).

145. Compare 52 U.S.C. § 30104(f)(3)(B)(i) (providing an exception from the definition of electioneering communication for “a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate”), and 52 U.S.C. § 30101(9)(B)(i) (providing an exemption from the definition of expenditure for “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate”), with COLO. CONST. art. XXVIII, § 2(7)(b)(I)–(III), 2(8)(b)(I)–(III) (providing an exemption from the definition of electioneering communication for “[a]ny news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party” or “[a]ny editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party” or “[a]ny communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families” and providing an exemption from the definition of “expenditure” for “[a]ny news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party” or “[a]ny editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party” or “[s]pending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families”), and COLO. REV. STAT. § 1-45-103(9)–(10) (providing that the meaning of electioneering communication and expenditure is in accordance with COLO. CONST. art. XXVIII, § 2(7), 2(8)).

146. *Citizens United II*, 773 F.3d at 208 (citing Suzanne Staiert, Deputy Sec’y of State, State of Colo., *Declaratory Order, In the Matter of Citizens United’s Petition for Declaratory Order*, (June 5, 2014), <http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/2014/20140605CitizensUnitedDeclaratoryOrder.pdf>).

to persons and businesses whose primary purpose is distributing content.<sup>147</sup>

Following the Secretary's denial of its request, Citizens United sought a preliminary injunction in the United States District Court for the District of Colorado to enjoin the enforcement of the disclosure requirements.<sup>148</sup> The action was brought against the Secretary to challenge the disclosure provisions as violating the First Amendment, both facially and as applied to Citizens United, because the provisions included media exemptions.<sup>149</sup> The district court denied the motion for preliminary injunction, and Citizens United appealed.<sup>150</sup>

### C. Majority Opinion

In the majority opinion, authored by Circuit Judge Harris L. Hartz and joined by Circuit Judge Timothy M. Tymkovich, the court declined to address Citizens United's facial challenge and considered the district court's denial of the preliminary injunction regarding the as-applied challenge under an abuse of discretion standard.<sup>151</sup> In considering the constitutionality of Colorado's disclosure requirements, the court applied the exacting scrutiny standard.<sup>152</sup>

First, the court found the disclosures relating to electioneering communications and independent expenditures served the purpose of "providing the electorate with information about the source of election-related spending."<sup>153</sup> The court, however, rejected the Secretary's argument that anticorruption was an important governmental interest in requiring the disclosure of independent expenditures.<sup>154</sup> In so doing, the court distinguished coordinated contributions to candidates from independent expenditures lacking such coordination because the latter present

---

147. *Id.* The Secretary relied on the court's interpretation of the regular-business exemption in *Colorado Citizens for Ethics in Government v. Committee for the American Dream*, 187 P.3d 1207, 1216 (Colo. App. 2008). In this case, the court interpreted the exemption narrowly "as limited to persons whose business is to broadcast, print, publicly display, directly mail, or hand deliver candidate-specific communications within the named candidate's district as a service, rather than to influence elections." *Id.* Thus, the exemption does not apply to those seeking to influence election outcomes. *Id.* The court reasoned that because "[b]roadcasters and publishers do not seek to influence elections as their primary objective, except where they are 'owned or controlled by a candidate or political party,'" the reporting requirements are not applicable. *Id.* (quoting COLO. CONST. art. XXVIII, § 2(7)(b)(I)-(II)).

148. *Citizens United II*, 773 F.3d at 202.

149. *Id.* at 202, 208.

150. *Id.* at 208.

151. *Id.* at 202, 209 (holding that under the First Amendment, the Secretary must treat Citizens United and the exempted media the same, which negated the need for the court to address the facial challenge).

152. See discussion *supra* Section I.A.2. The exacting scrutiny standard requires finding "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United II*, 773 F.3d at 210 (quoting *Citizens United I*, 558 U.S. 310, 366 (2010)).

153. *Citizens United II*, 773 F.3d at 210.

154. *Id.* at 211.

no risk of quid pro quo corruption and do not give rise to the appearance of corruption.<sup>155</sup>

Next, the court relied on the Supreme Court's opinion in *Citizens United I* in rejecting the Secretary's justification—that the First Amendment provides greater protection for the press—for the media exemptions.<sup>156</sup> The court concluded that the Secretary could not rely on the First Amendment to differentiate between the news media and other speakers.<sup>157</sup> The Secretary argued that the public's ability to evaluate a message's credibility served as the line distinguishing "single-shot speakers" with misleading names from the exempted media that perform press functions, which provides context for the electorate.<sup>158</sup> The court relied on factors that correlate with the public's opportunity to evaluate the speaker, such as an extended period of time and regular intervals of publication, to determine what provides context for evaluating messages.<sup>159</sup>

The court held that the Colorado government lacked a sufficiently important interest to justify imposing disclosure requirements on Citizens United because its history of producing films allowed the public to evaluate its messages.<sup>160</sup> In so holding, the court relied on the Secretary's justification for the media exemption that the public's familiarity with the media enables sufficient evaluation of its reports and opinions.<sup>161</sup> In fact, the court stated that the electorate would more easily be able to evaluate a Citizens United documentary than an editorial in a newspaper or magazine that does not frequently address controversial political topics.<sup>162</sup> The court further recognized that the "presence of . . . exemptions can cast doubt on the validity and extent of the asserted governmental interest because the exemptions may indicate that the statutory command is not based on the asserted interest but on a qualified, more narrow interest."<sup>163</sup> Lastly, the court held that Citizens United's advertisements for *Rocky Mountain Heist* did not fall under the exemption because it could not show it was being treated differently than the media in respect to advertisements.<sup>164</sup> Accordingly, the court reversed the district court's ruling on the motion for preliminary injunction and remanded with instructions to issue an injunction.<sup>165</sup>

---

155. *Id.* (citing *Citizens United I*, 558 U.S. at 356–57).

156. *Id.* at 212 (citing *Citizens United I*, 558 U.S. at 352).

157. *Id.*

158. *Id.* at 213.

159. *Id.* at 215.

160. *Id.* at 210.

161. *Id.* at 213–15.

162. *Id.* at 215–16.

163. *Id.* at 216.

164. *Id.* at 217–18.

165. *Id.* at 219.

#### D. Dissenting Opinion

Circuit Judge Gregory A. Phillips authored an opinion concurring in the judgment regarding the requirement that Citizens United comply with the Colorado disclosure laws for the advertisements for *Rocky Mountain Heist*, but dissented from the reversal of the district court's ruling that Citizens United did not qualify for exemption from all other disclosure requirements.<sup>166</sup> In disagreeing with the majority's conclusion that Citizens United be afforded exemption from the disclosure requirements, Judge Phillips opined that the court was rewriting Colorado law to include additional exemptions without the authority to do so.<sup>167</sup> He reasoned that the governmental interest in ensuring the electors are able to determine the source of political messages and helping them to make informed choices was sufficient to uphold the disclosure requirements.<sup>168</sup>

Judge Phillips criticized the court's as-applied analysis and recalled the district court's statements regarding Citizens United's arguments that seemed to focus on equal protection.<sup>169</sup> He then went on to debase Citizens United's claims under a First Amendment–Equal Protection legal theory and reasoned that the court, in allowing Citizens United to be treated as a media entity, second-guessed the Colorado voters' need for information regarding donors.<sup>170</sup>

Additionally, Judge Phillips determined that Citizens United was not being treated differently than the exempted media, who would also have to comply with the disclosure requirements were they to produce a film considered an electioneering communication.<sup>171</sup> He noted that news organizations do not normally raise funds for electioneering communications or seek donations from subscribers in support of specific messages.<sup>172</sup> Lastly, Judge Phillips disagreed with the majority's remedy and opined that the appropriate action would be to "either sever the traditional media's exemption from disclosure or strike the entire disclosure scheme."<sup>173</sup> He reasoned that the majority had written in a third category of entities for exemption and risked increased case-by-case litigation.<sup>174</sup>

### III. ANALYSIS

Following the drastic shift in campaign finance jurisprudence marked by *Citizens United I*, disclosure laws were turned to as campaign finance reformists' saving grace and as opponents' new challenge to

---

166. *Id.* (Phillips, J., concurring in part and dissenting in part).

167. *Id.*

168. *Id.*

169. *Id.* at 220.

170. *Id.* at 221.

171. *Id.* at 221–22.

172. *Id.* at 222.

173. *Id.*

174. *Id.* at 222–23.



eviscerate.<sup>175</sup> Moreover, as corporate America embraced its newfound ability to influence elections through unlimited political spending, loopholes to disclosure laws were increasingly discovered and exploited.<sup>176</sup> The Tenth Circuit's recent decision in *Citizens United II* opened yet another door to the avoidance of campaign finance disclosure, increasing implications of the growing ineffectiveness of disclosure requirements and posing a greater risk to defeat the purposes behind the laws.<sup>177</sup> This Part first recognizes that *Citizens United I*'s real legacy has been the importance of disclosure. Next, it considers the existing loopholes to campaign finance disclosure laws and their expansion following *Citizens United I*. Lastly, this Part explores the numerous implications of the Tenth Circuit's decision in *Citizens United II*.

### A. Disclosure Becomes the New Focus

Disclosure has long been a central theme in regulating campaign finance.<sup>178</sup> Justice Brandeis captured the essence of the underlying principle of disclosure in stating, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>179</sup> Indeed, this oft-quoted aphorism reflects the philosophy that disclosure sheds light on situations to facilitate informed decision-making, to act as a deterrent, and to uncover unlawful activity.<sup>180</sup> Embraced as the last hope in

175. See Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 557 (2012) ("Everywhere you look, campaign finance disclosure laws are under attack."); see also Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 297–98 (2010) (discussing "the power of the ever-more disclosure idea" supported by campaign finance reformists).

176. See Potter & Morgan, *supra* note 15, at 459–63 (discussing the narrowed disclosure requirements applicable to organizations other than political committees following the FEC's 1980 independent expenditure rule and recognizing "[n]ow that following Citizens United corporations and labor organizations were permitted to make independent expenditures, what had previously been a flaw in the Commission's regulations of very limited applicability became a significant loophole").

177. See *Citizens United II*, 773 F.3d at 222–23 (Phillips, J., concurring in part and dissenting in part); see also Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 670–71 (2011); Briffault, *supra* note 175, at 274–76; Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 665–66 (2012); Shepard, *supra* note 59, at 148.

178. See, e.g., Potter & Morgan, *supra* note 15, at 388 ("Mandated public disclosure of the funds spent to influence elections has long been the 'essential cornerstone' of campaign finance laws in the United States, and is widely recognized as 'fundamental to the political system.'" (quoting HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 164 (4th ed. 1992))).

179. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1932); Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10.

180. Although Justice Brandeis was discussing the centralization of financial power within a few banks and the need for financial services regulations, his quote became the origin for the Sunlight Foundation, a nonprofit organization that advocates for open government, and the Government in the Sunshine Act of 1976, Pub. L. No. 94–409, 90 Stat. 1241 (codified as amended at 5 U.S.C. § 552b (2015)), which requires meetings of Government agencies to be open to the public. Additionally, his statement became the rallying cry in support of campaign finance regulation. See Briffault, *supra* note 175, at 273–74 ("Disclosure generally gets high marks from the public, academics, and the courts. Opinion polls find very high levels of public support for campaign finance disclosure. Among academics, both campaign finance reformers and campaign finance skeptics have endorsed

strengthening the campaign finance laws following the landmark decision of *Citizens United I*, disclosure fittingly moved center stage.<sup>181</sup> In his 2010 State of the Union Address, President Obama cautioned that the lift on the corporate independent expenditure ban would “open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”<sup>182</sup> The House of Representatives responded by passing the DISCLOSE Act, which was typified by the President as allowing “the American people [to] follow the money and see clearly which special interests are funding political campaign activity and trying to buy representation.”<sup>183</sup>

At the same time, disclosure laws also became the new focus of opponents.<sup>184</sup> The Senate shot down the DISCLOSE Act with the help of Minority Leader Mitch McConnell who fervently opposed the Act.<sup>185</sup> The Chamber of Commerce strongly opposed the Obama Administration’s consideration of imposing disclosure provisions on federal contractors regarding political donations<sup>186</sup> as threatening to subject American businesses to government harassment.<sup>187</sup> Pressure built on the FEC to impose disclosure requirements on super PACS,<sup>188</sup> and the agency faced

---

disclosure.” (footnote omitted)); see also Ellen L. Weintraub & Alex Tausanovitch, *Reflections on Campaign Finance and the 2012 Election*, 49 WILLAMETTE L. REV. 541, 550 (2013) (“Disclosure is one of the pillars of the Federal Election Campaign Act. In passing both the original Act and the Bipartisan Campaign Reform Act, it appears that Congress wanted every electoral message to contain an identifiable source who can be held accountable by the public for the content of that message.”).

181. See Ortiz, *supra* note 177, at 663–65 (“As the debate stands today, reformers defend disclosure as one of the few means left to discipline money in politics and help police against corruption, while deregulationists attack it as undermining the democracy its supporters claim it protects.”).

182. Press Release, President Barack Obama, United States of America, Remarks by the President in State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

183. See Press Release, President Barack Obama, United States of America, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-disclose-act>.

184. See Potter & Morgan, *supra* note 15, at 388–89 (“Opponents of disclosure have recently mounted numerous challenges to state and federal political disclosure laws . . . [and] have increased their public criticism of disclosure.”).

185. See Floor Statement: Sen. Mitch McConnell on the DISCLOSE Act, <http://www.cnn.com/2012/07/17/politics/mcconnell-disclose-act-statement/> (last updated July 17, 2012, 8:54 PM); see also discussion *supra* Section I.C.

186. Congress later “approved a provision in a spending bill that effectively killed the intent behind the draft executive order. The language, which sets forth that campaign contribution disclosure could not be required for companies bidding for federal contracts, has been reauthorized in every appropriations bill since.” Megan R. Wilson, *Obama Urged to Impose Rules on Campaign Spending Disclosure*, THE HILL (Mar. 3, 2015, 11:16 AM), <http://thehill.com/business-a-lobbying/234437-obama-urged-to-impose-rules-on-campaign-spending-disclosure>. Recent requests for action would require disclosure only from companies that win federal contracts. *Id.*

187. See Coalition Letter from the U.S. Chamber of Commerce to President Obama (May 15, 2011), <https://www.uschamber.com/letter/coalition-letter-president-obama-draft-executive-order>; see also Eric Lichtblau, *Lobbyist Fires Warning Shot over Donation Disclosure Plan*, N.Y. TIMES (Apr. 26, 2011), [http://www.nytimes.com/2011/04/27/us/politics/27donate.html?partner=rss&emc=rss&\\_r=0](http://www.nytimes.com/2011/04/27/us/politics/27donate.html?partner=rss&emc=rss&_r=0).

188. See Robin Bravender, *Dems: Crack Down on Super PACs*, POLITICO (Feb. 21, 2012, 5:19 PM), <http://www.politico.com/story/2012/02/dem-senators-want-super-pac-crackdown-073136>.

attacks for gutting campaign finance law,<sup>189</sup> but these views continued to be strongly opposed.<sup>190</sup> Political groups filed multiple suits challenging state campaign finance disclosure laws on constitutional grounds,<sup>191</sup> and Target Corporation faced boycotts and protests after the public learned of its donation to a political group that was considered to be anti-gay marriage.<sup>192</sup>

Disclosure has also been in the spotlight of the campaign finance policy debate.<sup>193</sup> Some scholars have criticized disclosure laws for chilling speech,<sup>194</sup> posing a threat to privacy,<sup>195</sup> inadequately deterring corruption or even exacerbating it,<sup>196</sup> and ineffectively providing the public with valuable information.<sup>197</sup> Others have argued that disclosure still fulfills its intended purpose of providing voters with important information, furthering the public interest,<sup>198</sup> and solving the problem of quid pro quo corruption.<sup>199</sup> As evidenced by the ongoing debate, this focus on disclosure is well-founded.

### B. Expanding Loopholes to Disclosure

After the ban on corporate independent expenditures was invalidated, political spending skyrocketed particularly by “social welfare organizations,” which enjoy tax-exempt status under Section 501(c)(4) of the Internal Revenue Code and are not required to disclose donor information.<sup>200</sup> Undisclosed spending by nonprofit groups topped \$308 mil-

189. See, e.g., Richard L. Hasen, *The FEC is as Good as Dead: The New Republican Commissioners are Gutting Campaign Finance Law*, SLATE (Jan. 25, 2011, 10:13 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/01/the\\_fec\\_is\\_as\\_good\\_as\\_dea\\_d.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dea_d.single.html).

190. See Luke Rosiak, *Republicans Oppose Super PAC Disclosure*, WASH. TIMES (June 20, 2012), <http://www.washingtontimes.com/news/2012/jun/20/republicans-oppose-super-pac-ad-limits/>.

191. See Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES (Sept. 19, 2011), <http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html>.

192. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J. (Aug. 7, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703988304575413650676561696>.

193. Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1850 (2013).

194. The chilling affects of compelled disclosure laws have been recognized to varying degrees. The concept that disclosure chills speech has become conventional wisdom. See *id.* at 1849.

195. See William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 873 (2011).

196. See Briffault, *supra* note 175, at 290–91; see also Michael D. Gilbert & Benjamin F. Aiken, *Disclosure and Corruption*, 14 ELECTION L.J. 148, 154 (2015).

197. See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 275 (2010).

198. See Hasen, *supra* note 175, at 559.

199. See Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 103–04 (2010).

200. “To be tax-exempt as a social welfare organization described in Internal Revenue Code (IRC) section 501(c)(4), an organization must not be organized for profit and must be operated exclusively to promote social welfare.” *Social Welfare Organizations*, IRS, <https://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations> (last updated Nov. 18, 2015). “The promotion of social welfare does not include direct or indirect partici-

lion in the 2012 election cycle compared to \$69 million in the 2008 election cycle.<sup>201</sup> These figures do not even account for donations by these organizations to super PACs, which spent a total of \$609 million in the 2012 election cycle but only \$62 million in 2010.<sup>202</sup> Even more telling is the marked decline in transparency of outside spending—of the roughly \$1.03 billion spent by outside groups in 2012, an estimated 40.8% of the sources of funds expended were publicly disclosed that year, while just six years prior, an estimated 92.9% of outside spending was fully disclosed.<sup>203</sup> Because this type of spending by 501(c)(4) organizations is not subject to disclosure, commentators have labeled it “dark money.”<sup>204</sup>

### 1. Political Committees and Super PACs

Organizations formed solely for the purpose of influencing candidate elections and those created specifically to raise funds to make independent expenditures for that purpose, or super PACs, are subject to disclosure requirements and must remain independent of candidates and political parties.<sup>205</sup> Although, political committees, including super PACs, are not required to ensure the original sources of their contributions are disclosed.<sup>206</sup> Consequently, an avenue for avoiding disclosure by passing contributions through super PACs evolved. Organizations and individuals could form shell corporations<sup>207</sup> to pass contributions through to super PACs while disguising the original source of the funds from the public.<sup>208</sup> Moreover, because the timing of filing requirements can be

pation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity.” *Id.* For a discussion regarding the major purpose test, see *infra* Section III.B.

201. Compare 2012 Outside Spending, by Group, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> (last visited Jan. 23, 2016), with 2008 Outside Spending, by Group, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=V&disp=O&type=U> (last visited Jan. 23, 2016).

202. Compare 2012 Outside Spending, by Super PAC, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> (last visited Jan. 23, 2016), with 2010 Outside Spending, by Super PAC, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (last visited Jan. 23, 2016).

203. Outside Spending by Disclosure, Excluding Party Committees, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/disclosure.php?range=tot> (last visited Jan. 23, 2016); see also Outside Spending by Disclosure, Excluding Party Committees, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/disclosure.php?range=tothttp://www.opensecrets.org/news/reports/citizens\\_united.php](http://www.opensecrets.org/outsidespending/disclosure.php?range=tothttp://www.opensecrets.org/news/reports/citizens_united.php) (last visited Jan. 23, 2016).

204. See, e.g., Potter & Morgan, *supra* note 15, at 385.

205. See *SpeechNow.org v. FEC (SpeechNow)*, 599 F.3d 686, 689 (D.C. Cir. 2010) (creating the super PAC).

206. Potter & Morgan, *supra* note 15, at 461–62 (discussing the transparency flaws of the FEC’s disclosure rules).

207. Shell corporations are companies that lack significant assets or operations of their own and, instead, serve as a vehicle for their owners to transact business through. See Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 708–09 (2012).

208. See *id.* (recounting several examples of the use of shell corporations to pass money through to super PACs and avoid disclosure).

manipulated by super PACs, donors could remain undisclosed until after the corresponding election concluded.<sup>209</sup>

## 2. Social Welfare Organizations and the Major Purpose Test

Following *Citizens United I*, 501(c)(4) organizations became the most attractive way for corporations to avoid disclosure of election contributions.<sup>210</sup> 501(c)(4) status allows organizations formed for the purpose of promoting social welfare to engage in substantial political activity while not being subject to disclosure requirements.<sup>211</sup> Despite the Internal Revenue Code's requirement that social welfare organizations "operate[] exclusively for the promotion of social welfare,"<sup>212</sup> the Treasury Regulations do not prohibit such organizations from engaging in political activity so long their "primary purpose" is not to influence candidate elections.<sup>213</sup>

Moreover, based on *Buckley's* narrowing of the term "political committee," organizations whose major purpose does not involve influencing elections can avoid disclosure.<sup>214</sup> Many practitioners argue that the major purpose test, while not setting forth a particular numerical requirement, is satisfied so long as an organization's political activity constitutes less than 50% of its total expenditures.<sup>215</sup> Because the major purpose test has allowed organizations to engage in significant political activity while avoiding disclosure, 501(c)(4) status has remained an exploited loophole in the campaign finance arena.<sup>216</sup>

---

209. See Potter & Morgan, *supra* note 15, at 463 ("For example, if a super PAC simply opted for a monthly—as opposed to quarterly—reporting schedule, contributions to the super PAC made leading up to the January 10, 2012 New Hampshire Republican Primary were not required to be disclosed until the super PAC filed its January 31, 2012 disclosure report with the FEC.").

210. See Paul Blumenthal, 'Dark Money' in 2012 Election Tops \$400 Million, 10 Candidates Outspent by Groups with Undisclosed Donors, HUFFINGTON POST (Nov. 2, 2012, 1:36 PM), [http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million\\_n\\_2065689.html](http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html).

211. "Due to the Court's narrowing of the term 'political committee' in *Buckley* to include only those groups with the 'major purpose' of influencing elections, 501(c) groups could engage in substantial political activity without risking triggering political committee status and its accompanying disclosure requirements." Potter & Morgan, *supra* note 15, at 463. Additionally, even though 501(c)(4) organizations must disclose the source of annual donations in the amount of \$5,000 or more to the IRS, the Agency is prohibited from making donor information public. *Id.* at 464 (citing 26 U.S.C. § 6033 (2006); 26 U.S.C. § 6104 (2006)).

212. 26 U.S.C. § 501(c)(4)(A) (2012).

213. See Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2016).

214. Potter & Morgan, *supra* note 15, at 463.

215. *Id.* at 465; see also *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678–79 (10th Cir. 2010) (applying the major purpose test to an organization involved in, among other activities, political activity).

216. See Matea Gold, *Groups Backed by Secret Donors Take the Lead in Shaping 2016 Elections*, WASH. POST (July 14, 2015), [https://www.washingtonpost.com/politics/groups-backed-by-secret-donors-take-the-lead-in-shaping-2016-elections/2015/07/14/e56a2572-2a3e-11e5-a5ea-cf74396e59ec\\_story.html](https://www.washingtonpost.com/politics/groups-backed-by-secret-donors-take-the-lead-in-shaping-2016-elections/2015/07/14/e56a2572-2a3e-11e5-a5ea-cf74396e59ec_story.html).

### 3. Issue Advocacy and Earmarking

Even if an organization is subject to disclosure requirements, additional loopholes exist for avoiding such disclosure.<sup>217</sup> Although *Citizens United I* relaxed the BCRA's definition of express advocacy or electioneering communications regarding corporate spending, it found the definition applicable to disclosure essentially closing the decades old issue advocacy loophole.<sup>218</sup> Donors to political committees, however, can avoid disclosure where the donor does not earmark its contribution for independent expenditures or electioneering communications.<sup>219</sup>

For instance, in *Citizens United II* Secretary Scott Gessler discussed his interpretation of Colorado's disclosure regulations.<sup>220</sup> Any amount spent toward producing an electioneering communication was not required to be disclosed.<sup>221</sup> Further, donors would only need to be disclosed if their donation was earmarked specifically for an electioneering communication.<sup>222</sup> Thus, "[i]f a donor permits the recipient to use the donation for electioneering communications and other purposes, and the entire donation could be used for the other purposes, the donor need not be disclosed."<sup>223</sup>

While disclosures for independent expenditures are slightly more rigid, donations must be disclosed only if directed to be used solely for the purpose of attacking or supporting a Colorado candidate.<sup>224</sup> Thus, money donated to Citizens United for general use would not have to be disclosed nor would a donation that was to be used at Citizens United's discretion for films attacking or supporting candidates.<sup>225</sup> Thus, the rules regarding earmarking have allowed donors to relatively easily evade disclosure.

---

217. See *infra* notes 222–28 and accompanying text.

218. See Briffault, *supra* note 207, at 700–03; see also *McConnell v. FEC*, 540 U.S. 93, 129 (2003) (discussing the 1998 Senate Committee on Governmental Affairs Investigation), *overruled by Citizens United I*, 558 U.S. 310 (2010). The reports concluded “that the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system that had been intended ‘to keep corporate, union and large individual contributions from influencing the electoral process.’” Briffault, *supra* note 207, at 700 n.75 (quoting S. REP. NO. 105-167, vol. 4, at 4611, 7515 (1998)). Additionally, courts have upheld the applicability of disclosure requirements to “issue ads.” See, e.g., *Indep. Inst. v. Gessler*, 71 F. Supp. 3d 1194, 1203 (10th Cir. 2014) (“The Independence Institute seeks to change the distinction, to require an exception for ‘pure issue advocacy’ as compared to ‘campaign related advocacy.’ Yet the plaintiff presents no authority that would require, let alone allow, this Court to find a constitutionally-mandated exception for its advertisement on the grounds that it constitutes ‘pure issue advocacy.’”).

219. See *infra* notes 223–28 and accompanying text.

220. 773 F.3d 200, 204–05 (10th Cir. 2014).

221. *Id.* at 204.

222. *Id.*

223. *Id.*

224. *Id.* at 205.

225. *Id.*

#### 4. Disclosure Exemptions

The Supreme Court first allowed for an exemption from campaign finance disclosure in *NAACP v. Alabama*<sup>226</sup> back in 1958. Later, relying on *NAACP*, the *Buckley* Court held that an exemption would apply only upon a showing that there was a reasonable probability that disclosure would result in threats, harassment, or reprisals.<sup>227</sup> This evidentiary standard has remained high and difficult to satisfy, and although exemptions from disclosure requirements have been sought over the years, they have very rarely been granted.<sup>228</sup>

More recently press exemptions have afforded organizations, such as Citizens United, another form of avoidance of disclosure regulations.<sup>229</sup> The Supreme Court considered whether a press exemption applied in *MCFL* based on its regular production of a newsletter and a special edition that amounted to a campaign flyer.<sup>230</sup> Because the special edition was not comparable to any issue of the newsletter, the Court declined to consider whether the newsletter qualified for press exemption.<sup>231</sup> Years later, the Court touched on the FEC's media exemption in rejecting *Austin's* antidistortion argument<sup>232</sup> recognizing that “[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”<sup>233</sup>

Nonetheless, following the decision in *Citizens United I*, the FEC issued an advisory opinion that granted Citizens United press exemption for both its film and the advertisements promoting its film.<sup>234</sup> The media

226. 357 U.S. 449, 466 (1958).

227. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United I*, 558 U.S. 310 (2010).

228. *See, e.g., Doe #1 v. Reed*, 561 U.S. 186, 200–02 (2010) (holding that the plaintiffs failed to establish a reasonable probability of threats, harassment, or reprisals despite the argument that “once on the Internet, the petition signers’ names and addresses ‘can be combined with publicly available phone numbers and maps,’ in what will effectively become a blueprint for harassment and intimidation” (quoting Petitioners’ Brief at 46, *Doe #1 v. Reed*, 561 U.S. 186 (2010) (No. 09-559))).

229. *See infra* notes 237–39 and accompanying text.

230. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 250–51 (1986).

231. *Id.*

232. In *Citizens United I* the Court explained the antidistortion rationale as follows:

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

*Citizens United I*, 558 U.S. 310, 348 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990), *overruled by* *Citizens United I*, 558 U.S. 310 (2010)).

233. *Id.* at 352.

234. FEC Advisory Op., No. 2010-08, 2010 WL 3184266, at \*1–3 (June 11, 2010). Finding the advertisements promoting the film were covered by the exemption, the FEC noted that “courts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product.” *Id.* at 6 (first citing *FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308,

exemption became critically important to the court's decision in *Citizens United II*.<sup>235</sup> Considering the Secretary's broad interpretation of the exemptions, the Tenth Circuit concluded that Citizens United qualified for exemption based on its "extended history of producing substantial work, comparable to magazines or TV special news reports," but the advertisements promoting its films would still be subject to the disclosure requirements.<sup>236</sup> By following the FEC's lead, the Tenth Circuit expanded the opportunity for organizations to avoid campaign finance disclosure lessening the effectiveness of such disclosures. Consequently, the court's decision further undermined the corresponding purposes of deterring corruption and the appearance of corruption, discovering violations of other campaign finance laws, and providing voters with vital information.

### C. *The Implications of Citizens United v. Gessler*

In *Citizens United II*, the Tenth Circuit leaned sharply against the transparency movement and created an opportunity for endless organizations to bring as-applied challenges to disclosure laws, to qualify for exemptions, and to eviscerate the line between the "press" and advocacy groups seeking to influence elections.<sup>237</sup> The court posed significant risks to the effectiveness of campaign finance disclosure laws in four significant ways: (1) by failing to consider the constitutionality of the media exemption on its face; (2) by rejecting the Secretary's anticorruption argument; (3) by concluding that the public would not further benefit from the information that Citizens United's disclosures would provide; and (4) by broadly interpreting the media exemption to cover Citizens United.

#### 1. The Refusal to Consider a Facial Challenge

Voters' distaste for the growing influence wealthy donors have on politics and elections has become a central issue in the 2016 election cycle.<sup>238</sup> With spending "significantly outpacing recent election cycles in contributions"<sup>239</sup> and outside groups taking the lead, the 2016 presidential campaign will likely present all-time highs in terms of dollars expended. Based on the lack of action by the Internal Revenue Service

---

1313 (D.D.C. 1981); and then citing *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

235. 773 F.3d 200, 205 (10th Cir. 2014).

236. *Id.* at 206–07, 215–18.

237. *See id.*; see also discussion *infra* Section C.3.

238. Matea Gold, *Big Money in Politics Emerges as a Rising Issue in 2016 Campaign*, WASH. POST (Apr. 19, 2015), [https://www.washingtonpost.com/politics/big-money-in-politics-emerges-as-a-rising-issue-in-2016-campaign/2015/04/19/c695cbb8-e51c-11e4-905f-cc896d379a32\\_story.html](https://www.washingtonpost.com/politics/big-money-in-politics-emerges-as-a-rising-issue-in-2016-campaign/2015/04/19/c695cbb8-e51c-11e4-905f-cc896d379a32_story.html) (citing Daniel Weeks, executive director of the New Hampshire Rebellion, "a project to make money in politics a major topic in the state's presidential primary").

239. *See* Editorial, *Which Presidential Candidates Are Winning the Money Race*, N.Y. TIMES, [http://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html?\\_r=0](http://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html?_r=0) (last updated Apr. 5, 2016).



(IRS), the Department of the Treasury, and the FEC, proponents of campaign finance reform have recently urged the Department of Justice to get involved.<sup>240</sup> As suggested by Circuit Judge Phillips, the court's as-applied challenge was inappropriate in *Citizens United II* and risks future case-by-case litigation where a considerably important and contentious issue looms.<sup>241</sup>

According to the *Coalition for Secular Government* court, an as-applied analysis—where a facial challenge can be and should be addressed—is offensive to the First Amendment itself.<sup>242</sup> In so finding, the court reasoned that failing to resolve the uncertainty precipitating the litigation “chills robust discussion at the very core of our electoral process.”<sup>243</sup> Based on this reasoning and recognizing the current landscape of campaign finance disclosure, the Tenth Circuit has engendered further uncertainty in place of providing critical guidance for political committees, their potential donors, and the public that relies on disclosure information in making crucial political decisions.

The Supreme Court, in *Citizens United I*, recognized the troubling consequences of addressing an as-applied challenge in lieu of a facial challenge in the context of campaign finance and First Amendment rights where one speaker is potentially preferred over another.<sup>244</sup> The Court opined that drawing and redrawing constitutional lines on the basis of the media used to distribute a particular speaker's political message would necessarily compel continuous litigation and “create an inevitable, pervasive, and serious risk of chilling protected speech” in the interim.<sup>245</sup> The Court emphasized that under the First Amendment, courts must resolve any doubts in favor of protecting speech rather than stifling it.<sup>246</sup>

In his dissent, Circuit Judge Phillips concluded that the court should have either struck down the disclosure scheme or severed the media ex-

---

240. See Press Release, Senator Sheldon Whitehouse, U.S. Senate, Sen. Whitehouse Urges DOJ to Take Action on Dark Money (July 15, 2015), <http://www.whitehouse.senate.gov/news/release/sen-whitehouse-urges-doj-to-take-action-on-dark-money>.

241. *Citizens United II*, 773 F.3d at 220 n.1 (Phillips, J., concurring in part and dissenting in part) (“I say that *Citizens United* hasn't made a traditional as-applied challenge because it admits that the disclosure law would be valid against it if the law also applied against the exempted traditional media. By then arguing that the disclosure law becomes unconstitutional by treating traditional media differently, *Citizens United*, in my view, veers to an equal protection challenge, not an as-applied challenge under the First Amendment.”).

242. *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1178 (D. Colo. 2014).

243. *Id.*

244. See *Citizens United I*, 558 U.S. 310, 326 (2010) (declining to address *Citizens United*'s as-applied challenge to FECA's application to movies shown through video-on-demand and concluding that “[s]ubstantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored”).

245. *Id.* at 326–27.

246. *Id.* at 327.

emption.<sup>247</sup> By instead providing Citizens United with an exemption from campaign finance disclosure requirements, the Tenth Circuit created a third category<sup>248</sup> and drew a constitutional line based on the particular speaker's choice of media—those entities that the court determines have “spoken sufficiently frequently and meaningfully . . . over an extended period of time.”<sup>249</sup> Moreover, the court left open what constitutes speech that has been disseminated “sufficiently frequently” and “meaningfully” and what period of time would qualify as “an extended period of time.”<sup>250</sup> Rather than keeping with the legislature's determination of what disclosure is needed to evaluate a speaker's message, the court has weighed in on what should be left to the democratic process.<sup>251</sup>

Because the court's as-applied approach has created such uncertainty, absent filing suit on a case-by-case basis, no one will know who qualifies for exemption from Colorado's campaign finance disclosure requirements.<sup>252</sup> Consequently, organizations are encouraged to challenge the Secretary's determinations and the disclosure provisions' application, donors may be reluctant to contribute, and voters will be left in the dark.

## 2. Deterring Corruption and the Appearance of Corruption

Despite disclosure serving the governmental interest of deterring corruption or the appearance of corruption for decades,<sup>253</sup> the *Citizens United II* court rejected the anticorruption rationale for reporting independent expenditures.<sup>254</sup> The court relied on *Citizens United I*'s narrow-

247. *Citizens United II*, 773 F.3d 200, 222 (10th Cir. 2014) (Phillips, J., concurring in part and dissenting in part) (citing *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000)).

248. *Id.* (“But in my view, the majority takes a long stride toward lawmaking when it instead takes a pen to Colorado's Constitution and statutes and writes in a nebulous third category of entities that the Court believes have a First Amendment right to the same exemption because those entities supposedly are sufficiently similar to traditional media.”).

249. *Id.* at 215 (majority opinion).

250. *See id.* at 217 (“Finally, we cannot justify shirking our constitutional duty because of the dissent's concerns about determining who qualifies for the media exemptions. To be sure, there could be challenging questions about what entities are entitled to the same relief as *Citizens United*. But those challenges are inherent in the exemptions expressed in Colorado law.”). Accordingly, the court should have addressed the disclosure scheme as a whole, in which case, *Citizens United* makes an equal protection argument. *See id.* at 219–21 (Phillips, J., concurring in part and dissenting in part). If the court were to find the disclosure exemption constitutional in this regard, the legislature would be the proper avenue for remedying any statutory flaws.

251. *See id.* at 222–23 (“I would rather trust Colorado citizens to know when they need or do not need disclosure to evaluate a speaker's message.”).

252. *Id.*

253. *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (“[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions to the light of publicity.”), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United I*, 558 U.S. 310 (2010); *see also* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (concluding that disclosure requirements may “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity” (quoting *Buckley*, 424 U.S. at 67)).

254. *See Citizens United II*, 773 F.3d at 211.

ing of the anticorruption interest to direct contributions to candidates excluding the rationale's applicability to independent expenditures.<sup>255</sup> In doing so, the court distinguished contributions and expenditures coordinated with candidates—and those lacking such coordination—reasoning that precisely because of the absence of prearrangement, independent expenditures do not give rise to corruption.<sup>256</sup> The court concluded that this “alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>257</sup> Thus, the need for disclosure of such uncoordinated spending cannot be justified by an anticorruption rationale.<sup>258</sup>

On the contrary, the court's dismissal of the possibility of corruption through independent expenditures contradicts conventional wisdom<sup>259</sup> and current practices regarding “uncoordinated” independent expenditures.<sup>260</sup> With the rise of super PACs following *Citizens United I* and *SpeechNow*,<sup>261</sup> candidates flocked to assist with fundraising efforts, and based on the relative ease with which independence from candidates and political parties can be preserved under the FEC's regulations, it is fairly simple for super PACs to keep their fundraising activities from being deemed “coordinated.”<sup>262</sup>

In fact, candidates are able to “endorse and solicit contributions for groups that run ads benefitting their candidacy,” and groups are permitted to plan an ad's messaging with a candidate, as well as feature a candidate in an ad and target the candidate's electorate.<sup>263</sup> Moreover, candidates are free to attend super PAC hosted fundraisers and to use common vendors including fundraising consultants.<sup>264</sup> In addition, super PACs are able to solicit contributions, potentially based off of a list of possible donors provided by a candidate, from a candidate's friends and family for amounts above the candidate's own ability.<sup>265</sup>

255. See *id.* at 211 (citing *Citizens United I*, 558 U.S. 310, 356–57 (2010)).

256. *Id.*

257. *Id.* (emphasis omitted).

258. See *id.*

259. See Gilbert & Aiken, *supra* note 196, at 149 (“The theory that disclosure combats corruption has become conventional wisdom.”).

260. See Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1484–87 (2015).

261. *SpeechNow*, 599 F.3d 686 (D.C. Cir. 2010). *SpeechNow* essentially created the super PAC. See *supra* notes 87–90 and accompanying text.

262. See Potter & Morgan, *supra* note 15, at 460.

263. *Id.* at 461.

264. See Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 91, 96–97 (2013).

265. See DANIEL P. TOKAJI & RENATA E. B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 68 (2014), <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>.

Super PACs are also not required to determine or ensure the original source of funds received are disclosed.<sup>266</sup> Thus, individuals and corporations have disguised contributions to super PACs by passing funds through shell corporations.<sup>267</sup> Additionally, social welfare organizations, like Citizens United, are able to avoid disclosure completely and even to make transfers to super PACs engaged solely in independent expenditures all the while allowing donors to go undisclosed to the public.<sup>268</sup> With the continually evolving avenues for avoiding disclosure, coordinated efforts between organizations and candidates, which at least give rise to the appearance of corruption, fly under the public's radar.

Perhaps even more concerning, coordinated activities between candidates and super PACs are reflected through single-candidate super PACs, which one commentator argues are the "alter egos for the official campaign committees of the candidates whom they existed to serve."<sup>269</sup> According to one report, more than half of the super PACs operating in 2012 existed solely for the advancement of specific individual candidates or were closely allied with a national party accounting for nearly 75% of super PAC spending that year.<sup>270</sup> These groups frequently maintained "close structural relationships with the candidates they backed" and were often organized and directed by the particular candidate's former staffers.<sup>271</sup>

For instance, several of Mitt Romney's former aides formed Restore Our Future; two of Barack Obama's former White House aides set up Priorities USA Action; and Newt Gingrich's former press secretary and spokesman served as a senior advisor for Winning Our Future, the founder of which also used to work for a group Gingrich previously ran.<sup>272</sup> Moreover, numerous single-candidate super PACs and candidate committees have relied on common vendors including "pollsters, media

---

266. See R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 12, 22 (2013).

267. See, e.g., Dan Eggen, *Short-Lived Firm's \$1M Donation to GOP Fund Raises Concerns over Transparency*, WASH. POST (Aug. 4, 2011), [https://www.washingtonpost.com/politics/short-lived-firms-1m-donation-to-gop-fund-raises-concern-over-transparency/2011/08/04/gIQAvczrul\\_story.html](https://www.washingtonpost.com/politics/short-lived-firms-1m-donation-to-gop-fund-raises-concern-over-transparency/2011/08/04/gIQAvczrul_story.html).

268. See, e.g., Robert Maguire, *Obama's Shadow Money Allies File First Report*, OPENSECRETS.ORG (Jan. 8, 2013), <http://www.opensecrets.org/news/2013/01/obamas-shadow-money-allie/> ("One donor alone gave more than 80 percent of Priorities' total revenue in 2011, or \$1.9 million of about \$2.3 million. . . . Whether the donors were corporations, individuals, unions or other nonprofits that also don't have to disclose their donors is impossible to know from the form.").

269. See Briffault, *supra* note 264, at 91.

270. TAYLOR LINCOLN, PUB. CITIZEN, SUPER CONNECTED: OUTSIDE GROUPS' DEVOTION TO INDIVIDUAL CANDIDATES AND POLITICAL PARTIES DISPROVES THE SUPREME COURT'S KEY ASSUMPTION IN CITIZENS UNITED THAT UNREGULATED OUTSIDE SPENDERS WOULD BE 'INDEPENDENT,' at 9-10 (2013), <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf>.

271. Briffault, *supra* note 264, at 90.

272. *Id.* at 90-91 (citing *Outside Spending Summary 2012*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cmte=C00490045&cycle=2012> (last visited Apr. 19, 2016)).

buyers, television ad producers, and fundraisers.”<sup>273</sup> Even more telling, super PAC contributors frequently have interests that would be impacted by those that they are advocating for or against and have been “actively engaged in lobbying over a wide range of tax, regulatory, and other legislative issues.”<sup>274</sup>

Super PACs are virtually coordinating with candidates on every level.<sup>275</sup> With the intended purpose of influencing elections and the prevalence of single-candidate super PACs, the reasoning that independent expenditures do not give rise to corruption<sup>276</sup> because of the lack of coordination can no longer stand. At minimum, the aftermath of *Citizens United I* has resulted in the appearance of corruption, which the Tenth Circuit failed to even consider as a governmental interest in the disclosure requirements.<sup>277</sup>

### 3. Providing the Public with Valuable Information

By concluding that the Secretary failed to show “a substantial relation between a sufficiently important governmental interest and the disclosure requirements that follow from treating *Rocky Mountain Heist* as an ‘electioneering communication’ . . . under Colorado’s campaign laws,”<sup>278</sup> the Tenth Circuit undermined the importance of providing voters with information regarding who is speaking and who is funding that speech.<sup>279</sup> Consequently, the court has provided organizations additional opportunities to avoid disclosure regarding their funding sources and further diminished the effectiveness of campaign finance disclosure laws.

The *Citizens United II* court first recognized that disclosure can “help citizens make informed choices in the political marketplace.”<sup>280</sup> Additionally, the court opined that the disclosure requirements were not expansive, noting the many limitations and the information required to be disclosed only consisted of those donors who specifically earmarked their contributions to be used toward electioneering communications or

---

273. *Id.* (citing T.W. Farnam, *Vendors Finesse Law Barring ‘Coordination’ by Campaigns, Independent Groups*, WASH. POST (Oct. 13, 2012), [https://www.washingtonpost.com/politics/vendors-finesse-law-barring-coordination-by-campaigns-independent-groups/2012/10/13/69dcb848-f6d9-11e1-8398-0327ab83ab91\\_story.html](https://www.washingtonpost.com/politics/vendors-finesse-law-barring-coordination-by-campaigns-independent-groups/2012/10/13/69dcb848-f6d9-11e1-8398-0327ab83ab91_story.html)).

274. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1691 (2012).

275. *See id.* at 1669–70, 1680–82, 1685–87 (“To be sure, these oversized contributions are going to committees that are technically independent of the candidates, and are not allowed to coordinate their activities with the candidates. But in practice a committee is part of the campaign of the candidate it is aiding.” (footnote omitted)); *see also* Briffault, *supra* note 264, at 89–92 (“In virtually all respects, then, these single-candidate Super PACs were alter egos for the official campaign committees of the candidates whom they existed to serve.”); Note, *supra* note 260, at 1484–87 (discussing the growth of super PACs and their increased fundraising collaboration with candidates).

276. *See supra* notes 267–78 and accompanying text.

277. *See Citizens United II*, 773 F.3d 200, 211 (10th Cir. 2014).

278. *Id.* at 203.

279. *See SpeechNow*, 599 F.3d 686, 698 (D.C. Cir. 2010).

280. *Citizens United II*, 773 F.3d at 210 (quoting *Citizens United I*, 558 U.S. 310, 367 (2010)).

independent expenditures.<sup>281</sup> Nevertheless, the court accepted that the public would be able to properly assess statements made by the media based on its familiarity with such sources as justification for the media exemption.<sup>282</sup>

Yet, the court acknowledged that the public could no longer count on traditional media outlets for providing transparent, balanced, or objective information with accountability.<sup>283</sup> If the media does not provide the public with information transparently or accountably, How does supposed familiarity with a source because of its periodic speech negate any need for further information regarding who is behind that speech? The electorate is left with nothing but its familiarity to determine who might be attempting to influence its vote in an upcoming election? The court's reasoning does not follow from decades of jurisprudence relying on the interest of providing the public with information in upholding disclosure regimes.<sup>284</sup>

Furthermore, in light of *Citizens United I*, greater significance has been attributed to disclosure in regulating campaign finance<sup>285</sup> with the informational benefit serving as its most important function and purpose.<sup>286</sup> The court, however, determined that the electorate would not benefit from *Citizens United* being subject to the disclosure requirements that were intended to apply to electioneering communications such as *Rocky Mountain Heist*.<sup>287</sup> Instead, the court relied on *Citizens United*'s history of producing politically driven films as providing the public with "the requisite context for its messages" and information "that is at least as accessible to the public as donor lists reported to the Secretary."<sup>288</sup> Can the messages of *Citizens United*'s films actually provide the public with the same information as its donor lists would provide?<sup>289</sup> The content of these two different forms of information cannot be compared as equal. Furthermore, as Circuit Judge Phillips noted, *Citizens United* had never before produced anything focusing on Colorado politics or drawing particular attention to Colorado.<sup>290</sup>

---

281. *Id.* at 211–12.

282. *Id.* at 213–15.

283. *See id.* at 212.

284. Even the *Citizens United I* court easily found the governmental interest of providing the public with information was sufficiently important to justify infringing on speech through compelled disclosure. *Citizens United I*, 558 U.S. at 367–71.

285. *See Hasen, supra* note 175, at 559 (arguing that "disclosure laws remain one of the few remaining constitutional levers to further the public interest through campaign finance law").

286. *See Mayer, supra* note 197, at 258–59.

287. *See Citizens United II*, 773 F.3d at 221 (Phillips, J., concurring in part and dissenting in part) ("I do not believe this Court acts within its proper sphere by second-guessing Colorado voters about the information they need to evaluate express advocacy such as made in *Rocky Mountain Heist*.").

288. *Id.* at 215 (majority opinion).

289. "If voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates." Hasen, *supra* note 175, at 571.

290. *Citizens United II*, 773 F.3d at 222 (Phillips, J., concurring in part and dissenting in part).

The court's conclusion that "[b]ecause Colorado has determined that it does not have a sufficient informational interest to impose disclosure burdens on media entities, it does not have a sufficient interest to impose those requirements on Citizens United"<sup>291</sup> cannot be reconciled with the intent behind the campaign finance disclosure requirements promulgated by the Colorado legislature and adopted by the state's citizens.<sup>292</sup> This irreconcilability reflects the implication that the purpose behind the disclosure requirements has been degraded and the effectiveness of providing the public with information diminished.

#### 4. Interpreting the Media Exemption and Assessing its Validity

In validating corporations' limitless political spending ability in *Citizens United I*, the Supreme Court remarked that media corporations, just as other corporations, benefit from the corporate form in amassing immense aggregations of wealth and express views that "have little or no correlation to the public's support."<sup>293</sup> The Court emphasized that there is no legal support for distinguishing between corporations that are exempt as media entities and those that are not and, again, "rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."<sup>294</sup> Thus, the Court suggested that the distinction between media and non-media corporate speakers created by the exemption offends the Constitution and refused to consider whether Citizens United qualified for such exemption.<sup>295</sup>

Yet, the Tenth Circuit considered just that in *Citizens United II* concluding that the media exemption was applicable to the nonprofit organization.<sup>296</sup> The court considered it reasonable for Colorado to provide a media exemption on the grounds that the public has no informational interest in disclosure by media entities because their history of reporting and offering opinions affords the public adequate means to evaluate these

291. *Id.* at 216 (majority opinion).

292. *See id.* at 221 (Phillips, J., concurring in part and dissenting in part) ("Colorado voters have determined at the ballot box that the identity of Citizens United's donors who earmark financial contributions to produce or advertise a political film helps them evaluate the film's message.").

293. *Citizens United I*, 558 U.S. 310, 351 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United I*, 558 U.S. 310 (2010)).

294. *Id.* at 352 (quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting) (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978))).

295. *See id.* at 351–53. Although the Court discusses the media exemption to justify lifting the ban on corporate independent expenditures, it also stressed the importance of disclosure laws and reasoned that they "impose no ceiling on campaign-related activities," and "d[o] not prevent anyone from speaking." *Id.* at 366 (alteration in original) (first quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United I*, 558 U.S. 310 (2010); then quoting *McConnell v. FEC*, 540 U.S. 93, 201(2003), *overruled by Citizens United I*, 558 U.S. 310 (2010)). Accordingly, the application of disclosure regulations to all speakers, including media corporations, would serve sufficiently important governmental interests without imposing overly intrusive burdens. *See id.* at 366–67.

296. *Citizens United II*, 773 F.3d at 216.

speakers.<sup>297</sup> By accepting the Secretary's justification that the public would be able to properly assess speech disseminated by the media based on familiarity, the court essentially found that the exemption did not offend the Constitution despite its earlier remarks that the First Amendment does not provide greater protection based on the identity of the speaker as part of the institutional press.<sup>298</sup>

Moreover, the court called into question the validity of the governmental interest in the disclosure requirements "because the exemptions may indicate that the statutory command is not based on the asserted interest but on a qualified, more narrow interest."<sup>299</sup> This doubt flies in the face of the court's easy acceptance of the disclosures' importance in "ensuring that Colorado's electors are able to discern who is attempting to influence their votes."<sup>300</sup> Then again, the court opined that the media exemptions reflected Colorado's interest in disclosure based on the identity of the speaker.<sup>301</sup> Indeed, the court essentially made an as-applied determination based on equal protection grounds by considering whether it would be unlawful to require Citizens United to disclose information that the traditional media need not disclose.<sup>302</sup>

Recognizing the difficulty in determining whether various media entities should be afforded exemption from disclosure, the court provided little guidance regarding who will be covered by the media exemption moving forward.<sup>303</sup> The only relevant factor discussed by the court was in regard to the frequency of which an entity disseminated information to the public noting that "30-second sound bites" miss the mark.<sup>304</sup> Aside from true "drop in" speakers, this interpretation of the media exemption provides countless entities with a way out of disclosure. Can the public really be expected to discern who is attempting to influence its vote amongst the thousands of blogs, periodicals, cable broadcasters, filmmakers, and radio talk shows that exist today? As the Supreme Court recognized—"the line between the media and others who wish to comment on political and social issues becomes far more blurred"<sup>305</sup>—this line will soon be nothing more than a mirage.

---

297. See *id.* at 215–16.

298. See *id.* at 212.

299. *Id.* at 216.

300. *Id.* at 210.

301. See *id.* at 217 ("Colorado's law, by adopting media exemptions, expresses an interest not in disclosures relating to *all* electioneering communications and independent expenditures, but only in disclosures by persons unlike the exempted media.").

302. *Id.* at 220 (Phillips, J., concurring in part and dissenting in part) ("After hearing that position, the district court remarked that '[i]t sounds like you're making an equal protection argument, and yet you keep telling us, no, we're not.'" (alteration in original) (quoting Transcript of Record at 19:9–11, *Citizens United v. Gessler*, 69 F. Supp. 3d 1148 (D. Colo. 2014) (No. 14-cv-002266-RBJ), *rev'd*, *Citizens United II*, 773 F.3d 200 (10th Cir. 2014))).

303. *Id.* at 215 (majority opinion).

304. *Id.*

305. *Citizens United I*, 558 U.S. 310, 352 (2010).



In the wake of *Citizens United I*, disclosure remains as the predominant source of campaign finance regulation and continues to provide a less restrictive means of regulating speech than alternative measures.<sup>306</sup> With little else left in the campaign finance arena, loosening disclosure requirements poses the significant risk of completely eviscerating the entire campaign finance landscape. By adopting a broad interpretation of the media exemption,<sup>307</sup> the Tenth Circuit has provided yet another avenue for avoiding disclosure and posed such a risk to the campaign finance scheme.

#### IV. CLOSING LOOPHOLES, COMBATTING CORRUPTION, AND THE VALUE OF INFORMATION

While *Citizens United I* set the stage for the current state of diminishing campaign finance laws, it also turned the spotlight on disclosure as a constitutionally valid means to regulating the influence of money on politics.<sup>308</sup> The Supreme Court reinforced the importance and legitimacy of disclosure as an effective balance to a campaign finance system that allows for unlimited corporate independent expenditures, recognizing that with the assistance of technology, citizens have access to timely information necessary to hold elected officials accountable.<sup>309</sup> As an essential tool to combat the potential effects of striking down the corporate expenditure ban, the Court laid the framework for the structural change to the campaign finance landscape: “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.”<sup>310</sup>

Hence, disclosure is critical to the field of campaign finance in light of *Citizens United I*. Finding the proper balance to ensure the effectiveness of disclosure in combating corruption and providing the electorate with important information while protecting First Amendment rights and encouraging unfettered discussion is the challenge that lies ahead. As one commentator has suggested, “[r]ightsizing’ disclosure to enable voters to understand the financial forces behind our election campaigns requires that we both raise the monetary thresholds for disclosure and extend the ambit of disclosure to include the donors paying for independent spending.”<sup>311</sup> This Part addresses possible ways to mend the damage done to campaign finance regulation by proposing reforms to the information required to be disclosed, disclosure-triggering thresholds, and the stand-

---

306. *Id.* at 369 (citing *MCFL*, 479 U.S. 238, 262 (1986)).

307. *See Citizens United II*, 773 F.3d at 213–16.

308. *See Briffault*, *supra* note 177, at 667–68.

309. *See Citizens United I*, 558 U.S. at 370–71.

310. *Id.* at 371.

311. Briffault, *supra* note 207, at 690–91.

ards regarding social welfare organizations, super PACs, earmarking, and media exemptions.

### A. Full-Disclosure v. Anonymity

On opposite ends of the spectrum, two predominant models for campaign finance disclosure have been proposed and have garnered support: full-disclosure and anonymity.<sup>312</sup>

#### 1. Deregulate and Disclose

The call to “deregulate and disclose” has gained significant attention in recent years.<sup>313</sup> Even traditional opponents of campaign finance regulation have endorsed disclosure as a substitute for more restrictive regulation.<sup>314</sup> One of the main criticisms of full disclosure, however, regards its practical effectiveness.<sup>315</sup> Critics have noted that voters’ actual reliance on information is overstated.<sup>316</sup> With the mass amount of information flooding citizens’ daily lives, it is unlikely that most citizens utilize websites dedicated to campaign finance disclosure.<sup>317</sup> Instead, voters rely on news outlets for information regarding elections, which rarely focus on campaign finance aside from the volume of contributions as an indication of who is winning the race.<sup>318</sup> Moreover, disclosure laws have recently allowed the concealment of the “giant influence of financially and politically powerful entities,” while exposing small-scale citizen participation in campaign finance effectively defeating the informational purpose behind the laws.<sup>319</sup> Implementing a comprehensive disclosure system impounds these absurd results. Endless, detailed information

312. See Noveck, *supra* note 199, at 100.

313. See Briffault, *supra* note 175, at 286.

314. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997).

315. See Noveck, *supra* note 199, at 101–02 (“First, there is substantial reason to question whether the full disclosure model actually works as well in practice as it does in theory.”); see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1727–28 (1999); William McGeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 24–29 (2003); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 901–04 (1998).

316. See, e.g., Issacharoff & Karlan, *supra* note 315, at 1717–18.

317. Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 237 (2007).

318. See Briffault, *supra* note 175, at 288 (“Although today’s enhanced disclosure has led to marginally increased press coverage of campaign finance, press attention to campaign finance is still very limited, and a good deal of the coverage that is provided tends to focus on the ‘horse race’ aspect of campaign money—that is, what the volume of contributions and expenditures reveal about the relative strengths of the candidates—rather than what the money says about the candidates’ backers or views.”); see also McGeveran, *supra* note 195, at 863 (“In the past, disclosed data entered general circulation only if conventional media outlets considered it especially newsworthy. Traditional news judgment involved choosing individual political actions of special relevance to highlight, and surrounding this information with extensive context. This occurs rarely: even in jurisdictions with strong campaign finance disclosure regimes, for example, newspapers publish very few stories about political fund-raising.” (footnote omitted)).

319. McGeveran, *supra* note 195, at 864 (arguing the “upside-down rules reached their absurd climax” during the 2010 election cycle).

about donors will become insurmountable—both minimizing the value of information regarding influential donors and increasing privacy concerns for small donors.

In particular, the detailed nature of full disclosure presents challenges that may be overly burdensome, which can, in turn, deter donors.<sup>320</sup> A full disclosure regime would mean more comprehensive and detailed disclosure requirements, which would impose heavy burdens on donors and would likely deter those wishing to make smaller donations from doing so.<sup>321</sup> With the Internet and increased use of digital technology, the landscape of disclosure laws has “qualitatively transformed.”<sup>322</sup> While the laws have remained the same, their effect has completely changed—campaign finance data is easily accessible, searchable, sortable, and downloadable online—thus, anyone can quickly pull the contribution information of their neighbors, friends, coworkers, and so on.<sup>323</sup> Small donors are much more likely to be deterred to voice their political beliefs through contributions knowing that their name, address, contribution amount, and oftentimes their employer will be disclosed online.<sup>324</sup>

Furthermore, the movement toward deregulating campaign finance and requiring full disclosure relies too heavily on disclosure as a means to prevent corruption. Although disclosure can deter corruption or the appearance of corruption,<sup>325</sup> it does not—and will not—on its own accomplish this goal. For example, before unlimited soft money donations were prohibited by Congress, which were subject to disclosure, political party committees received an average of \$375,000 in contributions from some eight hundred individuals in the 2000 election cycle.<sup>326</sup> Disclosure did not deter these arguably corrupting donations.<sup>327</sup> Rather, they increased until they were prohibited by the BCRA.<sup>328</sup> Likewise, wealthy individuals continue to flood super PACs with large donations, which at least give rise to the appearance of corruption despite being subject to disclosure requirements.<sup>329</sup>

Standing alone, campaign finance disclosure laws cannot serve the purpose of deterring corruption. Moreover, a full disclosure system decreases the value of disclosure by providing the public with an indiscernible amount of information. Furthermore, it creates a chilling effect on

---

320. See Noveck, *supra* note 199, at 102–03.

321. See McGeeveran, *supra* note 195, at 13–24 (discussing the privacy costs of disclosure).

322. *Id.* at 11–12.

323. *Id.*; Briffault, *supra* note 175, at 290–91.

324. See Briffault, *supra* note 175, at 291.

325. See discussion *supra* Section III.C.2.

326. Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1182–83 (2002).

327. Briffault, *supra* note 175, at 286.

328. *Id.*

329. See discussion *supra* Section III.C.2.

speech of the majority of citizens who wish to or would typically make small contributions in elections.

## 2. An Anonymous Donation System

The opposite approach to the full-disclosure model is to replace disclosure with a regime of anonymous donations or to establish a “secret donation booth.” To limit the influence of large donors, Professors Bruce Ackerman and Ian Ayres proposed the secret booth in their book *Voting with Dollars*.<sup>330</sup> This system is premised on the theory that politicians’ inability to verify the sources of political contributions would greatly reduce the possibility for quid pro quo corruption, as complete anonymity makes it more difficult to sell access or influence.<sup>331</sup> Similarly, some scholars have asserted that full disclosure can exacerbate corruption rather than combat it because it provides candidates with potential donors’ detailed information and correspondingly provides donors with information regarding who supports a particular candidate.<sup>332</sup> This arguably allows corrupt actors to identify those that may be more open to striking a deal and facilitates their ability to assess each others’ credibility through voting and contribution records.<sup>333</sup>

The effectiveness of this model, however, would depend largely on the operation and integrity of a blind trust, which could itself give rise to corruption.<sup>334</sup> Although Professors Ackerman and Ayres proposed many precautions to address the risk of imperfect anonymity, such as “cooling-off periods” allowing donors to revoke their donations within a specified period of time and a “secrecy algorithm” preventing the blind trust to which payments are made from crediting contributions all at once, per-

---

330. See generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002). Voucher systems had previously been proposed, but Ackerman & Ayres book drew attention as a paradigm shift to disclosure. See DAVID W. ADAMANY & GEORGE E. AGREE, *POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA* 189–92, 201–04 (1975) (proposing voucher systems); see also Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1208–11 (1994) (citing Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT (Spring 1993), <http://prospect.org/article/crediting-voters-new-beginning-campaign-finance>) (comparing his proposal to a previous voucher proposal by Ackerman); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 21–22 (1996) (proposing a voucher plan).

331. ACKERMAN & AYRES, *supra* note 330, at 6 (“The voting booth disrupts vote-buying because candidates are uncertain how a citizen actually voted; anonymous donations disrupt influence peddling because candidates are uncertain whether givers actually gave what they say they gave. Just as vote-buying plummeted with the secret ballot, campaign contributions would sink with the secret donation booth.”).

332. See Gilbert & Aiken, *supra* note 196, at 153–56.

333. See *id.* (noting that while disclosure “can raise the expected cost of corruption by increasing the likelihood of detection . . . it can also raise the expected benefit by making conspirators more confident that their counterparts will follow through and, more generally, by resolving information asymmetries in the market for favors” in arguing that disclosure has “crosscutting effects”).

334. See ACKERMAN & AYRES, *supra* note 330, at 99.

fect anonymity is simply not possible.<sup>335</sup> Of course, no system will meet the expectation of perfection, but the risk “that the anonymity system would break down, resulting in the worst of all worlds—one which the contributors were known to the recipients but not disclosed to the public” poses far too great of a threat to the integrity of elections.<sup>336</sup>

This model would also provide little insight regarding the effect of wealth on politics<sup>337</sup> and largely ignores the important purpose behind disclosure laws, specifically the informational value they provide the electorate. Adopting a campaign finance system based on anonymity would result in a complete loss of information regarding contributions, cutting off the voters’ ability to “follow the money [to] see clearly which special interests are funding political campaign activity,”<sup>338</sup> which the Supreme Court has consistently found to serve an important interest that allows the electorate to evaluate candidates.<sup>339</sup>

### *B. A More Balanced Approach*

Although the full-disclosure and anonymity models for reform present valid arguments, to protect the First Amendment rights of political speakers and to enable voters to make informed decisions through transparency, a more balanced approach is necessary. To effectively address the loopholes provided by current disclosure laws, including earmarking, the major purpose test, coordination with super PACs, fund pooling, and press exemptions, comprehensive reform efforts on both the federal and state level need to take place. First, to provide voters with the most valuable information, large contributions should require more detailed disclosure while disclosure regarding smaller donations should be focused on aggregated data. Furthering this goal, disclosure triggering thresholds should be raised, and guidelines surrounding social welfare organizations require amendments. Lastly, earmarking provisions, coordination standards, and media status parameters should be redefined.

---

335. See Daniel H. Lowenstein, *Voting with Votes*, 116 HARV. L. REV. 1971, 1985–94 (2003) (reviewing BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002)), and recognizing the importance of a contributor’s reputation in establishing trust with candidates, allowing a credibility assessment to accurately determine who is a contributor to the candidate’s campaign).

336. *Id.* at 1994 (“It is therefore especially disappointing that Ackerman and Ayres do so little to explore the foundations of their proposals and that they rely on relatively wooden conceptions of human conduct and motivation, thereby missing some of the most interesting questions raised by their proposals.”).

337. See Noveck, *supra* note 199, at 106.

338. Press Release, President Barack Obama, *supra* note 183.

339. See, e.g., *Citizens United I*, 558 U.S. 310, 371 (2010).

### 1. Aggregate Data of Small Donor Information

Several scholars have recently proposed aggregate data as an alternative to individual donor information.<sup>340</sup> For example, rather than focusing on a contributor's name and address, aggregate statistics could be compiled based on "more general characteristics, such as the donor's occupation, income bracket, race, or geographic region."<sup>341</sup> Additional aggregate statistics regarding percentages of donations based on different data sets, such as political party affiliation, could also provide voters with helpful information in evaluating candidates.<sup>342</sup> This type of information avoids providing specific donor identifying information, which prevents quid pro quo corruption, the risk of harassment or retaliation and, thus, chilling speech.<sup>343</sup> Moreover, the personal information of the vast majority of contributors does not likely provide the vast majority of voters with any real educational value because most contributors are relatively unknown to the public.<sup>344</sup>

Instead, providing voters with data sets aligns the information disseminated with the candidate rather than the contributor, which will prove more valuable in educating voters.<sup>345</sup> For example, if a candidate or political group is heavily supported by out of state contributors, or large food corporations rather than local farmers, or employees of the tobacco industry, voters can use these heuristic cues to assess the candidate or group's policy positions. Whereas, individual contributors' names and addresses on their own provide voters with little to no insight.<sup>346</sup> While some intermediary organizations filter, sort, and publish contributor information in data sets, they can easily selectively highlight certain information to further a particular agenda or bias.<sup>347</sup> At the same time, "[a]ggregate disclosure can provide a rich and valuable source of politically relevant information . . . [including] information on patterns of political support that may prove insightful to both voters and policymakers alike."<sup>348</sup> To ensure accurate, unbiased, and consistent publication of aggregated data, collection and dissemination should be handled by federal and state agencies through reporting reforms.

---

340. See, e.g., Briffault, *supra* note 175, at 276 ("Campaign finance reports should be treated more like Census data or income tax returns, with the focus for the most part not on the activities of specific individual donors and more on the behavior of demographic or economic aggregates.").

341. Noveck, *supra* note 199, at 106.

342. See *id.* at 107-08.

343. See *id.* at 108-10.

344. See Mayer, *supra* note 197, at 265-66.

345. See *id.* at 267.

346. See *id.*

347. See *id.* at 268-70; see also La Raja, *supra* note 317, at 248.

348. Noveck, *supra* note 199, at 108.

## 2. Higher Thresholds, Original Source Disclosure, and Earmarking

In a similar vein, to provide the electorate with information useful in determining candidates' and groups' policy positions and what special interests are attempting to influence elections, disclosure triggering thresholds should be raised.<sup>349</sup> As the Tenth Circuit and Colorado courts have suggested, there is little educational value in providing voters with donor information regarding small donors and ballot-issue committees expending relatively small amounts.<sup>350</sup> Additionally, small contribution amounts pose little potential of corruption but are more apt to expose donors to retaliation, threats, and harassment.<sup>351</sup> Significantly higher thresholds will ensure that the most influential donors, which will provide the electorate with more important information, are captured.<sup>352</sup> Donations at these higher levels would warrant more detailed disclosure requirements, beyond aggregate reporting, as the majority of voters are more likely to be familiar with wealthy individuals, celebrities, and issue organizations contributing large amounts and, thus, more readily able to utilize the information in their decision-making.<sup>353</sup>

Perhaps even more essential to effective disclosure, with campaign funds increasingly being moved through independent committees, all campaign spending by such committees should be traceable to the original source.<sup>354</sup> Those contributions above the threshold and utilized in support of independent expenditures or electioneering communications should be subject to disclosure. In addition, because these social welfare organizations are being used as conduits for donations to super PACs, requiring disclosure of these donations is equally important.<sup>355</sup> Thus, disclosing the original source for applicable spending above corresponding thresholds should also be required. Because the IRS has failed to

349. Several scholars have called for higher thresholds and recognized that the identity of contributors making small donations does not provide the electorate with sufficiently helpful information. *See id.* at 107; *see also* Mayer, *supra* note 197, at 280–81; Briffault, *supra* note 207, at 690–91; McGeeveran, *supra* note 315, at 53–54; Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327 (1998).

350. *See, e.g.*, Sampson v. Buescher, 625 F.3d 1247, 1261 (10th Cir. 2010) (finding the burdens of compliance did not warrant the disclosure of small expenditures by a ballot-issue committee).

351. *See* Mayer, *supra* note 197, at 283; *see also* McGeeveran, *supra* note 195, at 873–78.

352. Thresholds should be based on research and current spending norms and adjusted for inflation on an annual basis. One commentator has suggested a donor who makes a donation of more than \$10,000 to an independent committee or more than a threshold fraction of the committee's funds should be subject to disclosure requirements. Briffault, *supra* note 207, at 709.

353. *See* Mayer, *supra* note 197, at 265–66 (“[A] voter might be able to use the fact that, for example, Jane Fonda or Rush Limbaugh contributed to a particular candidate’s campaign or to an organization that opposed a particular candidate to intuit correctly something about the relevant candidate’s qualifications for office or policy positions . . .”).

354. *See* Briffault, *supra* note 207, at 707–10 (“With limits on spending by and donations to independent committees gone, disclosure of the individuals behind the independent committees becomes more critical.”).

355. *Id.* at 685–87.

adopt amendments to the 501(c)(4) guidelines,<sup>356</sup> and the FEC is not likely to amend current guidelines concerning the independence of super PACs,<sup>357</sup> these original source disclosures will work to combat pooling efforts of wealthy individuals and to close the existing loopholes that allow dark money to increasingly influence elections.

Lastly, earmarking standards should be applied in an opt-out fashion rather than an opt-in fashion. Hence, rather than allowing donors to avoid disclosure unless they specifically earmark their donations to be used in support of electioneering communications or for independent expenditures, any donations that do not opt out of such electoral activities would be subject to disclosure so long as they are above the corresponding threshold.<sup>358</sup> This distinction would make it more difficult to avoid disclosure by funneling donations through social welfare organizations. In conjunction, raising threshold amounts, requiring social welfare committees and super PACs to disclose original donors, and redefining standards for earmarking will provide for more effective and comprehensive disclosure of important campaign finance information and plug the existing gaps in current election laws.

### 3. Interpreting Press Exemptions

Lastly, the FEC and the Tenth Circuit's broad application of the media exemption to *Citizens United*<sup>359</sup> is problematic and does not allow for practical application of the exemption in future cases. In *Citizens United I*, the Supreme Court reasoned that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."<sup>360</sup> Moreover, the Court recognized that "the advent of the Internet and the decline of print and broadcast media" further blurred "the line between the media and others who wish to comment on political and social issues."<sup>361</sup> With this line continuing to blur as social media and blogs rise as outlets for political speech, the legal categorization of press entities will continue to present challenges.

---

356. The IRS proposed amendments in 2013, which would have redefined the "exclusive" versus "primarily" discrepancy, but after receiving a record amount of comments during the notice and comment period, failed to adopt the proposal. See generally Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535-01 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

357. See Briffault, *supra* note 207, at 686 (discussing the independence of super PACs from candidates as meaning "that they are barred from consulting with candidates concerning the specifics of the decisions of which ads to air and what to say in those ads").

358. See *id.* at 698 (suggesting issue committees set up non-electoral spending accounts, which could not be used for electoral spending and would not be subject to disclosure, allowing donors to opt out of disclosure).

359. See FEC Advisory Op., No. 2010-08, 2010 WL 3184266 (June 11, 2010); see also *Citizens United II*, 773 F.3d 200, 213-15 (10th Cir. 2014).

360. *Citizens United I*, 558 U.S. 310, 352 (2010).

361. *Id.*



The reasoning applied in *Citizens United II* does not provide a workable framework for evaluating whether an entity qualifies for the exemption.<sup>362</sup> Relying on the public's "ability to evaluate the credibility of a particular message"<sup>363</sup> to determine an entity's status forces courts to second-guess the public's judgment on a case-by-case basis.<sup>364</sup> Moreover, the press exemptions make little sense in light of current campaign finance disclosure. As Circuit Judge Phillips noted in *Citizens United II*, media organizations do not normally engage in electioneering communications or make independent expenditures and would be subject to the same disclosure requirements in advertising such express advocacy pieces.<sup>365</sup> Furthermore, should the Court find media exemptions to be unconstitutional, as it suggested in *Citizens United I*,<sup>366</sup> they should be severed from disclosure laws and media corporations should be treated the same as non-media corporations.

#### CONCLUSION

Political speech is at the core of the First Amendment protections reflecting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>367</sup> This constitutional guarantee is most applicable to political campaign activity because the ability of the electorate to make informed decisions is essential as "the identities of those who are elected will inevitably shape the course that we follow as a nation."<sup>368</sup>

Based on the current landscape of campaign finance regulation, effective disclosure schemes on both the federal and state level are critical to ensuring that the electorate has the information necessary to make these important decisions. In the wake of *Citizens United I* and the Tenth Circuit's recent decision in *Citizens United II*, disclosure reform is of the utmost importance as political spending, particularly dark money, continues to rise with another election on the horizon. In particular, in *Citizens United II* the court improperly granted the organization media exemption resulting in additional opportunities for entities to avoid campaign finance disclosure. In consequence, the court's decision undermined the purposes behind disclosure regulations and has risked minimizing the effects of such regulations.

---

362. *Citizens United II*, 773 F.3d at 214.

363. *Id.*

364. *See id.* at 221–23 (Phillips, J., concurring in part and dissenting in part).

365. *See id.* at 222.

366. 558 U.S. at 351–54.

367. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

368. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United I*, 558 U.S. 310 (2010); *see* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–73 (1971).

By raising thresholds and limiting disclosure in regard to small donors to aggregated data, along with requiring social welfare organizations and super PACs to disclose the original sources of their donations, and redefining earmarking and media exemption standards, existing loopholes that allow increasing amounts of donations to go undisclosed can be closed. Consequently, campaign finance disclosure laws would serve their intended purpose of combatting corruption, detecting contribution violations, and providing the public with important information in evaluating political candidates.

*Nicole L. Jones*\*

---

\* J.D. Candidate, May 2017, University of Denver Sturm College of Law. Special thanks to the *Denver Law Review* Board, both Volume 93 and Volume 94, and editorial staff for their input, guidance, and hard work, without which this publication would not have been possible. Additionally, I would like to express my deepest gratitude to my family for their enduring support, encouragement, and belief in me. Above all, I thank my wonderful husband, Dillon Godofsky, who inspired me to pursue my dreams. I would not be here without your constant love and support, and your boundless confidence in me.