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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | November 2019

Even Before 2019 Holiday Season, 2020 Pre-Election Time Windows Are Going Into Effect

D. Mark Renaud and Eric Wang

Iowa's presidential caucuses – scheduled for February 3 for the 2020 election cycle – have long been a significant mile marker on the path to the White House. But even before this "first in the nation" presidential electoral event is held, pre-election time windows regulating election-related activities already are starting to go into effect.

Companies, PACs, and other entities that intend to engage in any activities in connection with elections for federal or state office are faced with a complex regulatory calendar. Independent activities that occur close in time to an election, and even activities that are not, in fact, election-related, such as coordinated grassroots advocacy, could be regulated under these pre-election time windows.

FEC Coordination Rules. The first pre-election time window regulating the 2020 presidential race actually kicked in on October 6, 2019 – 120 days before the Iowa caucuses. Under Federal Election Commission (FEC) rules, any public communication in Iowa during this time window that refers to a

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Courts Reject Overbroad Compulsory NJ/NY Disclosure Laws

By Lee E. Goodman

Two federal courts recently have restrained overbroad compulsory donor disclosure and related disclosure laws on the basis of First Amendment privacy concerns. Considered together, the court rulings re-affirm First Amendment protection for political privacy and anonymity in political speech and association. They also signal caution to legislators and regulators that the courts will impose meaningful constitutional boundaries around government efforts to compel public registration and disclosure of political activities.

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Citizens Union v. New York

In 2016, the New York legislature passed, and Governor Cuomo signed, a new ethics law that required each non-profit 501(c)(3) organization to disclose its contributors ($2,500 and more) whenever the organization contributed $2,500 in a six-month period to a social welfare 501(c)(4) organization. It also required 501(c)(4) groups that spend over $10,000 a year on issue advocacy to disclose their contributors ($1,000 or more). The law was challenged in the U.S. District Court for the Southern District of New York as a violation of the First Amendment by non-profit organization Citizens Union of the City of New York and other non-profit groups.

"There is no question," the court started its analysis, "that public disclosure of donor identities burdens the First Amendment rights to free speech and free association." The court surveyed historical precedents, including the often discounted opinions in *McIntyre v. Ohio* (1995), *Talley v. California* (1960), and *NAACP v. Alabama* (1958), as well as the Supreme Court's seminal decision in *Buckley v. Valeo* (1976), and divined a clear line between election advocacy, which can be regulated through compelled donor disclosure, and issue advocacy, which generally cannot be so regulated.

The court, applying a muscular version of "exacting scrutiny," then assessed whether there was any "substantial relation" between public identification of donors and New York's asserted interests in providing citizens information, deterring corruption, and detecting violations of the law. The court found that the compelled disclosure of 501(c)(3) donors was not justified in light of the "tangential and indirect support of political advocacy" covered by the law. Among other weaknesses, the court found the relationship between a 501(c)(3)'s donors and electioneering or direct lobbying "too attenuated to effectively advance any informational interest." Many donors contribute to a non-profit's general treasury without earmarking their contributions for the eventual use by a 501(c)(4) organization.

The court also struck the law's requirement for 501(c)(4) groups to disclose their donors if they engage in issue advocacy. The court first considered the breadth of the topics covered by disclosure, which included any elected official's "position" on legislation or potential legislation. The court observed that "any matter of public importance could become the subject of legislation and given the range of positions taken by all elected officials," which the court termed "pure issue advocacy." Indeed, the "government acknowledges that the government interest at stake is the interest in revealing 'the funders of issue advocacy,'" the court recorded. "The cases upholding donor disclosure requirements have never recognized an informational interest of such breadth." The court also distinguished the breadth of the issue advocacy covered by the New York law and the narrow "electioneering communication" definition at issue in *McConnell v. FEC* (2003).

Accordingly, the court struck the compulsory disclosure laws for both 501(c)(3) and 501(c)(4) organizations as violative of the First Amendment.

Americans for Prosperity v. New Jersey

In 2019, the New Jersey legislature passed, and Governor Murphy signed (subject to expressed constitutional reservations), S1500 which required 501(c)(4) and 527 organizations that spend as little as $3,000 in a calendar year on "influencing or attempting to influence the outcome" of any election, public question, legislation or regulation, or that merely "provide any political information" about any candidate, public question, legislation or regulation, to file quarterly reports publicly disclosing the names of all contributors who donated $10,000 (or more). The law included activities to influence elections such as voter registration, polling, research and get-out-the-vote drives, even if they were non-partisan. The law was challenged facially and as-applied under the First Amendment by non-profit 501(c)(4) organization Americans for Prosperity, which

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presidential candidate seeking the nomination of any of the parties holding caucuses in Iowa may be regulated as an in-kind contribution if it is coordinated with one of the candidates, their campaigns, a political party, or their agents. For ads mentioning presidential candidates, this coordination time window lasts through the general election. For ads mentioning many U.S. House and Senate races, this pre-election coordination time window will begin on December 4, 2019 – 90 days before the March 3, 2020 "Super Tuesday" event, when many states will hold congressional and presidential primaries.

(The 120-day pre-election time window for communications that refer to a presidential candidate – known in FEC parlance as a "*content* standard" – should not be confused with the other 120-day time window under the FECs' coordination rules. Under that "*conduct* standard," hiring or retaining an employee or contractor who also has worked for a candidate, candidate's committee, or political party within the past 120 days – irrespective of any upcoming election – also could trigger the coordination rules if one of the FEC's five "content standards" is met as well.)

If a public communication is regulated as an in-kind contribution under the 90/120-day windows, it is subject to the limits and prohibitions that apply to monetary contributions. That means for a conventional PAC, the spending on the communication could exceed the PAC's contribution limit, while for corporations (including trade associations and Section 501(c)(4) entities) and super PACs the spending would be prohibited outright.

Electioneering Communications/Grassroots Advocacy. As the infomercials say, "But wait, there's more … ." Under the FEC's "electioneering communication" rules, advertisements that are run on broadcast, cable, or satellite television or broadcast radio may trigger reporting and disclaimer requirements if they refer to a federal candidate within 30 days before a primary (e.g., beginning January 4, 2020, for the upcoming Iowa presidential caucuses) or 60 days before a general election and are "targeted to the relevant electorate."

Although the law deems them to be "electioneering," such ads may include pure grassroots advocacy, such as ads urging constituents to contact their members of Congress to either support or oppose the impeachment proceedings. Such ads could be deemed "electioneering" with respect to named members of Congress up for re-election, President Trump, or both.

Notably, the electioneering communication reporting and disclaimer requirements apply regardless of whether an ad is coordinated. However, an ad that qualifies as an electioneering communication also triggers one of the above-mentioned "content standards" in the FEC's coordination rules, and could therefore also be regulated as a coordinated communication if it also satisfies one of the coordination "conduct standards."

As noted in **the last issue of** *Election Law News,* a number of states also have electioneering communication laws for ads that refer to candidates for state office. Many of these states follow the federal 30/60-day pre-election time windows. However, some states have much longer time windows: Alabama's time window begins 120 days before any election, while Massachusetts' begins 90 days before any election.

IRS "Facts and Circumstances" Test. For tax-exempt organizations, pre-election time windows matter not only for the purposes of coordination and electioneering communications under the campaign finance laws. Under the Internal Revenue Service's (IRS) nebulous "facts and circumstances" test, whether a communication "is delivered close in time to [an] election" is a factor in determining whether the communication

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moved first for a preliminary injunction.

Like its sister court in New York, the federal court in New Jersey started by acknowledging that "compelled identification of contributors to independent groups that expend money on political causes 'can seriously infringe' the rights to privacy of association and to belief guaranteed by the First Amendment." The court cited *Buckley v. Valeo* and *NAACP v. Alabama*. The court also relied upon the critical distinction *Buckley* drew between issue advocacy and election advocacy. The New Jersey court quoted the *Buckley* formulation for exacting scrutiny to require that a law "furthers a vital governmental interest … that is achieved by a means which does not unfairly or unnecessarily burden either a minority party's or individual candidate's equally important interest in the continued availability of political opportunity." Finally, the court held the government responsible for undesirable public attention visited by compelled disclosure.

The court concluded there was no "substantial relation between the disclosure requirement and a sufficiently important governmental interest" because it was patently overbroad. The court cited three main reasons. First, the law required disclosure of donors for merely "political information," even "purely factual information" about public officials and their votes in office, such as a "scorecard" informing citizens how a public official voted. Second, it applied to communications over virtually all possible media. Third, it applied to activities from January 1 through election day in November.

Accordingly, the court issued a preliminary injunction prohibiting the state from enforcing the compulsory disclosure law based on the likelihood

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is political campaign activity if it can be construed as "favoring or opposing a candidate." Section 501(c)(3) charities and educational institutions generally may not engage in any political campaign activity, while such activity is limited for Section 501(c)(4) advocacy groups and Section 501(c)(6) trade associations.

The IRS has never clearly articulated a bright-line rule for how "close" to an election is too close. However, a document the agency put out several years ago suggests the IRS follows the same 30/60-day pre-election time windows for "electioneering communications" under the federal campaign finance law. That is to say, if a public communication is disseminated within 30 days before a primary or within 60 days before a general election and refers to any candidate running in that election, it is at greater risk of being treated by the IRS as political campaign activity.

As we head into the final stretch of 2019, now is the time for politically active organizations to start marking their calendars for all of the pre-election time windows that may apply to them in connection with next year's elections. Wiley Rein's Election Law Practice tracks and advises clients on all federal and state laws that regulate activities within these windows. ■

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U.S. Representatives Ken Buck and Ro Khanna Introduce Legislation to Modernize FARA Filings

By Daniel B. Pickard, Tessa Capeloto, Paul Coyle*

On November 15, 2019, U.S. Representatives Ken Buck (R-CO) and Ro Khanna (D-CA) introduced H.R. 5122, the Foreign Agents Registration Modernization (FARM) Act of 2019. The FARM Act seeks to increase the transparency of foreign government influence activities in the United States by making filings under the Foreign Agents Registration Act (FARA) more accessible and the filing contents more searchable. The bill has been referred to the House Committee on the Judiciary, upon which Rep. Buck serves.

The FARM Act would enhance the transparency of foreign influence in the United States in two ways. First, the bill requires agents of a foreign principal to submit their FARA filings to the U.S. Department of Justice (DOJ) in an easily searchable electronic format, also known as a structured data format. Second, the legislation directs the DOJ to work with the Secretary of the U.S. Senate to create a public database for FARA filings similar to the **Lobbying Disclosure Act Database,** which is a searchable domestic lobbying registration database hosted on the Senate's website. In addition to greater public access, proponents of the FARM Act say the formatting requirements will enhance the DOJ's FARA enforcement efforts by making it easier to identify incomplete or delinquent filings.

Although the text of this legislation is not yet publicly available, its filing format requirements appear to align with Rep. Pramila Jayapal's (D-WA) H.R. 1566, which would likewise amend FARA to require registrants to file registration statements in a searchable digital form. Congress passed the language of H.R. 1566 within H.R. 1, the House Democrat's comprehensive government ethics, campaign finance, and voting rights legislation. Although the substance of H.R. 1566 was included in H.R. 1, Rep. Jayapal's bill has failed to gain any traction as a stand-alone bill while H.R. 1 has made no progress in the Senate.

In 2016, the DOJ Inspector General issued a report on its audit of FARA enforcement and administration. That report found that the DOJ lacked a comprehensive FARA enforcement strategy, flagged potential abuse of the FARA registration exemptions, and noted an overall decline in FARA registrations. The report spurred the present era heightened enforcement efforts within the DOJ and significant bipartisan legislative reform efforts in Congress. The Foreign Agents Registration Modernization Act of 2019 is a modest bill that would not fundamentally alter FARA law. Nevertheless, Reps. Buck and Khanna have introduced a bipartisan bill with two simple measures that would enhance public awareness of foreign influence and support the DOJ's enforcement work.

Wiley Rein's FARA Handbook, which reviews the laws and regulations that govern whether an entity should register with the FARA Registration Unit of the DOJ, the registration process, the obligations of registered agents, and the penalties that may be imposed for FARA violations, can be read **here**. For more information about FARA, please contact one of the authors listed below.

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Maryland Pay-to-Play Report Due November 30

Please note that Maryland's semiannual pay-to-play report is due on November 30 from certain state and local government contractors, even if no reportable contributions have been made.

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that it facially violated the First Amendment. The court reserved judgment on the plaintiff's as-applied challenge, although it expressed sympathy for the claim noting what it called the current "climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others."

Conclusion

The Supreme Court's seminal decision in *Buckley v. Valeo* (1976) figured centrally in each decision. Specifically, the courts observed the critical line *Buckley* drew between *election* advocacy versus *issue* advocacy. Another common thread was application of a muscular "exacting scrutiny" standard of review that came closer to strict scrutiny than the rational basis review that other courts recently have applied. Applying these principles, the federal courts in New York and New Jersey found facial infirmities with the state laws. The New York and New Jersey rulings are likely to be appealed to the Second and Third Circuits, respectively, which have tended to be more deferential to government compelled disclosure. ■

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FEC Matter Cautions Against Use of Corporate Employees, Facilities, and Logos

By Carol Laham and Louisa Brooks

In late August, just before it lost a quorum of Commissioners, the Federal Election Commission (FEC) voted 4-0 to dismiss a complaint filed against Whirlpool Corporation and U.S. Senator Sherrod Brown's campaign committee, Friends of Sherrod Brown. The complaint alleged that Whirlpool Corporation made – and the Brown campaign received – a prohibited corporate contribution when the campaign employed the Whirlpool logo and corporate facilities and employees in a campaign advertisement.

The advertisement at the center of the complaint was a YouTube video ad paid for and released by the Brown campaign. The ad featured Whirlpool corporate employees sporting Whirlpool-branded clothing and stating their support for Senator Brown. (Press coverage of Senator Brown sometimes labels his appearance as "rumpled," and the Whirlpool employees had a rebuttal: "We make washing machines, and Sherrod Brown looks great to us!") The employees and Senator Brown both delivered lines while standing in front of a large Whirlpool sign, and the ad also featured b-roll footage from inside a Whirlpool factory.

While the ad's repeated allusions to Whirlpool were unmistakable, the FEC nonetheless found that there was no corporate contribution by Whirlpool. This conclusion hinged on several important findings, namely: (1) that all Whirlpool employees who appeared in the advertisement did so in their individual capacities and on their own time; (2) that Whirlpool did not authorize the Brown campaign to use its name or logo; (3) that the ad was filmed on public property; and (4) that the Whirlpool factory footage was obtained from publicly available sources, not from Whirlpool. Moreover, the FEC observed that Whirlpool had specifically refused to allow the Brown campaign to film on corporate property, and after the ad was released the company had immediately requested that the Brown campaign add a disclaimer stating that the ad "d[id] not constitute an endorsement of Whirlpool Corporation." Given the factual circumstances and Whirlpool's actions to alleviate any perception of corporate endorsement, the FEC concluded that it had not contributed any corporate resources to the Brown campaign.

Though this case was resolved in Whirlpool's favor, the FEC could easily have reached the opposite conclusion had any of the factual circumstances been different – if, for example, the company had allowed the Brown campaign to capture factory footage inside the corporate facilities. The case thus serves as a cautionary reminder that a corporation's resources – including its employees, its facilities, and its trademarks or logos – may not be used for campaign purposes. ■

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California AG Releases Proposed CCPA Implementing Regulations

By Megan L. Brown, Matthew J. Gardner, Duane C. Pozza, Antonio J. Reynolds, Kathleen C. Scott, and Joan Stewart

Last month, California Attorney General (AG) Xavier Becerra released the long-awaited draft regulations for the California Consumer Privacy Act (CCPA). These rules, once finalized, will govern compliance with the CCPA.

The proposed regulations—24 pages in length—establish procedures and provide guidance for businesses covered under the CCPA. Below is an illustrative list of some of what the proposed rules cover:

- **Notice**. The proposed regulations detail what notice must be provided at the time of data collection—distinguishing between online and offline (in person) collection. They also outline the notice that must be provided to consumers about how to exercise an opt-out request. For those businesses offering financial incentives or price of service differences, a description of the specific notice that must be provided about those offerings is also detailed in the draft.
- **Privacy Policy**. The proposal details the information that the CCPA requires to be included in the privacy policy of a business, including specific information about consumer rights, and how the consumer can exercise those rights, designate an authorized agent to exercise those rights, or contact the business for more information. Additionally, the proposed regulations include a requirement that would require a business to include in its privacy policy an affirmative statement about whether or not the business has disclosed or sold personal information to third parties in the preceding 12 months.
- **Business Practices for Handling Consumer Requests**. The proposal details the procedures businesses should have in place to process consumer requests to exercise their rights under the statute. The proposed regulations outline a two-step process for the exercise of certain consumer rights, including deletion and opt-out. They require businesses to confirm receipt of such requests within 10 days, in addition to responding to the request within 45 days from the date of receipt. The proposed regulations also require that businesses treat user-enabled privacy controls, such as browser plugins or privacy settings, as a valid request to opt-out.
- **Verification Procedures**. Businesses are required by the proposed regulations to establish a "reasonable" method to verify—"to a reasonable degree of certainty"—that the consumer making a request is the individual about whom the business has collected information, including that the business satisfy a minimum number of verification points depending on the type of information involved. The proposed regulations tie the level of verification required to the sensitivity of the data. The proposed regulations contemplate that consumers could designate an authorized agent to exercise rights on their behalf and propose additional verification requirements for such entities.
- **Training and Record-Keeping**. The proposed regulations require that all individuals responsible for handling consumer inquiries receive training about CCPA requirements. Businesses, under the proposed regulations, must establish procedures for record-keeping and would be required to maintain records of consumer requests made pursuant to the CCPA for at least 24 months.
- **Special Rules Regarding Minors**. The CCPA requires that minors under 13 years

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> of age must affirmatively opt-in to the sale of their personal information. The proposed regulations require that businesses establish a reasonable method for verifying the identity of a parent or guardian of a child who would be exercising the opt-in on behalf of their child. The regulations list examples of several methods that are reasonably calculated to ensure that the person providing consent is the child's parent or guardian. The regulations also set out special requirements for notices to minors under 16 years of age.

The CCPA will take effect January 1, 2020, and enforcement by the Attorney General will begin six months after the final implementing regulations are published, or on July 1, 2020, whichever comes first. The CCPA applies to a for-profit business that collects a California resident's personal information, does business in California, and meets at least one of the following criteria: (1) has annual gross revenues in excess of $25 million; (2) receives or discloses the personal information of 50,000 or more consumers, households or devices per year; or (3) derives 50% or more of their annual revenues from selling the personal information of California residents. There are limited exceptions to the scope of the law, including for information that is governed by the HIPAA or the Gramm-Leach-Bliley Act.

The Attorney General is currently accepting written comments on the proposed regulations through December 6, 2019. Additionally, the Attorney General will be holding four public hearings at which interested parties may submit oral or written testimony. The public hearings are scheduled for December 2 in Sacramento, December 3 in Los Angeles, December 4 in San Francisco, and December 5 in Fresno.

If your organization would like to participate in the upcoming hearings or submit written comments, or for more information on how the CCPA applies to your organization, please contact:

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FCC Clarifies Political File Rules and Warns of Further Enforcement Action

By John M Burgett, Ari Meltzer, and Joan Stewart

The Federal Communications Commission (FCC or Commission), on October 16, 2019, released a **Memorandum Opinion and Order** (Order) clarifying the online political file requirements for broadcast stations. In a **companion decision** released the same day, the FCC also admonished a broadcaster for failing to adequately identify in its political file the sponsor of a political ad because the broadcaster used the acronym "DSCC-IE" instead of the entity's full name – the Democratic Senatorial Campaign Committee. In both items, the full Commission underscores the critical responsibility of broadcasters to maintain complete and accurate online political files, and makes clear that the burden of ensuring that all information required to be disclosed in the political file falls squarely on the broadcaster (and not on candidates or other political ad buyers).

The content of the Order may seem familiar – as it is a slightly revised version of an order released in early 2017 by the Media Bureau, in response to a series of complaints filed in 2014 by Campaign Legal Center and Sunlight Foundation arguing that the political files of several stations were incomplete. Shortly after the release of that 2017 Bureau-level decision, the full Commission rescinded it, and the complaints were returned to pending status so that the full Commission could consider the issues raised therein. Now, more than two years later, the full Commission has finally released its own decision, which, like the prior Bureau decision, admonishes the cited stations for various failures of their political file record-keeping obligations, clarifies certain disclosure obligations, and warns all broadcasters that going forward the agency may impose more severe sanctions on stations that violate the political file rules as now clarified.

The release of the Order at this time – heading into an already active and issue-packed election cycle – should serve as a warning to broadcast stations that the Commission (and public interest groups) will be closely scrutinizing stations' political files. Accordingly, it is crucial that material in the political file be accurate, complete, and timely uploaded.

In brief, the Order clarified that:

- The record-keeping requirements for candidate ads and third-party issue ads are not mutually exclusive – meaning that if a candidate ad references a political matter of national importance, or a third-party issue ad references a federal candidate, the political file must disclose both the candidate and issue(s) referenced in the ads;
- The broadcaster is responsible for the accuracy and completeness of the documentation placed in the political file, not the party sponsoring the ad (i.e., a candidate or third-party political advocacy group); and
- Promptly uploading complete material to the political file on a timely basis is critical.

Refresher on Political File Requirements

Before we discuss the clarifications set forth in the Order, here is a brief summary of the political file rules:

Section 315(e) of the Communications Act requires broadcasters to "maintain, and make available for public inspection, a complete **record** of" two types of requests:

- Those made by or on behalf of a **legally qualified candidate**; and
- Those that communicate a message relating to any **political matter of national importance**, including:
  - a legally qualified (federal) candidate;
  - any election to federal office; or
  - a national legislative issue of public importance.

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The **record required to be** placed in the political file of a station's online public inspection file must include:

- whether the request to purchase broadcast time is accepted or rejected by the licensee;
- the **rate** charged for the broadcast time;
- the **date and time** on which the communication is aired; and
- the **class** of time that is purchased.

As applicable, the record must also include:

- the **name of the candidate** to whom the communication refers;
- the **office** to which the candidate is seeking election;
- the **election** to which the communication refers; or
- the **issue** to which the communication refers.

When the request is made **by, or on behalf of, a candidate**, the record must also include:

- the **name of the candidate**;
- the **authorized committee** of the candidate; and
- the **treasurer** of such committee.

For other requests (i.e., issue ads), the record must also include:

- the **name** of the person purchasing the time (i.e**.**, the sponsor);
- the **name, address, and phone number of a contact person**f or such person; and
- a **list** of the chief executive officers or members of the executive committee or of the board of directors of such person.

Separately, Section 73.1212(e) of the FCC's rules requires that, when a station broadcasts material (typically, state or local issue ads) that involve a "**political matter** or **matter involving the discussion of a controversial issue of public importance** and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter," the station must place in the political file:

- a **list** of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group.

To collect the information listed above, many stations rely upon the ad buyer to complete NAB Form PB-18, and then just drop the form in their political files. As the Order makes clear, however, this practice carries significant risk because the onus is on the broadcaster alone to ensure that all required information is placed in the political file. Accordingly, a station should not rely solely on the information submitted by a political ad buyer, but must conduct its own due diligence – including a review of the ad itself – to ensure that the contents of its political file include all required disclosures.

Below is a summary of the Order's clarifications of the FCC's rules governing broadcasters' political file record-keeping obligations.

Contents of Political Records to Be Maintained

In the Order, the Commission interprets Section 315(e)(2)(B) of the Communications Act as requiring stations to disclose in their political file, for each political ad, **all** references to federal candidates (and the offices to which they are seeking election), federal elections and political matters/issues of national importance (including any issue that is the subject of pending federal legislation) referred to in the advertisement. It is insufficient to identify only the primary candidate or the primary issue discussed in the spot.

For example: If the Donald Trump campaign placed a candidate buy for a spot that referenced President Trump's position on immigration and the

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economy, the station's political file must disclose: the candidate's name: Donald Trump; the office: President; the election: 2020 Presidential Election; and all issues: Immigration and the Economy. These disclosures are in addition to his authorized committee name, treasurer, and other schedule-specific requirements (schedule, class of time, rate, etc.).

If this spot also criticized Joe Biden and Elizabeth Warren's positions on these issues, the political file would also have to disclose the name, office, and election for both of these referenced candidates.

Certain of these enhanced disclosure requirements extend to state or local candidates. For example, if a state or local candidate references a federal candidate, federal election, or political matter of national importance, those references must be disclosed in the political file. However, if a federal (or a state) candidate references a state candidate or state election, or a political matter or controversial issue of public importance (i.e., a state or local issue), these additional references are not required to be disclosed in the record for that ad in the political file under Section 315(e)(1)(B).

Stations should be careful to use the full name of the person, entity, or campaign in the political file documentation. The Commission admonished several stations for using shortened or abbreviated versions of names, or shorthand references such as the "Anti-Peters Senate Race" in their political file documentation, finding that such shorthand references are insufficiently descriptive.

Broadcasters Must Inquire to Obtain the Names of All Chief Executive Officers or Members of the Executive Committee or Board of Directors of the Entity Seeking to Purchase Air Time

Section 315(e) of the Communications Act requires that when a non-candidate advertisement addresses a political matter of national importance, the political file must contain a **list** of the chief executive officers or members of the executive committee or of the board of directors of the entity sponsoring the ad.

In addition, Section 73.1212 of the Commission's rules requires that when an advertisement concerns **a political matter** or **matter involving the discussion of a controversial issue of public importance** and is paid for by a corporation, committee, association, other unincorporated group, or other entity, then the political file must contain a **list** of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association, or other unincorporated group.

In these instances, when a **list** is required to be placed in the political file, the Order clarifies that the station has an affirmative duty to question the advertiser if the station has a reasonable basis to believe the list is incomplete – for example, if the advertiser provides the station with only a single name. To fulfill its documentation requirement, the station must specifically ask the advertiser to confirm that the list is complete. The FCC does not require that the station receive a response, only that the station make the inquiry.

We recommend that this inquiry be made in writing (email) to the advertiser and that the station retain proof of the request.

Identifying Issues That Relate to a 'Political Matter of National Importance'

As discussed above, Section 315(e) of the Communications Act requires certain disclosures if an advertisement "relates to any political matter of national importance." A "political matter of national importance" could include (but is not limited to) a federal candidate, a federal election, or a "national legislative issue of public importance."

The Order clarifies that the term "political matter of national importance" is meant to encompass political matters that have "significance on

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a national level." Context is relevant for this determination, but any issue that is debated on the national political stage – such as immigration, health care, the economy, taxes, or the environment – would generally be covered.

The Order also clarifies that a "national legislative issue of public importance" only refers to an issue that is "the subject of federal legislation that has been introduced and pending in Congress at the time a request for air time is made." The Order dismisses the concerns raised by broadcasters that this requires a level of due diligence that their staffs are ill-equipped to undertake. Until further guidance is provided by the Commission, we recommend that stations err on the side of caution and disclose any issue that could reasonably be construed as a "national legislative issue of public importance." Specifically, if an advertisement addresses a specific piece of legislation (i.e., the Affordable Care Act), that information should be included in the political file.

Bottom Line

Stations cannot rely upon political ad buyers, either candidates or issue advertisers, to provide all of the information required for the political file. When an advertiser provides NAB PB-18, the station must compare the information on the form to the content of the advertisement to confirm that all required information (i.e., identification of all federal candidates, federal elections, and issues of national importance) are adequately disclosed. In addition, if an issue advertiser does not provide a complete list of the individuals involved in its organization, the station is required to ask the advertiser to confirm the completeness of its disclosure. Finally, stations must not only be diligent in their efforts to obtain the required political file information, but must make every effort to upload the information to their political files immediately. ■

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The First Amendment Right to Political Privacy, Chapter 7 – In Need of Judicial Clarity

By Lee E. Goodman

Introduction

Since 1950, the First Amendment has protected the political privacy of people as diverse as free marketer Edward Rumely, Marxist economist Paul Sweezy, social activist Manuel Talley, and average citizen Margaret McIntyre. It has protected associations such as the NAACP, the Jehovah Witnesses, the Committee for Constitutional Governance, the Progressive Party of New Hampshire, and the Socialist Workers Party. The diversity of citizens and causes that have invoked the privacy afforded by the First Amendment underscores why courts should resist viewing First Amendment challenges in the light of contemporary political biases and instead approach each case with political and ideological agnosticism. Future Rumelys and Sweezys should be protected equally by the First Amendment.

Yet, lower courts today are struggling to find consistency and uniformity in the jurisprudence of First Amendment privacy and in judicial outcomes. The line between political privacy and its exceptions has become blurred. At the same time, there is a national movement seeking to expose more speakers and funders of expanding categories of speech. Lower courts have, explicitly and implicitly, shined a light on ambiguities in the jurisprudence while Supreme Court Justices Alito and Thomas have acknowledged the problem and voted to take compelled disclosure cases for the purpose of clarifying the law. This chapter identifies key issues the Supreme Court needs to clarify about the First Amendment right to political privacy, starting with first principles.

1. Is Compelled Disclosure a First Amendment Harm?

Although it may sound elementary, the Supreme Court should affirm whether the First Amendment right to political privacy and its judicial provenance remain the starting analytical point for all compelled disclosure challenges. Of what continuing force are *Sweezy*, *NAACP*, *Talley*, *McIntyre* and *Watchtower*?[1] Or have they been relegated to the museum of historical judicial relics?

Setting the table for judicial review in this way is important because many lower courts have tended to gloss over, or pay mere lip service to, the early precedents establishing the First Amendment right to political privacy. The exceptions to the right of privacy have become the presumptive starting point and the burdens have been shifted to citizens to overcome the governmental interest. Accordingly, a fundamental predicate to the proper judicial analysis of government rules compelling exposure is establishing the proper starting point.

Relatedly, lower courts disagree over the nature of the constitutional harm implicated by compelled disclosure. Some lower courts have ruled that compelled disclosure of certain subjects or categories ("realms") of speech or association simply does not harm First Amendment rights.[2] The Ninth Circuit, for example, imposed upon The Center for Competitive Politics,[3] a nonprofit organization that engages in no electoral activity, a threshold burden of proving that its donors were subjected to economic reprisals, harassment, threats, or some other actual chill in order to state a *facial* claim of First Amendment infringement.[4] That is, exposure laws cause constitutional harm sufficient to put the government to its burden of justifying the exposure *only if* the plaintiffs can first prove a demonstrable chill that deters speech or membership.[5]

But the Supreme Court has not required citizens to prove harassment or retaliation in order to invoke the protection of the First Amendment in facial challenges in *Talley*, *McIntyre*, and *Buckley v. Valeo*. *Buckley* shifted the burden only for a plaintiff to justify an *as-applied* "exception" to the disclosure regime that the Court, in

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the first instance, found facially justified by the governmental interest in disclosure of contributions to candidates and expenditures explicitly advocating the election of candidates. The Fourth Circuit appears to have followed this approach, ruling on the facial constitutionality of a state campaign finance disclosure law while assuming a constitutional harm rather than shifting the burden to the plaintiffs to prove harassment.[6]

If there indeed exists a fundamental right to political privacy in speech, access to information, association, belief, and the right to vote, however, then any compelled disclosure would seem to infringe that right and constitute constitutional harm. If so, the Court needs to instruct lower courts that the citizen's right to political privacy and secrecy is an important right in all cases, compelled disclosure is the *per se* harm, and it is the government's burden to justify infringement of the right.

2. Are There Distinct Subjects or Categories of Anonymous Political Speech or Association That Are Off Limits to Compelled Disclosure?

The legal analysis in lower courts sometimes confuses distinct subjects of political speech or categories of political association as unprotected when the real question seems not whether the activity is protected, but whether the government's interests and impositions are sufficient to infringe upon the right. It is important not to blur the distinction between the existence of the right, whatever the subject of the speech or association, versus the governmental interest that might attach to varying speech subjects. Accordingly, the Court should do two things very clearly. First, it should identify any sacred subjects or categories of speech and association. Second, it should instruct lower courts which subjects or categories of speech and association are subject to overriding governmental interests.

For example, *Buckley* held that the government can compel exposure of the identity of a campaign's donors. The Court acknowledged that this exposure invades the right to political privacy, but found the government's interest in compelling the exposure overrides the right because the unique associational activity at issue, financial contributions to candidates, can corrupt politicians; disclosure retards corruption; and the public has a right to know to whom politicians are beholden. *McConnell* and *Citizens United* extended disclosure to "electioneering communications," issue messages that reference candidates over broadcast media within close proximity to an election.[7]

But *McIntyre* held the government cannot compel exposure of the identity of a person funding pure issue speech on a local tax referendum, because it infringes the right of the speaker anonymously to advocate a public policy, which cannot be corrupted in the way a politician can. In both contexts, the Court acknowledged the First Amendment right at stake. What differed was the subject matter of the political speech and the government's varying interests in compelling disclosure of the different subjects.[8]

Lower courts, however, are increasingly blurring any distinction between these realms of speech and association, stretching election financing disclosure precedents like *Buckley*, *McConnell*, *Wisconsin Right to Life*, and *Citizens United* to justify disclosure of issue speech and non-electoral association. *McConnell*, for example, ruled that the government could compel the disclosure of those paying for a broadcast advertisement referencing a candidate within 60 days of an election, known as an "electioneering communication," on a communication-by-communication basis, because such communications arguably influenced elections.[9] The Third Circuit has invoked *McConnell* to permit Delaware to compel nonprofit educational organizations to disclose donors over a four-year period if they incur just $500 to post the voting records of public officials

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on the Internet within 60 days of an election.[10] The Ninth and Second Circuits without blinking have cited *Citizens United*'s analysis of campaign finance disclosure to wholly non-electoral charitable donor disclosure.[11]

Likewise, the Court should reason with precision when it does recognize a realm or context of legitimate compulsory exposure. For example, *Doe v. Reed*[12] ruled that signing a petition to invoke a public ballot procedure was indeed protected by the First Amendment, but compulsory exposure of the names of petition signators was justified because the signature activity was public in nature. The signatures were signed for the specific purpose of giving them to the government to activate a public procedure. Further, public access to the signatures advanced the government's interest in ensuring the validity of the signatures so submitted. The context mattered significantly. Yet, the Ninth Circuit has cited *Doe* as the anchor for its analysis in nonprofit donor disclosure.[13] And now the Ninth, Second, and Third Circuits are citing each other.

Therefore, it is important for the Court to identify distinctions between political subjects and associational purposes that are beyond legitimate governmental interests. The Court should clearly distinguish any sacred realms of political speech and association particularly to head off the misapplication of the campaign finance exception to political privacy.

Moreover, lower courts often conceive of certain realms of speech as wholly unprotected, rather than understanding them to be protected but subject to an exception in light of a sufficient governmental interest. Such analysis can yield careless expansions of prior Supreme Court rulings. As noted above, *McConnell* is often invoked as a *carte blanche* predicate for federal and state legislative efforts to vastly expand exposure from the narrow "electioneering communication" concept and communication-specific reports to a far broader sphere of issue advocacy and far more intrusive reporting.[14]

Indeed, no realm of speech and association is in greater need of clarification than discussion of political issues. This category includes discussion of public policies that reference the public officials who are responsible for those policies. The zone for anonymous discussion of issues and association around issues, financially or otherwise, should be clearly delineated. If a zone of speech is qualified, the Court should draw clear and unmistakable lines around which speech is – although protected – susceptible to compelled disclosure. If the protection afforded anonymous issue speech is conditioned upon context, such as the petition signatures in *Doe v. Reed*, the Court should be precise in establishing those boundaries. If the answer depends upon how the speech and association are facilitated, such as communication over publicly owned airwaves or pamphlets or electronic posts over the Internet, the Court should make that clear too.[15]

And if there are realms of speech which are off limits to compelled exposure, sacred zones, the Court needs to say so in unmistakable terms. Is pure issue speech over the Internet, for example, so far beyond the public interest that the government cannot force disclosure of its speakers? National clarification – particularly for issue speech – is needed.

3. Is It Always the Government's Burden to Justify an Infringement?

As noted above, some courts have shifted the burden to the citizen to prove harassment or retaliation in order to state both facial and as-applied First Amendment infringement claims.[16] But the Supreme Court has not insisted upon such proof to establish a facial infringement in a number of cases.[17] Harassment or retaliation should be relevant only in an as-applied challenge to a disclosure law that the government has justified facially. But even there, the government still bears the burden of justifying the as-applied burden. Therefore, the burden must always be upon the government to justify compulsory

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exposure of private political belief, speech and association, in both facial and as-applied challenges.

4. What Judicial Scrutiny Applies to Compelled Disclosure?

The Court consistently has used the term "exacting scrutiny" to analyze compelled disclosure laws. In *Davis v. Federal Election Commission*, a decision written by Justice Alito, the Court reaffirmed an "exacting scrutiny" standard described as follows:

[W]e have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech. To survive this scrutiny, significant encroachments cannot be justified by a mere showing of some legitimate governmental interest. Instead, there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny. That is, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.[18]

Notwithstanding these words on a page in *Davis*, however, the true meaning of "exacting scrutiny" remains elusive and open to manipulation in implementation. Did the Court mean to suggest, for instance, that the test is a sliding scale or balancing test? That is, must the strength of the governmental interest increase to a compelling level if the invasion of privacy is severe, while a simple interest will suffice if the invasion of privacy is academic? If so, does "seriousness" testing suggest that not all invasions of political conscience constitute a First Amendment harm? And how should courts distinguish between "serious" versus "non-serious" invasions of a citizen's political privacy? Should courts decide the seriousness by some objective measure? Or is a court to shift the burden of proof to a citizen to convince the court of the "seriousness" of the invasion into its political privacy before the government even needs to justify its intrusion? What benchmarks apply to the citizen's proof?

The jurisprudence leading up to *Davis* suggests that "exacting scrutiny" was a standard very close to "strict scrutiny." Early case law required a "showing of 'overriding and compelling state interest' that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment."[19] Ten years later *Buckley* cited the "strict test" of *NAACP*. [20] Since then the Court has held that, where a law burdens First Amendment rights, "exacting" and "strict" judicial review "are one and the same."[21]

Lower courts historically applied "exacting scrutiny" as the functional equivalent of "strict scrutiny." [22] More recently, however, lower courts have concluded the two scrutiny tests are quite different under the guidance of later decisions such as *McConnell* and *Citizens United*. [23] Lower courts are diluting the standard by applying a very forgiving review akin to rational basis review.[24] The Third Circuit has in effect equated exacting scrutiny with rational basis review with a high degree of judicial deference to the government's chosen means of disclosure so long as the means are merely "rationally related" to the government's objective.[25] The Second Circuit described "exacting scrutiny" as just another term for "intermediate scrutiny" and proceeded to defer to the government's proffered interests, without a factual hearing.[26] The Ninth Circuit has applied *Davis* as a sliding scale test or balancing test, requiring the citizen first to prove "actual burdens" and, based upon the severity of those burdens, then deciding the necessary strength of the government's interest, even in a facial challenge.[27] The D.C. Circuit has acknowledged confusion between "strict" and "exacting" scrutiny, but concluded the difference is merely semantic. "In many respects, this debate over the appropriate adjective is beside the point. Whatever the test is *called,* the [Supreme] Court

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has already described what the test *is*."[28] The D.C. Circuit then quoted Davis without further elaboration because it held a disclosure law at issue satisfied strict scrutiny in any event.[29]

Justice Thomas, the strongest voice on the Court for political privacy, has opined that only "strict scrutiny" can apply to compelled exposure of citizens exercising First Amendment rights.[30] Offended by the Third Circuit's approval of Delaware's sweeping compulsory exposure regime for the publication of voting records online, as well as the Court's denial of certiorari, Justice Thomas admonished that the case revealed how "exacting scrutiny" as effectively devolved to "no scrutiny at all."[31]

Compelled disclaimers represent another area of confusion when choosing which level of scrutiny to apply. "Disclaimers" are compulsory sponsor identification notices printed within, or accompanying, political messages. When compelled disclosure takes the form of a disclaimer identifying the speaker, the Court has treated that kind of disclosure as a form of *content-based* speech regulation, because it forces the speaker to include information she otherwise would not choose to say. Content based speech restrictions typically trigger "strict scrutiny."[32] One federal district court recently expounded at length upon the lack of clarity in this area and chose "strict scrutiny" as the appropriate test.[33]

Forcing a speaker to identify herself in a disclaimer printed on the face of a pamphlet (*Talley*, *McIntyre*), on a name badge (*American Constitutional Law Foundation*), in a public registration and report (*Watchtower*), or in response to a congressional subpoena (*Rumely*, *Sweezy*) all represent comparable invasions of privacy. Thus, while variations in mechanisms might be relevant to a tailoring analysis (see below), all compulsory speaker identification mechanisms should receive the same level of scrutiny. Regardless of whether that level of scrutiny is called "strict scrutiny" or "exacting scrutiny," the scrutiny should be a *high, rigorous level of scrutiny* for all disclosure mechanisms. Certainly, the precedents have established that the government cannot interfere with the right to speak or associate anonymously *lightly*. Likewise, wide variances in the level of scrutiny for compelled disclosure versus other kinds of infringements of First Amendment rights seems illogical, for the Court has long recognized that speech can be impeded or silenced by a wide variety of subtle government actions. The issue cries out for clarification given explicit confusion observed by lower courts. Most importantly, it is imperative that the Court clarify the level of discipline that must go into "exacting scrutiny," because lower courts are applying the analysis with little rigor at all.

In sum, lower courts have struggled to select the appropriate level of scrutiny, to articulate standards for "exacting scrutiny," or to apply "exacting scrutiny" standards with consistency or rigor. Therefore, the Court needs to clarify the scrutiny applicable to compelled disclosure rules and tell us if the scrutiny level varies based on the content of speech, the mechanism of disclosure, or the severity of associational disruption. The court also needs to clarify the analytical and evidentiary scrutiny that flows from the *Davis* within and without the campaign finance disclosure context.

5. Which Governmental Interests Can Justify the Invasion of Political Privacy?

In addition to clarifying the level of scrutiny, the Court also should provide definitive guidance about the governmental interests that justify invasions of private political belief. In compelled disclosure cases, the degree of importance required of the government's asserted interest remains unclear. The Court has referred to the governmental interest necessary to justify an infringement interchangeably as "compelling" and "overriding" in some cases,[34] but "sufficiently important" in others.[35] It is possible, if *Davis* is

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understood as a sliding scale, that an asserted interest must be "compelling" in order to be "sufficiently important." Ironically, the Ninth Circuit has ruled that a citizen must prove an actual burden on private association is demonstrable and "substantial" in order to state a valid First Amendment claim, but the government may proffer an interest that is merely "important" to compel exposure.[36]

Early cases preceded the doctrinal development of First Amendment privacy and scrutiny tests, but laid early foundations for governmental interests that the Court has continued to draw upon. Among the governmental interests the Court has had occasion to consider are:

- National Security – Beginning in the communist cases in the 1940s (before and after *NAACP*) courts balanced the government's asserted need to protect the democracy from subversion against Judge Prettyman's early iteration, in *Barsky* (1948), of the "private right." Courts later distinguished communist cases from civil rights cases on the basis that national security was a more compelling governmental interest than southern states' professed interest in enforcing their corporate compliance rules.

- Preventing Corruption of Elected Officials – This interest is the *sine qua non* in the field of campaign finance restrictions. *Burroughs*, the earliest of cases (1934), recognized that disclosure of campaign contributions and expenditures was a mechanism that helped prevent corruption of politicians. *Buckley* (1976) was centrally focused on preventing corruption of elected officials.

- Informational Interest – Although *Buckley* also acknowledged government's interest in providing citizens information about who was funding the elected official's ambitions – the informational interest implicitly was subordinate to the corruption prevention interest. Citizens had an interest in knowing who funded a politician's campaign because the politician might be responsive to the funder and because the citizenry could hold the politician accountable. Likewise, *Harriss* (1954) recognized the interest legislators have in knowing who is paying to lobby them as a check against corruption and undue influence. Implicit in *Harriss* and *Buckley* was the ulterior use of the information to prevent corruption and hold politicians accountable.

- Election Procedural Integrity – *Doe* (2010) and *American Constitutional Law Foundation* (1999) recognized the public's interest in ensuring the integrity of a state-sponsored election, where the citizens engage in direct democracy, which included disclosure of the identity of those citizens who activate the election machinery.

Law Enforcement Tool – Another interest recently recognized by two courts of appeals is a law enforcement interest where the government claims it can glean internal information about a political association in order to enforce tax laws, nonprofit solicitation laws, or in one case securities fraud laws.[37] The Ninth Circuit has ruled that a state may require a nonprofit, non-electoral organization to disclose its donors to the state not because the state *needs* the information but rather for the state's mere convenience of having the information in a library in the rare event that the information might one day be useful.[38]

Courts must study these asserted interests closely to ensure they are genuine, not pretextual, and that they override a core First Amendment right for purposes other than disclosure for disclosure's sake. Two interests deserve the Supreme Court's special consideration.

First, the most problematic is the "informational

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interest." This interest is problematic because its logic, when placed under a microscope, often boils down to information for the sake of information, or exposure for exposure's sake, which is circular logic. Advocates of greater exposure and lawmakers increasingly invoke this generic interest to justify virtually all compulsory disclosure. It is also a boundless justification. It can be invoked to justify public exposure in almost every context because it has no logical stopping point. It is often trumpeted under the siren sounding term "transparency," or the pablum "transparency is good," which may sound like a constructive public policy, but constitutionally it amounts to nothing more than elevation of the government's policy preference for exposure over the citizen's First Amendment right to non-exposure.[39] It can be an interest that swallows the right. The Court should place clear metes and bounds on the "informational interest" and require that the information made public actually advances a specific ulterior interest such as the prevention of *quid pro quo* corruption or election integrity.

Second, the "law enforcement" interest is problematic because it often authorizes the government to collect information about citizens' political activities not for the purpose of enforcing a specific law with respect to any suspected unlawful conduct, but for the purpose of collecting information about wholly lawful and virtuous democratic activity in order to determine if the information might yield the rare unlawful activity. The government has to collect a far broader range of private information than is necessary for a case-specific investigation in order to build a haystack in order to look for a needle in that haystack. It often resembles a fishing expedition. The collection effort can be invasive and voyeuristic, especially given that government officials are partisan creatures. And the information can be abused or misused.

6. What Degree of Tailoring Between the Government's Objective and Its Disclosure Mechanism Is Necessary to Uphold Compulsory Disclosure?

Next, courts have been all over the board in applying the standard for tailoring. *McIntyre* stated that the Court will "uphold the restriction [compelled disclosure] only if it is narrowly tailored to serve an overriding state interest."[40] Previously, the Court had stated that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[41] Other courts have used the language of "substantial relationship" between compulsory disclosure and the asserted objective.[42] We know that disclosure only "tenuously related" to the state's asserted objective is inadequate, but after six decades of jurisprudence, we still are unclear on the degree of tailoring that is adequate.

Finally, it is unclear whether the government must choose the narrowest means of infringement in order to compel disclosure of speakers and associations. Many disclosure schemes demand far more disclosure than is necessary to prevent corruption or validate the bona fides of a nonprofit organization. Overbroad disclosure unnecessarily exacerbates the degree of the First Amendment harm. Lower courts have been inconsistent in observing tightly circumscribed boundaries for disclosure.[43] The Third Circuit's treatment of this issue is telling. Having found the broad informational interest to be "sufficiently important," the Third Circuit then deferred to the government's chosen means of compelling that disclosure.[44] The Ninth Circuit expressly ruled that a state's compelled disclosure scheme merely "furthers" the state's interest in "efficiency," even if the compulsory disclosure mechanism is unnecessary, overbroad, and harmful.[45]

The Court should set clear rules for the degree of tailoring between the government's asserted objective, if it justifies an infringement, and the compulsory exposure mechanism.

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7. Are The Differences in Disclosure Mechanisms Constitutionally Significant?

Governments employ several common tools to expose political belief, speakers and associations. The primary tools are:

Disclaimers – Speakers identify themselves on the face of a political communication. Sometimes the name of the immediate speaker is sufficient. Other times the government requires the speaker to identify itself as well as a designated number of the speaker's top donors or officers and directors. *McConnell* upheld disclaimers on the face of political ads that make use of the broadcast airwaves on the theory that the people own the airwaves and are entitled to know who is making a political use of them. *Talley* and *McIntyre* struck disclaimer requirements on pamphlets. *Buckley v. American Constitutional Law Foundation* struck name badges for petition circulators. Significantly, some disclaimer decisions analyze the mechanism under a forced speech doctrine rather than the compelled disclosure doctrine.[46]

Communication-Specific Reports – Speakers must file a one-time report with a government agency identifying itself as the sponsor of a communication or other political activity. The invasiveness of the information demanded on the report can vary. One appeals court has upheld the FEC's rule requiring a one-time report filer to disclose only those funders who provided funds "for the purpose of" funding the communication that triggered the report.[47]

Registration & Ongoing Reports – Speakers must file an initial registration and thereafter must file ongoing periodic reports disclosing varying details about their political activities. Political committee reporting at the FEC and lobbyist reporting under the Lobbying Disclosure Act are examples. Another example is the demand by some state attorneys general for nonprofit organizations to provide annually lists of all donors as a condition of soliciting contributions from citizens of their states.[48]

Subpoena or Civil Investigative Demand – Speakers or associations are demanded to turn over internal materials about their political activities in connection with a government investigation or even civil litigation initiated by a political opponent. This tool of exposure was at issue in *Barsky*, *Lawson*, *Rumely*, *Sweezy*, *NAACP*, and a number of other cases.

Investigative Hearing or Public Testimony – Government often demands disclosures in investigations and public testimony before legislative committees. It follows that if the government cannot require the disclosure legislatively, it cannot use the legislative fact-finding process to force the disclosure. The Court has ruled that the government cannot disclose by investigation that which is cannot disclose by legislation.[49]

Submission of Political Records – Some political documents are necessarily submitted to the government in order to participate in the public election machinery. Voter registrations, for example, fit this category. In the ballot petition context, citizens sign petitions for the explicit purpose of submitting them to the government.

Freedom of Information Disclosure or Similar Public Access – Sometimes the government holds private information about its citizens and discloses it to the public pursuant to freedom of information requests. This was the contested issue in *Doe v. Reed*, which upheld the public disclosure of petition signatures. But an appeals court blocked release of thousands of internal working records of the AFL-CIO under a provision of the FECA on the grounds that release would effect a severe First Amendment infringement.[50]

One would expect the Court to analyze closely the specific mechanism implemented by the government to determine if it actually advances the stated objective and whether another tool might be more effective and/or less invasive.

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Moreover, assuming the Court confirms that disclosure is *per se* the constitutional harm, the degree of invasiveness should not be relevant to that part of the analysis. Instead, the degree of invasiveness – i.e., the breadth of the chosen disclosure mechanism – should be consider as part of the tailoring analysis. The frequency, detail, breadth, and burden of the disclosure mechanism should be considered here.

For example, retrospective investigative inquiries based upon articulated suspicion of specific wrongdoing should always be preferable to blanket, ongoing reporting. Specific law enforcement inquiries, such as subpoenas, guard against overbroad invasions of privacy and official mischief, they can be tested in a court for legitimacy,[51] and hold the government accountable to remain within its jurisdiction. [52] Mere expediency or government convenience to avoid the encumbrances of issuing subpoenas for information necessary to law enforcement should not override the First Amendment right.

Yet, increasingly systematic reporting requirements are replacing targeted subpoenas. Regular, systematic reporting mechanisms effectively operate like monthly or periodic subpoenas. Rather than receiving a case-specific subpoena for specific and necessary information, the citizen must provide the same information to the government but as a matter of regular course, subject to government prosecution or other punishment for failure to file a report. While the Court upheld regular reporting of campaign finances only for a narrowly defined category of "political committees" in *Buckley*, the Court has not approved regular, ongoing, detailed reporting of a charity's donors (having nothing to do with an election) or the expenditures by an organization that engages in issue advocacy, which lower courts increasingly are approving despite the overbreadth of the mechanism.[53]

Another important issue to be considered under this prong of the analysis should be the breadth of the audience chosen for exposure. Disclosure to government officials only (e.g., for law enforcement purposes) might be more narrowly tailored than exposure to the general public. [54] Yet courts have recognized the problem of official misuse of information by less than virtuous government officials.[55]

Some of the most significant disclosure mechanisms subject to legal confusion today are the rules triggering campaign finance disclosure. They include (1) the components of the "major purpose" test which triggers regulation of an organization as a "political committee" subject to extensive registration and ongoing reporting burdens and (2) expansion of the "electioneering communication" concept of federal law to force communication-specific exposure of broader realms of issue speech.[56]

The "major purpose" test, which is the subject of intensive litigation before federal courts today,[57] presents a fulcrum through which the Court could clarify many areas. "Political committees" must disclose all donors, all expenditures, and other sensitive information about their internal workings. For decades courts ruled that only the most explicit electoral activities over a long period of time could subject an organization to these invasive exposure burdens. More recently, a lower federal court decided about a half dozen other federal court rulings had been eclipsed by subsequent Supreme Court rulings[58] or were simply wrong, and ruled that wide swaths of issue advocacy can trigger full-blown disclosure of politically-oriented organizations.[59] By contrast, communication-specific disclosure is a more tailored mechanism for facilitating disclosure of some campaign expenditures. That too is the subject of ongoing litigation.

Finally, state requirements for issue-centric nonprofit organizations to submit their donor lists as a condition of soliciting donations is a hotly contested issue. All are these disclosure mechanisms are the subject of active legislative

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efforts, litigation, and shifting legal rationales. All are highly politicized topics. All suffer from the absence of definitive guidance from the Court.

8. Even if the Government Facially Justifies the Infringement, Can a Citizen Nevertheless Qualify for an Exception to Compulsory Exposure?

As summarized in Chapter 6, *Buckley* held that a facial uphold compulsory disclosure mechanism does not end the citizen's First Amendment protection. The citizen can still challenge the law's application to the citizen's unique circumstances. *Buckley* and *Doe v. Reed* recognize the relief valve of an *as-applied* challenge to an otherwise constitutional disclosure regime.

Buckley ruled that, even under a facially justifiable compulsory disclosure rule, a citizen can qualify for an exception to it by establishing a unique hardship using *NAACP* as a template. The citizen can prove up harassment, economic or other reprisals, threats of physical harm, or similar special circumstances that justify an exception to disclosure, that is, an exception to the exception. Similarly, *Doe v. Reed* addressed a facial challenge to Washington state's policy of making petition signatures available to the public. The Court went to lengths to limit its ruling to the facial challenge before it, reserving on any possible as-applied challenge. But the Court remanded the case for further fact-finding and analysis of the plaintiffs' as-applied challenge.

9. How Much Evidence of Harassment or Hardship Is Necessary?

When *Doe v. Reed* did return to the lower courts, the district court set an insurmountable evidentiary standard for the Doe plaintiffs, determined that the plaintiffs failed to justify an exception, and denied the plaintiffs' motion for a preliminary injunction.[60] Thereafter Washington state made the names of petition signers public, and the Ninth Circuit dismissed the appeal as moot.[61] Even the as-applied challenge was held to an elusive standard.

By contrast, a district court in California found that Americans for Prosperity Foundation did present sufficient evidence of harassment, reprisals, and threats to justify an as-applied injunction excepting it from turning over its donor lists. But the Ninth Circuit reversed.

The Ninth Circuit's implementation of the *Davis* language illuminates how some lower courts have diminished First Amendment protection by setting insurmountable evidentiary standards. The organization Americans for Prosperity Foundation, a non-electoral 501(c)(3) think tank, presented copious evidence that its founders and funders faced death threats, public vilification, economic retaliation in the form of boycotts, and enough harassment that its donor base was highly sensitive to exposure.[62] The trial court heard evidence and was convinced that state compelled exposure chilled the educational organization's donor base and harmed the associational rights of its members.[63] On appeal, however, the Ninth Circuit imposed upon the Foundation a gauntlet of heightened evidentiary standards. The Ninth Circuit reasoned that although the Foundation's founders and funders were indeed subjected to death threats and harassment, the Foundation's lawyers could not specifically tie those threats to the Foundation's activities and, moreover, the Foundation could not specifically tie the associational chill to California's compulsory disclosure law.[64] Being controversial and facing threats in the political arena generally was not good enough, according to the Ninth Circuit.

Few organizations in America could meet that kind of evidentiary burden, even though they may be harmed nonetheless. It is difficult to prove up donors who chose not to associate due to concerns over a specific exposure law.

The Ninth Circuit's approach is far more burdensome than the Supreme Court has established for as-applied *exceptions* to

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compulsory disclosure in the campaign finance context. Even in that context, *Buckley* and *Brown v. Socialist Workers Party* set forth a less demanding evidentiary standard for citizens to justify an exception. *Buckley* "recognize[d] that unduly strict requirements of proof could impose a heavy burden" upon citizens associational chill, and therefore instructed lower courts to apply "sufficient flexibility in the proof of injury to assure a fair consideration of their claim."[65] The Court further instructed that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views."[66]

That this evidentiary standard was applied in *Buckley* and *Socialist Workers* to campaign finance disclosure, the north star of compelled public exposure regimes, indicates that no higher evidentiary standard should apply in other political speech and association contexts where the government can justify its forced exposure and a citizen or group seeks as-applied relief.

The Ninth Circuit's approach is likely far less protective of First Amendment rights than Justice Alito intended when he wrote *Davis*. Speaking of the evidentiary burden courts may impose upon citizens in *as-applied* challenges to exposure regimes that are ruled facially constitutional, Justice Alito wrote in *Doe v Reed* that "speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. We acknowledged as much in *Buckley,* where we noted that 'unduly strict requirements of proof could impose a heavy burden' on speech."[67] Coming from the author of *Davis*, that articulation of the evidentiary standard should carry some weight.

Doe v. Reed confirmed that the *Buckley* procedure is not limited to minor political parties or vaguely defined "dissident" or "minority" points of view. Justice Alito articulated a general as-applied paradigm that was effectively followed by the plaintiffs who did not appear to constitute a distinctly "minor party" or "dissident" group. While the "dissident" nature of a viewpoint might be one factor that elicits a backlash, there are distinct costs to expressing even majority points of view, if indeed the courts could even classify all viewpoints into neat categories of majority, popular, minority, or "dissident" opinion. Surely First Amendment protection should not be conditioned on a poll of public opinion or subjective judicial judgments before affording equal protection to all Americans on a content-neutral basis. In the current distressed political environment particularly speakers of all perspectives can and do find themselves the subject of economic reprisals and boycotts, de-platforming protests, disinvitations, threats on the Internet, and any number of other severe responses to even the minutest of controversial remarks on all sides of the political spectrum.

Significantly, the Ninth Circuit has imposed upon citizens the heightened burden of establishing harassment and retaliation at the threshold of both facial and as-applied challenges. There is no escaping the heavy evidentiary burden of proving actual retaliatory acts and causally connecting them directly to a specific government disclosure law in the Ninth Circuit. The Ninth Circuit, perversely it seems, has set a much higher bar to qualify for any kind of constitutional scrutiny, shifting the high burden to the citizen at the front end of both facial and as-applied constitutional analyses.[68]

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10. Avoiding Unnecessary First Amendment Conflicts Where Compulsory Disclosure Rules Are Extra-Statutory or Outside Agency Jurisdiction.

A reminder is in order that governmental interests are often delimited by statute or similar authorization. Therefore, before assessing a government's asserted interests under First Amendment scrutiny, a court should first satisfy itself that the compulsory disclosure is even within the agency's subject matter jurisdiction or authorized by statute. If it is not, then a court can reject the compulsory disclosure rule without further ado and avoid a First Amendment showdown. If there is ambiguity or doubt about the agency's subject matter jurisdiction, the court should interpret the agency's subject matter jurisdiction or statutory authorization narrowly to avoid the First Amendment question.

Courts have taken this approach in a number of cases. The four-Justice opinion of the Court in *Sweezy* determined that the New Hampshire Attorney General's inquiry into Paul Sweezy's fellow political travelers exceeded the scope of the Attorney General's authority under the relevant state statute. Courts have enjoined the FEC's attempt to investigate or disclose the internal secrets and activities of political organizations because the FEC was acting outside its statutory authority.[69]

Rumely invoked the doctrine of constitutional avoidance to narrowly construe the jurisdiction of the House Select Committee on Lobbying Activities (i.e., the "Buchanan Committee") and the definition of "lobbying" subject to disclosure. If a statute extends the government's asserted interest in compelling exposure far beyond a scope the First Amendment will bear, however, then a court should either strike the disclosure statute or save it by drawing the clear boundary to it. The Court did this in *Buckley*, imposing the "major purpose" limitation on "political committee" status and the "express advocacy" limitation on the realm of "expenditures" subject to regulation and disclosure.

In short, before entertaining a plaintiff's First Amendment challenge or a government agency's assertion of interest justifying a compulsory exposure rule, a court should first determine whether the compulsory exposure rule is even authorized by a clear government statute or policy. If there is doubt or ambiguity, the court should interpret the agency's jurisdiction narrowly and avoid the First Amendment problem. Only if that cannot be reasonably accomplished should the court jump into the First Amendment challenge.

Conclusion: Prospects at the Supreme Court

Predicting how the current Supreme Court would clarify the First Amendment right of political privacy is difficult. The pendulum has swung back and forth on the Court since the 1940s. There was a time when liberal Justices championed political privacy for communists, progressives, civil rights organizations, Jehovah's Witnesses, and even Margaret McIntyre as a paramount constitutional right while conservative Justices were most skeptical. Nevertheless, solid Court majorities eventually rendezvoused to protect political privacy.

But what has become of the once unanimous First Amendment right? Have the exceptions swallowed the right? Has the judicially-recognized exception for campaign finance disclosure overtaken all other realms of political activity disclosure? What kind of right is it if Congress, state legislatures, and state attorneys general wholly ignore it in legislation and investigations, usually targeted at their political or ideological opponents, while lower courts blithely write around it?

It is time for the Supreme Court to reset the proper judicial scrutiny and analysis for the important First Amendment right of privacy in political speech, association, and conscience. I will offer a few observations about the social cost

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of government's invasion of the political privacy of its citizens in the next, and last, chapter to this series. ■

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[1] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *NAACP v. State of Alabama, ex rel. John Patterson*, 357 U.S. 449, 452 (1958); *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Watch Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

[2] *See, e.g., Citizens United v. Schneiderman*, 882 F.3d 374, 383 (2nd Cir. 2018) ("requiring disclosure is not itself an evil"); *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1312-1314 (9th Cir. 2015) ("CCP is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury, and when it suggests that we must weigh that injury when applying exacting scrutiny.").

[3] The Center for Competitive Politics has changed its name to The Institute for Free Speech. It is a non-profit organization under section 501(c)(3) of the Internal Revenue Code devoted to expanding free speech rights of all Americans and it engages in no electoral activity.

[4] *Center for Competitive Politics*, 784 F.3d at 1314.

[5] *See, e.g., Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1009 (9th Cir. 2018) ("The mere possibility that *some* contributors *may* choose to withhold their support does not establish a substantial burden on First Amendment rights.").

[6] *Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270 (4th Cir. 2013).

[7] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 368-371 (2010); *McConnell v. Federal Election Commission*, 540 U.S. 93, 193 (2003).

[8] The Court has acknowledged the constitutional significance of the distinction between electoral speech and issue speech in a number of decisions. *See*, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203 (1999) ("We note, furthermore, that ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates."); *McIntyre*, 514 U.S. at 352 (same).

[9] *McConnell*, 540 U.S. at 193. The Federal Election Commission adopted a regulation limiting the donor disclosure to those donors who provided funds for the specific purpose of funding each electioneering communication, 11 C.F.R. § 104.20(c)(9), and the U.S. Court of Appeals for the District of Columbia Circuit upheld the regulation as an appropriate balance between donor exposure and the First Amendment right to political privacy. *Van Hollen v. Federal Election Commission*, 811 F.3d 486, 499 (D.C. Cir. 2016).

[10] *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 308 (3rd Cir. 2015) ("The Supreme Court has consistently held that disclosure requirements are not limited to 'express advocacy' and that there is not a 'rigid barrier between express advocacy and so-called issue advocacy.'") *citing McConnell*, 540 U.S. at 193; *Citizens United v. Federal Election Commission*, 558 U.S. 310, 368 (2010); *Wisconsin Right to Life*, 551 U.S. 449, 469-476 (2007).

[11] *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015); *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2nd Cir. 2018).

[12] *Doe v. Reed*, 130 S.Ct. 2811 (2010).

[13] *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1008 (9th Cir. 2018).

[14] *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 209 F.Supp.3d 77, 90 & n.8 (D.D.C. 2016); For the People Act of 2019 (H.R. 1, 116th Cong.); Maryland Online Electioneering Transparency and Accountability Act of 2018 (Md. Code Ann., Elec. Law § 13-405(c)); New York Executive Law §§ 172-e, 172-f (Chap. 286, Parts F, G).

[15] *Compare McConnell* (upholding FCC public file disclosure requirements for political messages communicated over broadcast airwaves, but leaving open as-applied challenges) *and Delaware Strong Families* (upholding Delaware law compelling disclosure of issue speech on the Internet) *and The Washington Post v. McManus*, 355 F.Supp.3d 272 (D.Md. 2019) (preliminarily enjoining Maryland FCC-like public file disclosure requirements for issue advertisements on the internet as applied to advertising platforms operated by press organizations).

[16] *See, e.g.*, *Americans for Prosperity Foundation*, 903 F.3d at 1012-1017.

[17] *Watchtower Bible*, 536 U.S. at 166 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."), *quoting McIntyre*, 514 U.S. at 341-342; *accord Talley*, 362 U.S. at 69 (Clark, *dissenting*); *Center for Individual Freedom*, 706 F.3d at 282.

[18] *Davis v. Federal Election Commission*, 554 U.S. 724, 745 (2008) (internal citations and quotations omitted).

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[19] *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966), *quoting Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1961).

[20] *Buckley*, 424 U.S. at 66, *citing NAACP v. Alabama*, 357 U.S. at 460-461.

[21] *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

[22] *See, e.g., United States v. Hamilton*, 699 F.3d 356, 370 n.12 (4th Cir. 2012); *Pharm. Care Management Assoc. v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005); *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

[23] *See, e.g., Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544, 549 (4th Cir. 2010); *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 229 n.9 (2d Cir. 2010); *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 133 n.12 (2d Cir. 2014); *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 787 (9th Cir. 2006).

[24] *See, e.g., Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012); *Schneiderman*, 882 F.3d at 382; *Americans for Prosperity Foundation*, 903 F.3d at 1009; *Center for Competitive Politics*, 784 F.3d at 1312-1314.

[25] *Delaware Strong Families*, 793 F.3d at 310.

[26] *Schneiderman*, 882 F.3d at 382.

[27] *Center for Competitive Politics*, 784 F.3d at 1314.

[28] *National Association of Manufacturers v. Taylor*, 582 F.3d 1, 10-11 (D.C.Cir. 2009).

[29] *Id*. At 11.

[30] *Doe v. Reed*, 561 U.S. at 232 (Thomas, *dissenting*).

[31] *Delaware Strong Families v. Denn*, 136 S.Ct. 2376, 2378 (2016) (Thomas *dissenting* from the denial of certiorari). Justice Alito also voted to grant certiorari, but did not join Justice Thomas' written rationale. Since that time, Justices Gorsuch and Kavanaugh have joined the Court raising speculation about whether there might be four Justices to grant certiorari in a future disclosure case.

[32] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812-813 (2000) (applying "strict scrutiny" to content-based speech regulations); *McIntyre*, 514 U.S. at 357 (holding that a ban on political speech because it omits government-compelled information is a content-based speech restriction).

[33] *The Washington Post v. McManus*, 355 F.Supp.3d 272, 289-290 & n. 14 (D. Md. 2019).

[34] *Buckley*, 424 U.S.at 64-68.

[35] *Citizens United*, 558 U.S. at 366-367.

[36] *Americans for Prosperity*, 903 F.3d at 1011 (approving state's "important" interest), at 1014 (characterizing necessary burden on associational rights as "substantial"), at 1019 (upholding compelled disclosure of non-profit's organization's donors "[b]ecause the burden on the First Amendment right to association is modest, and the Attorney General's interest in enforcing its laws is important").

[37] *See, Americans for Prosperity Foundation*, 903 F.3d at 1009-1012; *Schneiderman*, 882 F.3d at 382-384.

[38] *Americans for Prosperity Foundation*, 903 F.3d at 1010 ("the state's quick access to Schedule B filings increases the Attorney General's investigative efficiency") (internal quotations and citations omitted).

[39] As the D.C. Circuit recently phrased the problem, the elevation of transparency policy "treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents." *Van Hollen*, 811 F.3d at 501.

[40] *McIntyre*, 514 U.S. at 347.

[41] *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Buckley*, 424 U.S. at 41.

[42] *See, e.g., Center for Individual Freedom*, 706 F.3d at 282.

[43] *Compare Van Hollen* (upholding FEC's "for the purpose of" donor disclosure rule with respect to electioneering communications) *with Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 316 F. Supp. 3d 349 (D.D.C. 2018) (striking FEC's decades-old "for the purpose of" donor disclosure rule with respect to independent expenditures).

[44] *Delaware Strong Families*, 793 F.3d at 310.

[45] *Americans for Prosperity Foundation*, 903 F.3d at 1011.

[46] *See, e.g., McIntyre*, 514 U.S. at 348; *The Washington Post*, 355 F.Supp.3d at 286.

[47] *Van Hollen*, 811 F.3d at 498-499.

[48] *See, e.g., Center for Competitive Politics*; *Americans for Prosperity Foundation*; *Schneiderman.*

[49] *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966) ("Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy.").

[50] *AFL-CIO v. Federal Election Commission*, 333 F.3d 168, 177-179 (D.C. Cir. 2003).

[51] *DeGregory*, 383 U.S. at 829-830 (quashing subpoena to testify about citizen's past political activities); *Watkins v. United States*, 354 U.S. 178, 197-200 (1957) (same); *United*

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States v. Rumely, 345 U.S. 41, 46-48 (1953).

[52] *See Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-388 (quashing FEC subpoena that intruded upon the privacy of political activities outside the agency's jurisdiction); *United States v. National Committee For Impeachment*, 469 F.2d 1135 (2nd Cir. 1972) (ruling government could not force an organization to register and file reports disclosing its finances because the organization's activities were outside government's disclosure jurisdiction).

[53] *See, e.g.*, *Americans for Prosperity Foundation*, 903 F.3d at 1010 (government's law enforcement "efficiency" overrides wholly lawful charity's right to donor privacy); *Citizens for Responsibility and Ethics in Washington ("CREW I") v. Federal Election Commission*, 209 F.Supp.3d 77, 92 (D. D.C. 2016) ("[T]he majority of circuits have concluded that ... disclosure requirements [related to registration and reporting] are not unduly burdensome.") (internal quotation and citation omitted).

[54] This issue has figured centrally in several court rulings. *See, e.g., Doe v. Reed* (ruling that disclosure to the general public enhanced the government's objective of confirming the validity of petition signatures); *Buckley v. American Constitutional Law Foundation* (ruling that certain disclosures, such as the identities of petition circulators, were permissible to the government but overbroad and counterproductive when made to the public); *Center for Competitive Politics v. Harris* (upholding forced disclosure because donor lists would be seen only by government officials, not the general public); *Americans for Prosperity v. Becerra* (same).

[55] *Schneiderman*, 882 F.3d at 383 ("Law enforcement officials have been known to abuse their power, and there is always a risk that an office charged with care of confidential information will spring a leak. A list of names in the hands of those with access to a state's coercive resources conjures up an uneasy number of troubling precedents.").

[56] *See, e.g., Delaware Strong Families* (expanding reporting to internet postings and direct mail); *Center for Individual Rights* (expanding reporting to messages published in print media).

[57] *See, Citizens for Ethics and Responsibility in Washington ("CREW") v. Federal Election Commission*, Case No. 16-2255 (D. D.C.) (pending); *Public Citizen v. Federal Election Commission*, Case No. 14-00148 (D. D.C.) (pending).

[58] *Citizens for Ethics and Responsibility in Washington (CREW I) v. Federal Election Commission*, 209 F.Supp.3dd 77, 91-92 (D. D.C. 2016). The district court in *CREW* reasoned that *McConnell* had opened the door to disclosure of "electioneering communications," a form of issue advocacy, that *Citizens United* had endorsed disclosure, and therefore the funding of electioneering communications subjected an organization to full-blown registration and reporting burdens as a "political committee." *See also, Citizens for Ethics and Responsibility in Washington (CREW II) v. Federal Election Commission*, 299 F.Supp.3d 83 (D. D.C. 2018).

[59] *CREW,* 209 F.Supp.3d at 91-92 & n. 8.

[60] *Doe v. Reed*, 823 F.Supp.2d 1195, 1201 (W.D. Wash. 2011) ("For an as-applied challenge to a law such as the (Washington Public Records Act] to succeed, there would have to be a *significant threat* of harassment directed at those who sign the petition *that cannot be mitigated by law enforcement measures*…. I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech…. The as-applied exemption that Doe seeks has been upheld in only a few cases," such as NAACP and Socialist Workers Party).

[61] *Doe v. Reed*, 697 F.3d 1235 (9th Cir. 2012).

[62] *See* Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment (Dec. 9, 2014), *Americans for Prosperity Foundation v. Harris*, Civil Action No. 2:14-cv-09448 (U.S.D.C. C.D. Cal.).

[63] *Americans for Prosperity Foundation v. Harris*, 182 F.Supp.3d 1049 (C.D. Cal. 2016).

[64] *Americans for Prosperity Foundation*, 903 F.3d at 1015-1017.

[65] *Buckley*, 424 U.S. at 74; *Brown v. Socialist Workers Party*, 459 U.S. 87 (1982).

[66] *Id.*

[67] *Doe v. Reed*, 561 U.S. 186, 204 (Alito, *concurring*).

[68] *See Center for Competitive Politics*, 784 F.3d at 1314 (facial challenge); *Americans for Prosperity Foundation*, 903 F.3d at 1012-1014 (as-applied challenge).

[69] *See, e.g.*, *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1981) ("[I]f … the FEC lacks jurisdiction to enforce contribution limitations on 'draft' groups, then no compelling interest for the subpoenaed information can possibly exist. The highly sensitive character of the information sought simply makes it all the more important that the court be convinced that jurisdiction exists to conduct this investigation before it enforces subpoenas issued pursuant thereto.").

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