

The First Amendment Right to Political Privacy, Chapter 6 - Campaign Finance and Other Very Public Exceptions to Privacy

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Privacy in Focus®

Introduction – The Right and Its Exceptions

Previous chapters have traced the origin and development since the 1940s of the First Amendment right to privacy in the political sphere. That right manifested as the right to associate, speak, and access information for political purposes free from government compelled exposure.

Over the same period of time, the U.S. Supreme Court was grappling with discrete realms of government-compelled exposure and carving exceptions to the constitutional protection. The exceptions were drawn narrowly upon the Court's findings that "substantial" government objectives outweighed the constitutional right under one form or another of constitutional scrutiny. The most prominent exceptions were compelled disclosure of financial contributions to direct lobbying of members of Congress and contributions to candidates' campaigns. This chapter summarizes the jurisprudence of exceptions to the right of political privacy.

The Lobbyist Disclosure Exception (1950s)

Beginning with the Buchanan Committee's[1] inquisition of Edward Rumely's Committee for Constitutional Government (CCG) in 1951, the Supreme Court recognized that Congress' authority to demand disclosure of those who provide funding to support "lobbying" activities runs into First Amendment protections. To avoid the conflict, the Court interpreted the term "lobbying activities" narrowly to

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authorize Congress to require disclosure of CCG funders only in connection with CCG's "representations made directly to the Congress, its members, or its committees." [2] But Congress would run into the "prohibition of the First Amendment" if it attempted to exercise "power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiation of influence which they may exert upon the ultimate legislative process." [3]

A year later, the Court was presented with a direct First Amendment challenge to lobbyist registration and funder disclosure mandated by the Federal Regulation of Lobbying Act. In *United States v. Harriss*, [4] the Court restricted the realm of disclosure, citing *Rumely*, to direct communications with members of Congress that were funded with that "principal purpose" as the object of the funding. [5]

In fact, the Court performed so much narrowing surgery to the scope of "lobbying" subject to mandated disclosure that Justices Douglas and Black, in loyal dissent, chastised the majority for rewriting the statute to save it from First Amendment infirmity. "The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce the [constitutional] result," wrote the dissent. [6]

The extent of statutory narrowing to save the statute is one indication of how narrow the court conceived the exception to privacy in the realm of issue advocacy in *Harriss*. Indeed, 40 years later, in *McIntyre v. Ohio*, [7] the modern Court characterized *Harriss* as "limited disclosure requirements for lobbyists" justified only because lobbyists "have direct access to elected representatives," which "if undisclosed, may well present the appearance of corruption." [8] And the exception to political privacy was limited in scope to *compensated* communications to directly influence elected officials.

Although the Court, in 1954, had yet to develop a formula of First Amendment scrutiny to justify what it acknowledged to be a First Amendment infringement, it nonetheless resorted to an analysis similar to modern day strict scrutiny. The Court found that the First Amendment restriction "is designed to safeguard a vital national interest" (analogous to a compelling governmental interest). [9] The Court also observed that the disclosure rule informed members of Congress "who is being hired, who is putting up the money, and how much" when they are lobbied so that they could act in the public interest (i.e., narrowly tailored to advance the government's objective). And finally, the Court observed that the disclosure measure did not prohibit lobbying (i.e., a least restrictive means). [10]

The Campaign Finance Disclosure Exception (1970s)

The *Harriss* Court analogized the disclosure of lobbyist financing to the kind of donor disclosure required of political campaign committees under the Federal Corrupt Practices Act, a law in place since 1925, which, in the Court's judgment, "maintain[ed] the integrity of a basic governmental process." [11] Implicit in the comparison was the view that Congress could infringe the right to privacy where money was spent either to lobby or elect politicians.

In the first decade of the 20th century, a handful of states enacted laws requiring campaigns for public office to disclose the identity of their donors.[12] Disclosure and the issue of corporate contributions also were being debated in Congress, leading up to the passage, in 1907, of a law prohibiting corporate contributions and amendments in 1911 and 1925 (the Federal Corrupt Practices Act) to require campaigns and national parties to disclose donors and expenditures.[13]

In 1934, the Supreme Court had occasion to consider the constitutionality of the Federal Corrupt Practices Act. Although the political story underlying the Court's decision is too long to explain here, it suffices to summarize as follows. A prominent Methodist cleric, Virginia Democrat, and leader in the American temperance movement, Bishop James Cannon, had led a successful political revolt against Virginia's segregationist "Byrd Machine" in the 1928 presidential election, delivering Virginia to Republican Herbert Hoover against Democrat Alfred Smith who opposed Prohibition. For that apostasy the good Bishop had to endure a five-year retaliatory campaign led by Virginia's Democratic Senator Carter Glass, whose political vendetta spurred investigations and trials by national church tribunals, two committees of the U.S. Senate, and the U.S. Department of Justice, and an indictment and trial in federal court. Bishop Cannon was ultimately exonerated in all tribunals, but, as intended, was forever ruined as a cleric and political leader.[14]

During the course of defending his federal indictment for failing to properly disclose a loan and disposition of the funds in connection with the 1928 presidential campaign in Virginia, Bishop Cannon and his assistant, Ada Burroughs, challenged the Federal Corrupt Practices Act under Article 2, Section 1 of the Constitution, which provides that each state has the authority to appoint its presidential electors as it sees fit. The argument was that requiring presidential campaigns to disclose their donors and disbursements infringed the state's sovereignty in choosing presidential electors. The Court disagreed, however, finding that the law did not "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." [15] Furthermore, the Court observed, the law was within Congress' authority "to preserve the purity" of presidential elections.[16]

Although the decision came decades before the Court recognized the First Amendment right to anonymity in the political sphere, its reasoning nonetheless recognized the governmental interest at stake. Like *Harriss*, the Court sustained the law under an analysis that resembled the modern strict scrutiny doctrine. The Court recognized the "importance" and "vital" interest in safeguarding the country from "the improper use of money to influence" election results and "insidious corruption." [17] The Court then foreshadowed the future test for narrow tailoring focusing on whether "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained." [18] The Court accepted Congress' "conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied." [19] The Court concluded that "it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption." [20]

The Court's recognition, in 1934, of the relationship between campaign money, corruption, and disclosure would go on to form the bedrock of campaign finance jurisprudence for the next century. The next major Court decision addressing the issue came in 1976, passing on the constitutionality of sweeping post-Watergate campaign finance reforms codified in the 1974 amendments to the Federal Election Campaign Act of 1971 (FECA), in the seminal case of *Buckley v. Valeo*.^[21]

In *Buckley*, the Court was asked to declare FECA's donor disclosure regime unconstitutional, this time under the First Amendment right to privacy of conscience that had developed in the 1950s.^[22] The Court first acknowledged that FECA's disclosure mandates infringe free speech and associational rights under *NAACP* and its progeny. "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court began.^[23] The Court further recognized that once the government compels exposure, it is responsible for all repercussions visited upon the political organizations, even from private criticism.^[24] And the Court ruled "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations."^[25]

The Court ruled that such severe infringements "cannot be justified by a mere showing of some legitimate governmental interest," rather, "the subordinating interests of the State must survive exacting scrutiny" and the information subject to compelled disclosure must bear a "substantial relation" to the government's valid interests.^[26] The Court referred to this as the "strict test established by *NAACP v. Alabama*."^[27]

Applying this "strict test," the Court found that FECA's disclosure requirements "directly serve substantial governmental interests."^[28] Citing *Burroughs*, the Court decided that the prevention of corruption is a "substantial governmental interest" that justifies compelled exposure of direct campaign contributors as well as independent spenders who fund communications expressly advocating the election or defeat of federal candidates.^[29] Disclosure of a candidate's direct campaign donors, the Court found, informs voters of the interests to which politicians might be most responsive or beholden.^[30]

In the ensuing 40 years, the Court has continued to uphold disclosure of money spent with the direct effect of electing candidates. First, in 2010, the Court reaffirmed *Buckley's* approval of compelled disclosure of independent expenditures expressly advocating the election or defeat of candidates in *Citizens United v. FEC*.^[31] Second, the Court expanded constitutional tolerance for compelled disclosure of those who pay to run issue ads that merely reference candidates over broadcast media on the eve of candidate elections ("electioneering communications") in the 2003 decision *McConnell v. FEC*.^[32]

Exception to the Exception

Although *Buckley* found the government's interests substantial enough to justify the First Amendment infringement in general, it nevertheless limited disclosure in certain contexts. Too much disclosure, the Court recognized, could be a bad thing. First, the Court limited disclosure to spending on a narrow realm of direct election influencing, such as contributions to candidates and express advocacy ads. Second, the Court established a special exception from disclosure for small or unpopular political organizations especially

vulnerable to harassment, threats, or reprisals in accordance with *NAACP*.^[33] The Court thus established an exception to the exception to accommodate the most severe consequences of disclosure.

A few years later, in 1982, the Court returned to privacy under this exception in *Brown v. Socialist Workers '74 Campaign Committee*, which applied *Buckley's* exception from compelled exposure for a minor political party.^[34]

The Public Petition Drive Exception (2008)

Two of the Court's more significant disclosure decisions in recent years were *Doe v. Reed*^[35] and *Buckley v. American Constitutional Law Foundation, Inc.*^[36] The subject of both cases was citizen participation in state-sponsored petition drives and ballot question elections.

In *Doe v. Reed*, the Court reviewed Washington state's direct democracy procedure by which 4% of the state's registered voters could by petition place legislative questions on a statewide ballot. The petitions were signed and submitted to the state and checked for accuracy. Washington State considered the petitions to be public records subject to public availability under the state's public records law. Certain petitioners did not question the need to disclose their signatures, names and addresses to the state as part of the petitioning process, but they challenged release of the petitions to the public as a violation of their First Amendment right to political privacy. The Court held that the activity at issue was an inherently public act of signing a petition as a quasi-legislative act. Accordingly, the Court sustained release of the petitions to the public under a facial challenge to the law in this context.

Indeed, it is impossible to imagine how a state might require the signatures of 4% of all registered voters without expecting the signatures to be provided to the government and checked for validity.^[37] In this way the activity in *Doe v. Reed* was like voting, where each voter must appear before a clerk, state her name and address and exhibit a form of identification, with party observers watching, to maintain the integrity of the election.

In *Buckley v. American Constitutional Law Foundation, Inc.*, the Court upheld compelled disclosure of the people who fund petition drives in Colorado, but the Court struck compelled disclosure of the names and addresses of petition circulators.

The upshot of the two decisions is that those who fund and sign petitions to invoke the state-sponsored ballot machinery engage in sufficiently public acts, in a sufficiently public election procedure, that their names can be disclosed publicly. But the Court drew the line there, finding that those who merely pass clip boards to obtain signatures are protected by the First Amendment, confirming that there is a boundary to compelled exposure.

Do These Petition Drive Exceptions Affect Issue Speech Generally?

Doe v. Reed has become a favorite reference point for advocates of greater exposure of political participants generally, even in the issue speech arena, and even beyond the context of ballot petitions. Others see it as a highly contextual ruling, standing for the unremarkable proposition that participation in a state-operated ballot petition process is an inherently public act over which the state has responsibility for implementing with integrity.

Although rationales given in seven different opinions^[38] did little to clarify this area of jurisprudence, a couple of points did appear clear. First, eight Justices (except Scalia) recognized that disclosure constitutes an infringement on First Amendment rights. However, at least four Justices (Sotomayor, Stevens, Ginsberg, Scalia) thought there was little infringement given the inherently public nature of the legislative act at issue. Second, eight Justices (except Thomas) were impressed by the state's responsibility to conduct a fair and honest election process and were willing to accept some degree of disclosure to advance that objective. Third, at least two Justices (Alito, Breyer) thought an as-applied challenge was an appropriate relief valve to the facially acceptable infringement.

The cacophony of concurring and one dissenting opinions makes it difficult to discern clear jurisprudence beyond the context of the public petition procedure at issue. Four Justices (Sotomayor, Stevens, Ginsburg, Scalia) acknowledged that signing the petitions was essentially a public legislative act, substantively and legally different from private speech and associational activities.^[39] Justice Scalia, who never believed there is a constitutional right to speak or associate privately, went so far as to argue that the act of voting historically was a public act and there is no constitutional right to vote secretly.^[40]

On the other side of the spectrum is *McIntyre*, which ruled the government cannot force a pamphleteer advocating the defeat of a ballot referendum to identify herself in her literature. Of course, Ms. McIntyre was not a formal cog in the state's official election machinery. She did not fund a petition drive. She did not circulate government-issued petitions. She did not sign a petition. After a policy question was placed on a public ballot, Ms. McIntyre advocated the defeat of the question. Her speech was pure issue speech, not electoral advocacy on behalf of an impressionable politician. And it was her private activity, not an exercise of state-sponsored election machinery. For that purely private issue speech, the state had little grounds for compulsory exposure other than official voyeurism. The Court drew a line there.

Significantly, the Court has on several occasions distinguished between the acceptable levels of regulation in the two realms of advocacy – candidate speech versus issue speech.^[41] The former is corruptible; the latter is not. This distinction may be the key to understanding a bright line in privacy jurisprudence – that money spent directly to influence politicians is the tipping factor justifying an exception to political anonymity and privacy. And taking that distinction one step further, one might distinguish privately funded issue speech from political activity that is a formal implementation of a state-run election apparatus.

In short, preventing corruption (i.e., *quid pro quo* arrangements with politicians) justifies compelled exposure of spenders in candidate elections, while election integrity justifies exposure of those who invoke the official state machinery of initiative and referenda elections. But private issue speech, even advocacy about a ballot

question, arguably remains a private domain. It is a domain, however, that remains under constant inquisition as well as legislative and regulatory efforts to compel its disclosure too.

Two Lines of Law – Privacy Versus Its Exceptions

In summary, the Court has developed two lines of precedents in tension with each other. One steadfastly protects the right to privacy in the political sphere, including the right of conscience, of speech, of access to information, and association, and even the right to vote a secret ballot. The other, summarized above, upholds exceptions to the right. The gray area that lies between the two lines has invited a seemingly boundless range of state legislative efforts and court challenges to FEC rules seeking to expand disclosure to ever broader realms of political speech – from express advocacy exhorting voters to vote for a candidate to benign or merely factual candidate references, to broader time periods before elections, to communications over other discreet media including print and the Internet, to a broader range of government purposes, and, most profoundly, to issue speech generally that has no correlation to any candidate election, lobbying effort, or issue election apparatus. Nobody is sure where to draw the boundary line.

Although this series has focused almost exclusively on the Supreme Court’s jurisprudence in an effort to trace the First Amendment right and illuminate its contours, there are hundreds of lower federal and state court opinions that, unfortunately, wander through the two lines seemingly picking and choosing the best privacy decision or exception to support its conclusion.

Contradictions between the two lines have been most acute in a handful of areas. First is the subject of ballot petitions and referenda campaigns outlined above. One interesting discussion of the lack of clarity in this speech realm has been detailed by Matt Miller of the Goldwater Institute. [42] Mr. Miller highlights conflicting circuit court opinions over the government’s asserted “informational interest” to justify compelled exposure of donors to groups that speak about issues. Mr. Miller points to the Tenth Circuit as the circuit providing the most robust constitutional protection for privacy in the referenda speech realm. He cites two decisions, *Coalition for Secular Government v. Williams*[43] and *Sampson v. Buescher*.[44]

Second is the similar but distinct area of general issue speech. Here, Mr. Miller highlights doctrinal inconsistencies and conflicting results between the Tenth Circuit’s protection for privacy in referenda campaigns and decisions upholding disclosure in the issue speech realm in the Third and Ninth Circuits.[45] Likewise, the First Circuit has ruled that issue speech is not subject to compelled disclosure.[46] Mr. Miller concludes, “The split in federal circuits about the ballot-initiative question is too deep for the Supreme Court to ignore forever. This is especially true since pro-disclosure laws are rapidly spreading across the country.”

Third, an interesting issue has emerged in the Eighth Circuit over compelled registration and disclosure by individual citizens who lobby their representatives without compensation. The Eighth Circuit ruled that the disclosure rule of *Harriss* applied with equal force to the uncompensated discussions citizens have with their elected representatives.[47] That decision was a remarkable 2-to-1 decision with a very convincing dissent.[48] The Eighth Circuit has vacated the panel decision and has agreed to rehear the case *en banc*.

Fourth are government efforts, usually at the state level, to mandate nonprofit donor disclosure in the name of protecting consumers from fraudulent nonprofit solicitations. The Ninth and Second Circuits recently upheld donor disclosure mandates in the name of empowering state Attorneys General to vaguely police the *bona fides* of IRS-recognized and compliant nonprofit organizations.[49] In one of those cases, the group Americans for Prosperity presented such an overwhelming amount of evidence of death threats, harassment, name-calling, and general political hostility that it may well have exceeded the amount of evidence presented by the NAACP in its case against Alabama.[50] The district court found the evidence to satisfy an exception to the Attorney General's demand for donor lists.[51] But the Ninth Circuit, in one of the less compellingly articulated opinions in this area, wrote around the evidence and the district court's findings to reverse and uphold the compelled exposure of the group's donors. The Ninth Circuit's decision exposes many of the gaps in clarity of the law that would benefit from Supreme Court guidance.

Fifth is the area of inquisition into the internal records and workings of political organizations. The D.C. Circuit has been most protective of the privacy of political organizations against gratuitous government inquiry.[52] The Ninth Circuit also has protected intrusions into the internal affairs of political organizations, albeit pursuant to a different analytical framework than the D.C. Circuit.[53] However, that clearly established law did not stop a large cadre of state Attorneys General from announcing a multi-state investigation into a national think tank's climate studies.[54]

Sixth is the thicket of litigation over the metes and bounds of campaign finance disclosure on the fringes of campaign contributions and express advocacy expenditures and in gray areas of hybrid political activities discussing issues and politicians. That issue is currently brewing in the federal courts in the District of Columbia over the issue of which nonprofit organizations must register as "political committees" (i.e., PACs) and disclose all of their donors and disbursements. *Buckley* held that only those organizations that have as their "major purpose" the election or defeat of federal candidates can be compelled to register and publicly disclose all donors and financial activity.[55] Since that time, several federal courts have narrowly applied the "major purpose" test to organizations that devote a majority of their efforts to expressly advocating the election or defeat of candidates.[56] However, a more recent decision by one federal district court determined that all of those opinions are no longer good law and, moreover, ruled that the historical distinction between disclosure of issue speakers versus election speakers no longer has legal significance under the First Amendment.[57]

The legal analysis set forth in that most recent district court decision would upend decades of First Amendment jurisprudence and underscores the need for the Supreme Court to bring clarity and uniformity to this area of First Amendment jurisprudence. Not only have outcomes differed, but the analytical paths leading to the results have varied widely. Accordingly, legal observers generally agree that clarity is needed throughout these areas, even if they disagree sharply on the direction that clarity should take. Some believe the Court needs to bolster the analytical importance of the threshold First Amendment right. Others point to confusion over the jurisprudential level of scrutiny as the key to resolving the two lines. Others believe the Court needs to demand greater discipline and seriousness in the ascertainment of purported governmental interests, pointing to superficial review that has become typical in "exacting scrutiny" reviews. Transparency

for the sake of transparency is often perceived by proponents of stronger constitutional protection of privacy as a particularly weak justification for compelling disclosure, and it often presents under rationales such as the “right to know who is speaking” or the generic “informational interest.”

Lower courts also have openly complained about the lack of clear guidance. One federal court recently noted the lack of a clear standard of scrutiny for laws that compel disclosure of political speech and, as between “exacting scrutiny” or “strict scrutiny,” chose strict scrutiny to review a state campaign finance disclosure rule.[58]

More broadly, as the U.S. Court of Appeals for the D.C. Circuit recently observed in a significant campaign finance decision, the Supreme Court has been content to avoid “an answer to the important constitutional questions bubbling beneath the surface”:

[T]he Supreme Court’s campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents. But “the centre cannot hold.”[59]

In sum, the Supreme Court’s nods to both privacy and disclosure while resisting a comprehensive reconciliation of the constitutional limit on compelled disclosure policies has left lower courts across America to wander through idiosyncratic standards with often conflicting results. A reconciliation between the two competing principles is needed. Ideas for how we might reconcile the two lines of jurisprudence will be the subject the next chapter in this series.

[1] The formal name of the congressional committee was the House Select Committee on Lobbying Activities.

[2] *United States v. Rumely*, 345 U.S. 41, 47 (1953).

[3] *Id.* at 46.

[4] *United States v. Harriss*, 347 U.S. 612 (1954).

[5] *Id.* at 619-620.

[6] *Id.* at 629 (Douglas, joined by Black, *dissenting*).

[7] *McIntyre v. Ohio*, 514 U.S. 334 (1995).

[8] *Id.* at 356 n. 20.

[9] *Id.* at 626.

[10] *Id.* at 625.

[11] *Id.* at 625.

[12] See Robert E. Mutch, *Campaigns, Congress, And Courts: The making of federal campaign finance laws* (Praeger Publishers 1988), at pp. 8-9.

[13] *Id.* at 1-22.

[14] See Michael S. Patterson, "The Fall of a Bishop: James Cannon, Jr. Versus Carter Glass 1909-1934," *The Journal of Southern History*, Vol. 39, No. 4 (Nov. 1973), pp. 493-518; Virginius Dabney, *Dry Messiah: The Life of Bishop Cannon* (Knopf 1949), at pp. 277-291.

[15] *Burroughs v. United States*, 290 U.S. 534, 544 (1934).

[16] *Id.*

[17] *Id.* at 545-546.

[18] *Id.* at 548.

[19] *Id.*

[20] *Id.*

[21] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[22] See Chapters 1-5 of this series tracing the evolution of the First Amendment right to political privacy.

[23] 424 U.S. at 64, citing *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[24] *Id.* at 65, citing *NAACP*, 357 U.S. at 461 (holding that government exposure policy is necessarily responsible for private harassment and economic reprisals facilitated by the exposure).

[25] *Id.* at 66.

[26] *Id.* at 64.

[27] *Id.* at 66.

[28] *Id.* at 68.

[29] *Id.* at 67-68.

[30] *Id.*

[31] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[32] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

[33] 424 U.S. at 73-74.

[34] *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-93 (1982). Justice Alito provided a similar approach in his concurring opinion in *Doe v. Reed*, positing that the analysis starts with the First Amendment right and recognition of an infringement. Next, the government bears the burden of justifying the infringement. If the government carries its burden of justifying the infringement in a facial challenge, citizens then have an opportunity to persuade a court to carve an exception to the government's disclosure rule in an as-applied challenge. 130 S.Ct. 2811, 2822-2827 (2010) (Alito, *concurring*).

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

[36] *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

[37] The Court found that public access to the petitions advanced the state's interest in election integrity because private groups would double check the integrity of the election, a proposition that Justice Alito doubted. 130 S.Ct. at 2825-2827 (Alito *concurring*).

[38] The seven opinions of *Doe v. Reed*: (1) Chief Justice Roberts' opinion of the Court (joined by Kennedy, Ginsburg, Breyer, Alito, Sotomayor); (2) Breyer's concurring opinion; (3) Alito's concurring opinion; (4) Sotomayor's concurring opinion (joined by Stevens, Ginsburg); (5) Stevens' concurring opinion (joined by Breyer); (6) Scalia's opinion concurring in the judgment; (7) Thomas's dissenting opinion.

[39] *Id.* at 2828-2929 (Sotomayor *concurring*), 2833-2934 (Scalia *concurring*).

[40] *Id.* at 2833-2934 (Scalia *concurring*). In addition to distinguishing the Washington State petition process from other contexts of private political association and speech, Justice Scalia reiterated his dissenting argument in *McIntyre* that there is no right to private political activity – not even to cast a secret ballot. *Id.* He endorsed the “civic courage” necessary to vote by voice (ironically, in a case litigated under the pseudonym “Doe”).

[41] 514 U.S. at 356; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (“Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”) (internal citations omitted).

[42] See Matt Miller, “Privacy And The Right to Advocate: Remembering *NAACP v. Alabama* and its First Amendment Legacy on the 60th Anniversary of the Case” (The Goldwater Institute Jan. 17, 2018).

- [43] *Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016).
- [44] *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).
- [45] Mr. Miller cites two opinions upholding disclosure in the issue speech realm generally: *Delaware Strong Families v. Delaware*, 793 F.3d 304, 312-313 (3d Cir. 2015); *Americans for Prosperity Foundation v. Harris*, 809 F.3d 536 (9th Cir. 2015).
- [46] *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 386-387 (1st Cir. 2000).
- [47] *Calzone v. Summers*, 909 F.3d 940 (8th Cir. 2018), Opinion vacated and rehearing en banc granted Jan. 28, 2019.
- [48] *Id.* at 952-956 (Stras, J., *dissenting*).
- [49] *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018); *Citizens United v. Eric Schneiderman*, 882 F.3d 374 (2d Cir. 2018).
- [50] See Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment (Dec. 9, 2014), *Americans for Prosperity Foundation v. Kamala Harris*, Civil Action No. 2:14-cv-09448 (U.S.D.C. C.D. Cal.).
- [51] *Americans for Prosperity Foundation v. Harris*, 182 F.Supp.3d 1049 (C.D. Cal. 2016).
- [52] See *American Federation of Labor and Congress of Industrial Organizations v. Federal Election Commission*, 333 F.3d 168, 176-178 (D.C. Cir. 2003); *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388-389 (D.C. Cir. 1981).
- [53] *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-1165 (9th Cir. 2010).
- [54] See David Hasemyer, Sabrina Shankman, "Climate Fraud Investigation of Exxon Draws Attention of 17 Attorneys General," Inside Climate News (Mar. 30, 2016) (available at <https://insideclimatenews.org/news/30032016/climate-change-fraud-investigation-exxon-eric-shneiderman-18-attorneys-general>).
- [55] 424 U.S. at 79.
- [56] See *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007); *Federal Election Commission v. Malenick*, 310 F.Supp.2d 230 (D.D.C. 2004); *Federal Election Commission v. GOPAC, Inc.*, 917 F.Supp. 851 (D. D.C. 1996).
- [57] *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 209 F.Supp.3d 77, 90 & n. 8 (D.D.C. 2016) ("In the wake of *Citizens United*, federal appellate courts have resoundingly concluded that WRTL II's constitutional division between express advocacy and issue speech is simply inapposite in the

disclosure context.”).

[58] *The Washington Post v. McManus*, 2019 WL 112639 *15 (D. Md. Jan. 3, 2019) (“[W]hen analyzing the constitutionality of a compelled disclosure law, *Buckley* is not the starting point. The ‘exacting scrutiny’ standard it propounded is, on the contrary, a limited exception to the general rule that compelled disclosure laws, like all content-based regulations, must overcome strict scrutiny.”).

[59] *Van Hollen v. Federal Election Commission*, 811 F.3d 486, 501 (D.C. Cir. 2016).

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