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Congress shall make no law...

Campaign Finance Disclosure: *The Devil is in the Details*

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Points in Summary

- Although advocates for greater regulation of political speech claim that there are large amounts of undisclosed money in politics, in fact, all spending that calls for the election or defeat of candidates is already disclosed, as is all spending and all but the smallest donations to political candidates, parties, and PACs (political action committees). Indeed, there is more disclosure across the country currently than at any time in history. At the same time, a growing academic literature has found that there are significant costs to disclosure, notably the suppression of smaller donations, and that many of the claimed benefits of disclosure are negligible or nonexistent.
- In terms of practical issues, the costs of disclosure are significant and disproportionately harm volunteer-run or small budget organizations. Attempts to increase disclosure may also create “junk disclosure” by inking donations to activities unrelated to the donor’s intent, which would be misleading and confusing to the public. In addition, disclosure can result in harassment of donors.
- Supreme Court precedent spanning more than five decades has demonstrated the Court’s deep concern that disclosure requirements can invade privacy, lead to harassment of donors, chill speech, and be overly burdensome for small organizations.
- As a result, any changes to existing campaign finance disclosure legislation should respect the First Amendment as well as citizen rights and privacy, be rooted in moderation, and provide simple and clear rules.
- Specifically, when considering disclosure legislation, policymakers should: (1) incorporate reasonable monetary thresholds at which registration and reporting is required; (2) incorporate a major purpose test to determine reporting requirements; (3) not require disclosure of unnecessary and immaterial identifying information about donors; (4) allow reasonable time for groups to file any required reports; and (5) not require citizens to report their own activity.

Introduction

Disclosure laws vary between the federal government and the states, and from state to state, but the general framework is quite uniform. Most campaign finance disclosure laws require candidates, political parties, and citizen groups that primarily work to elect or defeat candidates, to register with the government and file detailed, periodic reports listing information about their donors, contributions, and expenditures. Additionally, groups that run independent expenditures for or against candidates must report these expenditures and often must report donations if earmarked or directed to support the independent expenditures. These reports are then published in government databases and usually made accessible online.

Media attention and the pleas of “reform” groups notwithstanding, at present, there is more disclosure of political spending in the U.S. than at any time in history. Most states require the public release of a donor’s name, address, and employer for contributions to candidates or political committees above very small *de minimis* amounts.

For comparison’s sake, at the federal level, just 4.4% of total election spending in 2012 came from groups that were not required to disclose all of their donors to the Federal Election Commission (FEC). Most of these groups, in turn, were well-known entities such as the U.S. Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, and Planned Parenthood. Using Texas as an example, in the 2012 election cycle, independent political spending by organizations that were not required to disclose their donors represented less than 1% of the total amount spent by all candidates for statewide and legislative offices. Furthermore, these non-disclosing organizations were already required to report their political expenditures, just not all of their general membership and donor information.

While many pro-regulation advocates tout the benefits of “transparency,” disclosure requirements harm First Amendment rights to freedom of speech and association in several crucial ways. Disclosure requirements impose significant compliance costs on affected candidates and groups that disproportionately burden volunteer-run and low-budget campaigns, slanting the political landscape in favor of large organizations and incumbents. Further, disclosure information creates a risk of harassment of donors to controversial candidates and causes that have their otherwise private information made publicly accessible. Disclosure of private donor information also chills speech by discouraging some people from contributing.

In recent years, increased disclosure requirements have risen to the top of the agenda of advocates for greater regulation of political speech. In 2013, seven states (California, Montana, Nevada, New Jersey, New Mexico, Texas, and Utah) seriously considered broadly expanding existing state disclosure requirements. While many of these proposals were ultimately unsuccessful, given the significant potential impact on First Amendment rights of such laws, it is important that state policymakers be knowledgeable of the practical and constitutional issues inherent in disclosure mandates.



Placing Disclosure in Context

- I. **All spending calling for the election or defeat of candidates requires some type of disclosure, and there is more disclosure today than at any previous time in U.S. history.** The Federal Communications Commission requires all broadcast and cable political advertising to include the name of the entity paying for the ad. Print political ads also disclose the payer. Beyond that basic information, candidates, political parties, PACs, and Super PACs at the federal level and in 49 states must disclose their expenditures, income, and donors. In federal races, this disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and for donations over \$200, the size of the donation and the occupation and employer of the donor. These entities also report all of their expenditures over \$200. In many states, the thresholds for reporting detailed information are much lower.

Current federal law also requires reporting of all independent expenditures over \$250 and “electioneering communications” over \$10,000. “Independent expenditures” are ads of any type that advocate for the election or defeat of a candidate. “Electioneering communications” are broadcast ads that mention a candidate in any way within 60 days of an election. All entities, including nonprofit groups, unions, trade associations, and corporations, must also disclose their donors who give money earmarked for either independent expenditures or electioneering communications. All of this information is freely available on the Federal Election Commission’s (FEC) website. States typically have similar regimes, often, again, with much lower triggers. However, while such groups must file reports and name contributors who have given money for those expenditures, they do not have to file information on donors and members who did not give money to finance such expenditures. This is what so-called “reform” organizations have dubbed “dark money.”

According to the FEC, \$7.005 billion was spent on federal races in 2012.¹ Of that total, less than \$311 million was “dark money” – that is to say, lawful spending by organizations that are not required to report the names of their individual donors.² This amounts to about 4.4% of spending on federal races. Nearly all of the organizations that financed such independent expenditures, however, were well-known entities, including the U.S. Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, Planned Parenthood, the National Association of Realtors, the National Federation of Independent Business, NARAL Pro-Choice America, and the Humane Society. Nor is such spending new – many of these groups spent substantial funds on such ads even before *Citizens United*, without disclosing the names of their general donors or their general membership lists.

1 Christian Hilland, Judith Ingram, and Julia Queen, “FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle,” Federal Election Commission. Retrieved on October 16, 2013. Available at: http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml (April 19, 2013).

2 “2012 Outside Spending by Group,” Center for Responsive Politics. Retrieved on October 16, 2013. Available at: <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> (2013). The \$311 million figure referenced above represents the combined federal spending of “Conservative” (\$262.5 million), “Liberal” (34.7 million), and “Other” (\$10.9 million) 501(c) organizations in the 2012 election cycle, according to the Center for Responsive Politics.

Even many spenders on the list that are not historically well-known organizations are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of those groups' funders are well-known, even when the organizations themselves do not disclose the names of their donors. Such donors, it should be noted, often contribute to support the mission of the organization, and not its independent political expenditures, let alone any particular expenditure.

Most states have similar, or more burdensome, reporting requirements, and many states require disclosure of their residents' full names, street addresses, employers, and occupations at much lower thresholds than the \$200 threshold applicable to individual donors to federal candidates, parties, and PACs.

In summary, candidates, parties, PACs, and Super PACs already disclose all of their donors. Other groups that spend in elections – primarily trade associations, 501(c)(4) non-profits, and unions, disclose their spending and the names of donors who have contributed specifically for that spending, but not the names of other members and donors. Spending that falls into this latter category is a very small fraction of total political spending, is not new, and declined as a percentage of total spending in 2012. In considering legislation that expands or retracts disclosure requirements, policymakers should first determine the extent of disclosure already in place in their state. This varies from state to state, but as with the federal and Texas example, the rhetoric of “secret money” in American politics is far overblown.

II. Academic research casts doubt on the alleged benefits of disclosure. After assessing the current level of disclosure within a state, policymakers must weigh the costs and benefits of expanding or trimming existing disclosure requirements. Proponents of mandating greater disclosure claim that it improves voter knowledge, by tipping voters to the sources of financial support for candidates and groups. However, scholarly research on the effects of mandated disclosure suggests little actual benefit.

Recent studies have shown that after accounting for information that is voluntarily disclosed by a campaign, mandated disclosure provides little additional useful information to voters.³ In controlled experiments, access to disclosure information about the sources of support for a ballot initiative had “virtually no marginal benefit” on voter knowledge, and voters showed less interest in disclosure information than in other forms of information such as news reports, editorials, and campaign ads.⁴ Other studies have confirmed that voters rarely seek disclosure information when deciding how to vote.⁵ Even among supporters of disclosure requirements, disclosure information is generally

3 David M. Primo, “Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge,” *Election Law Journal*, Vol. 12:2. Retrieved on October 16, 2013. Available at: <http://www.campaignfreedom.org/wp-content/uploads/2013/07/Information-at-the-Margin-Campaign-Finance-Disclosure-Laws-Ballot-Issues-and-Voter-Knowledge.pdf> (2013).

4 David M. Primo, Ph. D., “Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public Debate,” Institute for Justice. Retrieved on October 16, 2013. Available at: http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf (October 2011).

5 Jason M. Farrell and Nima Veisesh, “Public Perception and the ‘Appearance of Corruption’ in Campaign Finance,” Center for Competitive Politics’ Issue Review. Retrieved on October 16, 2013. Available at: <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Public-Perception-and-the-Appearance-of-Corruption-in-Campaign-Finance-Report-Final.pdf> (December 16, 2011).



not sought out or utilized by the public.⁶

Disclosure provisions often help those who need it least, by producing complicated data that is mostly used by well-educated, wealthy individuals.⁷ Given the complexities of disclosure information, some scholarly research has suggested that disclosure information could be improved by the collection and public release of simpler information, like shorter ad disclaimers, which would be easier for the public to understand.⁸

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Omri Ben-Shahar and Carl E. Schneider, “The Failure of Mandated Disclosure,” *University of Pennsylvania Law Review*, Vol. 159:647. Retrieved on October 16, 2013. Available at: <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Ben-Shahar-2011-Failure.pdf> (2011).

Practical Issues with Disclosure

Disclosure's practical problems have arisen largely out of disclosure's significant compliance costs and disproportionate effects on grassroots groups, the creation of misleading "junk disclosure" by extensive, overbroad reporting requirements, and the potential for donor harassment stemming from the public release of disclosure information.

- I. **The costs of disclosure are significant and disproportionately harm volunteer-run and low budget organizations.** While the benefits of disclosure are speculative, the costs are concrete. Complying with disclosure laws often requires expensive legal counsel, an accountant, and other record-keeping staff. It may be reasonable to impose these costs on large organizations and professionalized campaigns, but smaller groups can be deterred from political participation altogether by complex, overbroad regulations. Studies have confirmed that the costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers.⁹

Reporting requirements are typically too complex for ordinary citizens to understand without the help of a lawyer. A study of the costs of various state disclosure regulations concluded that "regulation of grassroots political activity puts ordinary citizens at risk of legal entrapment, leaves disfavored groups open to abuse from partisan regulators and robs unpopular speakers of the protective benefits of anonymous speech."¹⁰

Ordinary citizens volunteering for a candidate or issue campaign may unknowingly violate the law if disclosure requirements are overbroad or overly complex. Equally worrisome, powerful political interests may seek to use disclosure requirements to raise the cost of doing business for their grassroots competition. Policymakers must carefully analyze disclosure laws and the costs they impose to ensure that they do not slant the political playing field.

- II. **Increased reporting requirements often create "junk disclosure" by associating contributions with communications they have no link to, creating serious practical problems.** Disclosure is intended to inform voters of the major sources of financial support for political candidates, parties, and PACs. However, overly broad disclosure requirements fail to achieve this goal by muddying up reports with data that confuses, rather than informs, the public. This commonly happens in two ways: by requiring disclosure of donor information for organizations that are not primarily working to elect or defeat candidates, and by requiring disclosure for small dollar donors.

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to trade associations and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their

⁹ Jeffrey Milyo, Ph.D., "Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation," Institute for Justice. Retrieved on October 16, 2013. Available at: http://www.campaignfreedom.org/doclib/20100419_Milyo2010GrassrootsLobbying.pdf (April 2010).

¹⁰ *Ibid.*, p. 24.



views. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is “junk disclosure” – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

“Junk disclosure” also occurs when government requires the disclosure of small donors. Disclosing small dollar donors does not inform the public of major sources of financial support for candidates and independent speakers. Further, when disclosure data is populated with low dollar donors, it perversely makes it more difficult for voters to identify significant sources of support. The effect is that disclosure information’s primary use becomes for parties and groups to look for potential donors; for nosy neighbors to search; and for some groups, including in at least one publicly reported situation a known terrorist group,¹¹ to harass and threaten donors to causes or people who work for employers they dislike.

There are also serious practical problems. As former Federal Election Commission Chairman Bradley Smith explains:

Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a \$100,000 dues payment to the National Business Chamber (“NBC”) in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises \$350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers \$1 million – the \$350,000 it raised specifically for political activity, the \$350,000 from the NBC, and another \$300,000 from general dues - to the Committee for a Better State (“CBS”), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves \$200,000 for its own direct spending, and then transfers \$800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends \$3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?

What should be immediately obvious to any observer is that the question of “disclosure” is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme’s initial payment to NBC?... By the time we reach Acme Industries, is the information useful—or even truthful? Would it be truthful to say that Acme Industries is “responsible” or “endorses” messages on a state ballot initiative made by the State Jobs Alliance far down the road?¹²

11 Gigi Brienza, “I Got Inspired. I Gave. Then I Got Scared.” *Washington Post*. Retrieved on October 16, 2013. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html> (July 1, 2007).

12 Bradley A. Smith, “Disclosure in a Post-*Citizens United* Real World,” 6 *St. Thomas J. L. & Pol’y* 257(2012). Retrieved

III. Disclosure can result in harassment of donors. Most citizens recognize that having their private information and political allegiances publicly disclosed could lead to negative consequences. At least one study shows that citizens are less likely to contribute to issue campaigns if their address and employer are publicly disclosed,¹³ reaffirming that mandated disclosure has a “chilling effect” on speech and association. Worse still, little can be done once individual contributor information – typically a donor’s full name, street address, occupation, and employer – is made public. It can immediately be used by anyone to harass, threaten, or financially harm a speaker or contributor to an unpopular cause.

Indeed, in Justice Thomas’ opinion in *Citizens United*, he dissented in part, noting harassment faced by Proposition 8 supporters in California stemming from the release of their personal information because of the state’s disclosure requirements.¹⁴ Policymakers must take the threat of harassment seriously for both practical and constitutional reasons. The Supreme Court has recognized that harassment of donors is a real and significant threat that may justify striking down disclosure laws. Policymakers should learn the legal context surrounding disclosure to ensure that any proposed legislation is constitutional and will not create an unnecessary risk of harassment.

on October 17, 2013. Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

13 Dick M. Carpenter II, “Mandatory Disclosure for Ballot-Initiative Campaigns,” *The Independent Review*, Vol. 13:4. Retrieved on October 16, 2013. Available at: <http://www.campaignfreedom.org/2009/04/01/mandatory-disclosure-for-ballot-initiative-campaigns/> (Spring 2009).

14 *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).



Constitutional Issues with Disclosure

Constitutional concerns about disclosure have arisen primarily out of awareness for the potential harassment of individuals subjected to disclosure requirements, the chilling effects on speech caused by unclear or overbroad disclosure mandates, and the potential harm to small organizations from onerous disclosure requirements.

- I. **NAACP v. Alabama: Disclosure implicates privacy concerns and can result in the harassment of donors.** There is a growing awareness by individuals and the Supreme Court that threats and intimidation of individuals because of their political views is a very serious issue. Much of the Supreme Court's concern over compulsory disclosure lies in its consideration of the potential for harassment. This is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list. In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."¹⁵ Similarly, it is hardly impossible to imagine a future scenario in which donors to groups that back candidates who take controversial stands – for or against same-sex marriage; for or against abortion rights; for or against immigration measures; for or against animal rights; among many other issues – may face harassment from non-government entities as a result of their private information being disclosed. Donors might also be wary of associating with groups that have been linked in some way with persons who have been publicly vilified, such as the Koch family or George Soros.

- II. **Buckley v. Valeo: Disclosure must be related to express advocacy.** In this landmark case, the Supreme Court ruled that donor or membership disclosure can be compelled "only... [for] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," or "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."¹⁶ Footnote 52 of the ruling defined "expressly advocate" to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"¹⁷

In *Buckley*, the Court struck down disclosure for issue speech because the standard that triggered disclosure requirements was unclear or overbroad. Vague laws are unconstitutional if they provide insufficient notice of what is regulated and what is not. If the law does not make clear what speech is allowed and what speech is not, speakers will curtail their speech more than they otherwise would to avoid violating the law. The security of free speech breaks down when citizens are left to guess how regulations apply. The *Buckley* Court put this danger into context:

"No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy,

¹⁵ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).

¹⁷ *Id.* at 44 n. 52.

and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. ... Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.”¹⁸

In striking much of the disclosure requirements in the Federal Election Campaign Act, the *Buckley* Court ruled that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment ... significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.”¹⁹ As a result, disclosure laws are subject to “exacting scrutiny.”

III. *Massachusetts Citizens for Life v. FEC and Citizens United: Overly burdensome disclosure is constitutionally suspect.* Advocates for greater regulation of political speech often cite the Supreme Court’s *Citizens United* decision as an endorsement of expansive disclosure regimes, but that contention is not supported by the actual opinion or holding. The *Citizens United* Court upheld the disclosure of an electioneering communication report, which discloses only the *entity making the expenditure*, the purpose of the expenditure, and the names of contributors giving over \$1,000 *for the purpose of furthering the expenditure*.²⁰ “For the purpose of furthering the expenditure” has been interpreted by the Federal Election Commission to mean contributions earmarked for particular communications, an interpretation recently supported by the U.S. Court of Appeals for the D.C. Circuit in a case involving analogous electioneering communication reporting requirements.²¹ *Citizens United* did not endorse the disclosure of members and donors to groups that did not qualify as political parties, and that did not have the objectively determined primary purpose of supporting or defeating candidates, unless the donations were affirmatively earmarked for that purpose.

In contrast, broader disclosure regimes have been treated with skepticism by the Court. Importantly, the *Citizens United* Court specifically held that the limited disclosure of an electioneering communication report is a “less restrictive alternative to more comprehensive regulations of speech,” such as broader disclosure requirements.²² The *Citizens United* Court specifically invoked *Massachusetts Citizens for Life v. FEC (MCFL)*, where both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements.²³ The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only “members” rather than the general public.²⁴ Likewise, in her concurrent opinion, Justice O’Connor was concerned with the “organizational restraints” imposed by disclosure requirements, including “a more formalized organizational form” and a

18 *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

19 *Id.* at 64.

20 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).

21 *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

22 *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).

23 *Massachusetts Citizens For Life (MCFL) v. Federal Election Commission*, 479 U.S. 238 (1986).

24 *MCFL*, 479 U.S. at 253 (plurality opinion).



significant loss of funding availability.²⁵

The Court has recognized that the burdens of disclosure may be used to discourage speech in an unconstitutional manner, by forcing organizations to change their organizational structure, spend significant amounts on compliance with regulations, or opt out of making political contributions or independent expenditures altogether due to the burdens imposed by such laws. *MCFL* noted that these sorts of “incentives” serve to “necessarily produce a result which the State [can]...not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free.”²⁶

Additionally, in *Sampson v. Buescher*, the Tenth Circuit examined burdensome disclosure requirements for small ballot issue organizations under Colorado’s campaign finance disclosure scheme.²⁷ In holding that Colorado’s requirements “substantial[ly]” burdened the organization’s First Amendment rights, the court balanced the “substantial” burden of reporting and disclosure against the informational interest at stake, which it considered “minimal.”²⁸ It’s plausible that future courts will view the burdens imposed on small ballot issue committees by broad-based disclosure requirements with similar skepticism.

25 *Id.* at 266 (O’Connor, J. concurring).

26 *MCFL*, 479 U.S. at 256 (plurality opinion).

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

28 *Id.* at 1260.

Three Principles for True “Reform”

The preceding sections outline the practical and constitutional problems that have plagued many current and past disclosure laws. To move towards a smarter, more efficient disclosure regime, policymakers should seek to follow these three principles when contemplating legislation relevant to campaign finance disclosure:

- I. **Respect for the First Amendment, citizen rights, and privacy.** Disclosure laws harm First Amendment rights, so if any legislation in this area is drafted, it must be carefully crafted in order to avoid unconstitutional burdens. Following *Buckley*, disclosure laws should compel disclosure only of express advocacy communications, meaning those that expressly call for the election or defeat of candidates.²⁹ Only contributions made to directly support such communications should be disclosed.

Government should not generally be in the business of tracking its citizens’ political activity. This would seem to go without saying, yet in the world of campaign finance reform, many so-called “reformers” are happy to sacrifice the right to privacy. Taking this reckless approach will lead to the costly court battles and practical problems outlined above.

Citizens generally have the right to participate in politics while maintaining their privacy, so there must be a clear reason for infringing on this privacy. Any time a restriction on political participation or speech is proposed, the first question should be ‘why?’ Disclosure for disclosure’s sake is not a reason to upset the traditional expectations of privacy in political participation.

Having a clear, well-defined purpose for disclosure provisions will improve the law’s efficiency, cut down on “junk” disclosure, and increase the likelihood that the law will survive constitutional challenges.

- II. **Moderation.** All too often proposed disclosure legislation takes on a fool’s errand of trying to track all political spending, or close all loopholes. This sort of overreach harms the goals of disclosure through the creation of “junk disclosure” and leaves laws vulnerable to being challenged and struck down in court. It also risks creating a bureaucracy that stifles grassroots political activity.

It’s important to recognize that Americans have other values besides simply reducing the alleged influence of political spending. Free speech, democratic participation, donor privacy, efficiency in government, fairness in government, and other important values are implicated in disclosure laws. In attempting to increase the amount of disclosed spending in politics, one must always be conscious of these values. Just as the state that eliminates all crime would of necessity be a police state, one hundred percent disclosure of all donors who might in some way influence an election is impossible, and almost certainly not worth the cost of trying.

²⁹ Additionally, disclosure may be required for the “functional equivalent of express advocacy.” This is a narrow term that applies only to specific communications that, like express advocacy, are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Such a determination must be made from the ad itself, not extraneous information. *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007). In short, a state cannot simply refer to the “functional equivalent.” It must define some communication, “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” that it thinks qualifies as such. *Id.*



III. Simplification. Campaign finance laws are extraordinarily complex. This may be an acceptable price when dealing with large campaigns, national unions and trade organizations, and others that can afford high dollar lawyers, consultants, and accountants, but ordinary citizens should not have to consult a lawyer before engaging in grassroots political activity.

Future policies should make it clear which activities require reporting and which do not. Further, reporting should be easy and impose few costs on small groups. Substantial exemptions from reporting should also be permitted.

Five Specific Policy Recommendations

With these principles in mind – respect for the First Amendment, citizen rights, and privacy, moderation, and simplification – we recommend five policies that should be applied to any disclosure requirements.

- I. **Incorporate reasonable monetary thresholds for disclosure of individual donations and for registration and filing requirements by groups. This will encourage small donors by respecting their privacy and allow small grassroots groups to form and not inadvertently violate a speech law.** Many of the problems inherent in disclosure requirements can be drastically reduced simply by ensuring that requirements are only applied to major donors and organizations. While there may be good reasons for disclosure of large donors to candidates, parties, and PACs, what is gained by disclosure of a \$50, \$100, or \$500 donation to a statewide or legislative candidate? We recommend using a threshold of at least \$1000 before requiring disclosure of individual donations. These dollar amounts should be indexed for inflation and population growth to preserve their value over time.

For organizations, we recommend a registration and filing threshold of at least \$25,000 of funds raised or spent per year. This is the threshold at which a group is required to file Form 8871 with the Internal Revenue Service. Form 8871 is filed by political organizations, which seek to be treated as tax-exempt under Section 527 of the Internal Revenue Code. It is logical that state filing requirements use the same or higher dollar amount. In any case, the amounts should again be indexed for inflation and population growth. This will allow small grassroots groups to get started and speak out without tripping over complicated and burdensome filing requirements.

- II. **Incorporate a major purpose test for registration and complete disclosure.** Disclosure requirements should be targeted at political organizations that are primarily organized to influence elections; not at all entities that might make an expenditure on political speech. Donors to political organizations such as candidate campaigns, political parties, and PACs know that their money is going to political causes. The same is not always true for donors to multi-purpose 501(c) organizations and trade associations. Forcing disclosure of all donors to such groups would chill speech, deter people from becoming members of such groups, and associate donors with messages they might not even support. Under a major purpose test, only if a group spent more than half of its budget advocating for the election or defeat of candidates, would it be subject to the filing and registration rules for PACs.
- III. **Do not require disclosure of unnecessary identifying information of donors.** States policymakers should take steps to limit the risk for harassment of donors by restricting what information is publicly disclosed. Publicly disclosing a donor's home address or employer greatly increases the risk of harassment, and provides little valuable information to voters. Disclosing employer information can unfairly tag employers with the opinions of their employees. If such information is deemed essential, it should only be required for the largest donors.
- IV. **Allow reasonable time for groups to file reports.** Accuracy is essential in disclosure reporting. Policies that seek to force immediate disclosure are typically frustrated with failure. Rarely does the public need information within 24 or 48 hours.



Immediate disclosure, especially far in advance of an election, harms volunteer organizations that are not able to comply as quickly or fully as larger, established groups. It also inevitably leads to unintentional errors in reporting, wasted tax dollars investigating those minor errors, and erroneous information being released to the public. If rapid disclosure is desired, it should only occur in the closing weeks before an election and only for significant sums of contributions, such as over \$5,000. A realistic plan would provide reasonable time for filing (with tight deadlines only for late reports that otherwise would not be filed before the election), thus easing the burden on small, grassroots organizations, and helping to assure less hurried, and therefore more accurate reporting

- V. **Do not require citizens to report their own activity.** Ordinary citizens should not be subjected to fines or possible criminal penalties simply for speaking about politics without first registering with the state. They also shouldn't be burdened with complex reporting requirements just to exercise their First Amendment rights. States should ensure that the burden of disclosure is placed solely on candidate campaigns, political parties, and PACs.

Conclusion

The message policymakers should send to the American people is that political participation is a good thing, not a bad thing. Campaign finance laws should be simplified – not made more complex.

For half a century, the message of those who advocate even stricter campaign finance laws has been that political participation is bad, that people who donate are only out for themselves, and that political speech is, quite literally, dangerous. It is no wonder that the confidence in democratic institutions has declined.

Disclosure seeks to improve politics through transparency, but often damages politics by discouraging small donors, exposing them to the risk of harassment, burdening volunteer-run campaigns, and producing data that is often not useful to voters. To truly improve transparency, policymakers should narrowly tailor any disclosure provisions to avoid these common pitfalls and constitutional controversies.



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