No Good Speech Unpunished: New Model Regulations Would Muzzle Charities' Speech

Recently, the Coalition for Accountability in Political Spending ("CAPS") released a state-by-state analysis of nonprofit election spending.[1] In addition to an overview of nonprofit activity, the report proposed Model Regulations which would impose new disclosure of and control over nonprofit activity.[2] The Model Regulations are problematic, both practically and as a matter of constitutional law.

The Model Regulations ignore three vital constitutional principles. First, while candidate-oriented speech may be regulated, speech about issues generally may not. Second, the extent to which an organization may constitutionally be regulated is determined by its purpose—if an organization's major purpose is to influence elections, then it may be regulated more heavily than an organization with a broader purpose. Third, disclosure is burdensome and limits nonprofit fundraising ability—a grave harm that requires a compelling government interest to overcome.

Beyond these constitutional issues, the Model Regulations suffer from serious practical and drafting deficiencies.

I. Only political speech may be regulated.

In the foundational case of *Buckley v. Valeo*,[3] the United States Supreme Court held that speech promoting the election or defeat of political candidates could be regulated in ways that speech about issues cannot, due to the potential for the former to lead to quid pro quo corruption of officeholders. But the Court also noted the difficulty of drawing the line between issue speech and political speech: "the distinction between discussion of issues and candidates may often dissolve in

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[1] COALITION FOR ACCOUNTABILITY IN POLITICAL SPENDING ("CAPS"), BUILDING A FRONTLINE DEFENSE TO STOP SECRET POLITICAL SPENDING: A STATE-BY-STATE ANALYSIS OF NEW OPPORTUNITIES TO REIN IN UNFETTERED NONPROFIT ELECTION SPENDING (2013).

[2] *Id.* Appendix B.

[3] 424 U.S. 1 (1976).

practical application."[4] The discussion of issues often can involve the discussion of candidates and their votes and policies. Conversely, in an election, the discussion is often about the candidate's stances on issues. Issue speech, therefore, is not necessarily political speech, and cannot be regulated as such.

The Supreme Court then devised a test to determine if a communication is political. Regulable political speech was limited to "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,' [and] 'reject.'"[5] When in doubt about whether a communication is political or issue-focused, the First Amendment commands a bias in favor of classifying speech as issue speech.[6]

The Model Regulations recognize the distinction between issue and political speech in their definition of "express election advocacy," but go on to define and limit "election targeted issue advocacy." The latter term covers the very issue speech the Supreme Court protected in *Buckley*. Thus, the Model Regulations attempt an end-run around foundational Supreme Court precedent, regulating issue speech as political advertisements in exactly the way prohibited by *Buckley*.

II. The Model Regulations cover too many organizations.

Just as it exempts issue speech from regulation as candidate advocacy, the Court's jurisprudence also protects *issue organizations* from the disclosure requirements that may constitutionally be placed on overtly political organizations. The concern often arose in the context of the civil rights movement, when the NAACP went to the Supreme Court several times to protect its donors from disclosure to a public often violently opposed to the Association's work.[7]

Disclosure is a powerful tool and a powerful weapon. Therefore, the *Buckley* Court delineated between organizations that may periodically mention candidates while pursuing a broader mission than electoral advocacy (like the NAACP), and those that have the "major purpose" of supporting or opposing candidates (PACs, political parties, etc.). Such "major purpose" organizations, the Court reasoned, "are,

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[4] *Id.* at 42 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

[5] *Id.* at 44 n. 52. In *McConnell v. Federal Election Commission,* 540 U.S. 93, 206 (2003), the Supreme Court allowed regulation of defined speech that constitutes the "functional equivalent of express advocacy." Later cases have made clear that this is a very narrow category of speech "susceptible to no other reasonable interpretation" than promotion of the election or defeat of a candidate. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-470 (2007) ("*WRTL II*") (Roberts, C.J., concurring).

[6] *See, e.g.*, *Buckley*; 424 U.S. at 44; *WRTL II*, 551 U.S. at 474 (2007) (Roberts, C.J., concurring).

[7] *See, e.g.*, *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958). Note that many civil rights groups have both charity § 501(c)(3) *and* social welfare § 501(c)(4) arms.

by definition, campaign related."[8] Organizations that did not have the "major purpose" of engaging in political activity did not need to report and disclose their general donors like a PAC. Instead, they only disclose the donations earmarked for the limited political activity they engage in. Thus, issue speech is protected, while political disclosure is preserved.

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), the Supreme Court specifically addressed disclosure requirements in the context of a particular nonprofit organization.[9] In that case, the Court recognized that a nonprofit can have a "central organizational purpose…[of] issue advocacy," and yet "occasionally engage[] in activities on behalf of political candidates."[10] The Court weighed the political activity of the nonprofit against its ordinary activity in order to determine the organization's *major* purpose. Only the nonprofit's political activity needed to be reported, shielding the group from excessive government intrusion to the extent that it was only engaged in protected issue speech.

The Model Regulations lack such a major purpose test, and instead rely upon a simplistic and arbitrary monetary trigger. Without a major purpose test, the Model Regulations subject civil rights groups, trusts, and charities to donor disclosure for merely mentioning a candidate. The inevitable result is that organizations will self-silence with respect to mission-critical issues for fear that discussing those issues will trigger extensive reporting and disclosure requirements. This is especially true for organizations that lack the resources to comply with these new requirements.

III. The disclosure provisions are burdensome and problematic.

The Model Regulations create a dilemma for nonprofit organizations: they must either establish a separate segregated fund through which to make all communications (which imposes a substantial burden), or disclose the name, address, and employer of their donors, "if known" to the organization (which endangers donor privacy and makes fundraising more difficult).

The Supreme Court has specifically contemplated the burdensome nature of disclosure requirements. In *MCFL*, the Court expressed concern about federal law's detailed recordkeeping requirements, extensive reporting schedules, and limitation of fundraising to "members."[11] In her *MCFL* concurrence, Justice O'Connor took pains to point out the speech-chilling effect of "organizational restraints," including

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[8] *Buckley*, 424 U.S. at 79.
[9] 479 U.S. 238 (1986).
[10] *Id.* at 252 n. 6.
[11] *MCFL*, 479 U.S. at 253 (1986) (Brennan, J. for the plurality). *See also Citizens United v. Federal Election Commission*, 558 U.S. 310, 338 (2010).

the requirement to establish "a more formalized organizational form," and consequent loss of funding availability.[12]

The Model Regulations mandate detailed record keeping—including the names, addresses, and employers of donors. This information is commonly collected by political parties and candidates in an election, but not necessarily by a nonprofit charity which might incidentally speak out about an election-related issue. Indeed, charities often receive anonymous donations, a result that is generally praised.

The alternative, of course, is for an organization to establish a separate fund, and make all communications through this entity. But this requires groups to plan what communications they will make, and at what cost, a year in advance. Such a schedule significantly diminishes the impact an organization may have, given the fast paced world of public policy debate, amplified by election year issues and rapidly developing current events. Under such a paradigm, organizational speech must be predetermined a year before it is actually uttered—which is both practically untenable and irreconcilable with the First Amendment.

IV. The imprecision of the Model Regulations is exemplified by the extensive time period during which they attempt to regulate nonprofit activity.

The Model Regulations suffer from drafting weaknesses as well. For example, the Model Regulations attempt to regulate activity for an overly-large portion of the year. This problem stems from the definition of "election targeted issue advocacy," which suffers from two serious flaws. First, the definition of "election" is excessively broad. Second, the provision applies over an unreasonably-long period of time.

The Model Regulations define "election targeted issue advocacy" as "any communication other than express election advocacy made within forty-five days before any primary election or ninety days before any general election…." Such communications become "election related expenditures"—triggering disclosure and regulation.

Note that whether a communication constitutes "election targeted issue advocacy" is based upon when an "election" occurs. The Model Regulations define "election" as "any general, special, or primary election for federal, state or local office, or at which any proposition, referendum or other question is submitted to the voters *in any state or any locality in the United States*." That definition arguably covers not only an election in the state or city the Model Regulations are adopted, but *any* election, *anywhere*. Elections happen year round in different parts of the country—in even years, odd years, in November, in June. As a result, this provision

[12] *Id.* at 256 (O'Connor, J. concurring).

effectively renders the reporting period continuous, especially for organizations operating nationwide.

Even if the definition of "election" is narrowed, the triggering period is excessive. Under the Model Regulations, for 135 days (or about 37% of the year), covered organizations will be subject to regulation and disclosure. Worse, this is *precisely* the time period when people are most attuned to perennial issues like poverty, environmental health, or labor relations. Presumably meant to track the federal Bipartisan Campaign Reform Act ("BCRA"), the Model Regulation covers 150% of the time of its federal counterpart—and that latter statute is tied to a single national election calendar.[13] Consequently, the Regulations, while claiming to be tied closely to elections, in fact require registration and reporting for communications happening throughout much of the year.

In similar fashion, the Model Regulations move beyond their federal counterpart to cover a wide variety of communications. BCRA's "electioneering communications" was narrowly defined to cover "broadcast, cable, or satellite communications" which "refers to a clearly identified candidate" made within 60 days of the general election or 30 days of the primary, reaching 50,000 households.[14] The Supreme Court upheld the regulation because of its precise definition.[15]

In contrast, the Model Regulations cover a wide variety of other communications beyond that of broadcast media—such as the Internet, billboards, the U.S. mail, and even printed flyers. The expansive definitions of "election" and "election targeted issue advocacy" give no functional time limitation. Further, unlike BCRA, the Model Regulations have no audience trigger for broadcast, cable, and satellite communications. Telephone calls are regulated when they reach 1,000 households. Printing only 5,000 flyers triggers regulation. The Model Regulations lack the clarity and restraint of federal law.

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The Model Regulations wander into a complex area of constitutional law, and consequently find themselves mired in legal and practical problems. Disclosure is proper: 1) when the *communication* is clearly political by expressly advocating for or against a candidate, or 2) when the *organization* is clearly political by having the "major purpose" of politics. As these general weaknesses are compounded by

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[13] Additionally, the federal thresholds accepted by the Supreme Court in *McConnell* were the result of a lengthy evidentiary record purporting to demonstrate that such ads were likely to be candidate advocacy rather than issue advocacy. *See, e.g. McConnell,* 540 U.S. at 193. No such record exists for the proposed Model Regulations.

[14] 2 U.S.C. §§ 434(f)(3)(A)(i) and (C).

[15] *McConnell*, 540 U.S. at 194.

imprecise and shoddy drafting, jurisdictions should be wary of adopting the CAPS Model Regulations.