



## INSTITUTE FOR FREE SPEECH

# Seven Myths about Disclosure Masquerading as “Realities”

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The Campaign Legal Center (CLC) recently issued a briefing paper worthy of Lewis Carroll.<sup>2</sup> Purporting to explain “Seven Myths (and Realities) about Disclosure,”<sup>3</sup> the CLC paper instead creates seventh new myths about campaign finance disclosure under its false label of “reality.”

**CLC Myth #1:** *The Supreme Court’s ruling in Citizens United v. FEC was a general endorsement of political donor reporting requirements.*

**Reality:** Advocates of more stringent regulation of political speech often exaggerate the Supreme Court’s endorsement of reporting requirements in *Citizens United*. In reality, the decision confirmed that the Constitution does not permit comprehensive reporting requirements to be imposed on many political activities, and underscored the need to balance reporting requirements against the burdens they impose on political speech.

Specifically, the Court held that organizations may not be forced to register and report as political committees (“PACs”) simply because they wish to speak about candidates and elections. The Court called PACs “burdensome,” “expensive to administer,” and subject to “onerous restrictions.”<sup>4</sup> Yet, PACs are precisely the one-size-fits-all end-game for activist groups like CLC who seek greater “disclosure”; such groups want virtually all those engaged in political speech to be either regulated as PACs or subject to reporting burdens similar to those required of PACs.



In reality, the specific reporting *Citizens United* upheld was for “electioneering communications” – a fairly discrete type of speech with fairly narrow donor disclosure requirements – far from the broad disclosure CLC erroneously suggests the decision endorses.

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<sup>2</sup> See, Carroll, Lewis. *Alice’s Adventures in Wonderland*. New York: MacMillan, 1865.

<sup>3</sup> Trevor Potter, “Seven Myths (and Realities) about Disclosure,” The Campaign Legal Center. Retrieved on February 29, 2016. Available at: [http://www.campaignlegalcenter.org/sites/default/files/Disclosure Myths and Realities.pdf](http://www.campaignlegalcenter.org/sites/default/files/Disclosure%20Myths%20and%20Realities.pdf) (November 17, 2015).

<sup>4</sup> 558 U.S. 310, 337-339 (2010).

## CLC Myth #2: So-called “dark money” groups are not required to “disclose the funders of their political advertising.”

**Reality:** Generally speaking, the Institute for Free Speech agrees with much of CLC’s recitation of the reporting requirements applicable to organizations engaged in political speech. But these various reporting requirements actually belie CLC’s inexplicable insistence on tarring certain organizations subject to these laws as “dark money groups.”

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THE FIRST AMENDMENT  
TO THE U.S. CONSTITUTION  
15 DECEMBER 1791

As the CLC briefing paper notes, groups that receive or spend \$1,000 or more per year to elect or defeat federal candidates, and whose major purpose is the same, must register as PACs and report detailed information about their spending and the private information of their supporters. Other groups that spend \$250 or more per year on independent expenditures expressly advocating the election or defeat of federal candidates, or at least \$10,000 on so-called “electioneering communications” that refer to a federal candidate within certain time windows prior to an election, also

must publicly report their spending and comprehensive information about their donors who gave for the purpose of funding those ads. In short, while groups engaged in such political speech are, by CLC’s own admission, required to report their funding and spending, CLC nonetheless perpetuates the myth that such organizations are rampant, non-disclosing “dark money groups.”

As for CLC’s claim that the allegedly “deadlocked” Federal Election Commission (FEC) is “failing to hold dark money groups accountable,” the FEC actually achieved bipartisan consensus in 2014 on 93% of all votes, and on 86% of all substantive votes.<sup>5</sup> Despite this agreement, the reporting laws for PACs, independent expenditures, and electioneering communications are complex on their face, and are even more complex in their application. Reasonable disagreements by FEC commissioners on these issues are a sign the agency is carefully applying the law as construed by the courts, and is properly balancing groups’ First Amendment rights with the burdens of reporting.

## CLC Myth #3: Shareholders are demanding disclosure of corporate political spending.

**Reality:** CLC bemoans the lack of requirements for corporations to disclose their political spending. As discussed in Myths #1 and #2 above, much of the funding for political speech already is required to be disclosed by the speakers. Since 2009, among Fortune 250 companies, shareholder resolutions to require corporations to report additional information about their political spending have failed overwhelmingly by votes ranging from 75% to 83% opposed. Furthermore, 91% of these resolutions have been foisted on companies by labor and activist special-interest groups, rather than by institutional investors or shareholders who seek investment returns.<sup>6</sup> The vast majority of shareholders understand that the clamors for “disclosure” of corporate political spending are not in

5 Scott Blackburn, “Delusions about ‘Dysfunction’: Understanding the Federal Election Commission,” Institute for Free Speech. Retrieved on February 29, 2016. Available at: [http://www.ifs.org/wp-content/uploads/2015/10/2015-10-05\\_Two-Pager\\_Blackburn\\_Delusions-About-Dysfunction-Understanding-The-FEC.pdf](http://www.ifs.org/wp-content/uploads/2015/10/2015-10-05_Two-Pager_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf) (October 5, 2015), p. 2.

6 Joe Trotter, “2015 Proxy Season: The Relentless Targeting of Political Speech Continues,” Institute for Free Speech. Retrieved on February 29, 2016. Available at: <http://www.ifs.org/2015/01/29/2015-proxy-season-the-relentless-targeting-of-political-speech-continues/> (January 29, 2015).

their interest.<sup>7</sup> The notion that inaction on this issue by corporations and the Securities and Exchange Commission (SEC) is thwarting a groundswell of shareholder support for these requirements is a myth.

#### **CLC Myth #4:** *The public demands even more campaign finance data than what is already available.*

**Reality:** CLC complains about the lack of more, instantaneously available campaign finance reporting on the Internet than what is currently provided in FEC reports, SEC filings, and TV stations' "political file." While special-interest groups like CLC pore over such data, the average citizen does not share the same obsession.

In an academic study on the public's use of disclosure data, fewer than half of those surveyed claimed to be aware of campaign finance disclosure laws, only a third claimed to know where to access campaign finance reports, and only a tiny fraction of respondents presumably actually accessed the reports.<sup>8</sup> The FEC has made all campaign finance reports filed with the agency available on its website since January 1998.<sup>9</sup> Given the lack of more public demand for campaign finance data that is already available on the Internet, it is fanciful to believe that there is a great public mandate to impose additional reporting burdens on political speech.



#### **CLC Myth #5:** *Super PACs and their donors claim they are entitled to anonymity under the Supreme Court's NAACP v. Alabama decision, but there is no constitutional right to privacy in political speech.*

**Reality:** We are not aware of any super PACs or donors to super PACs categorically claiming to be entitled to anonymity, or making such claims specifically with respect to the Supreme Court's 1958 *NAACP v. Alabama* decision. CLC's assertion that this is the case is a "straw man argument." Nonetheless, to the extent CLC is attempting to suggest there is no privacy interest whatsoever in political speech, that is also assuredly a myth. As the Supreme Court stated in *Buckley v. Valeo*:

we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment... We long have recognized that 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. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.<sup>10</sup>

In other words, there is a presumption that speakers have a right to privacy (regardless of the content of their speech), and that privacy right must be overcome by a "substantial relation" between a "sufficiently important

7 David M. Primo, "A Political Attack on Shareholder Value," *The Wall Street Journal*. Retrieved on February 29, 2016. Available at: <http://www.wsj.com/articles/david-m-primo-a-political-attack-on-shareholder-value-1412032579> (September 29, 2014).

8 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 February 29, 2016. Available at: [http://www.ij.org/images/pdf\\_folder/other\\_pubs/fulldisclosure.pdf](http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf) (October 2011), p. 8.

9 "40th Anniversary Timeline, 1975-2015," Federal Election Commission. Retrieved on February 29, 2016. Available at: [http://www.fec.gov/pages/40th\\_anniversary/40th\\_anniversary.shtml#disclosure](http://www.fec.gov/pages/40th_anniversary/40th_anniversary.shtml#disclosure) (March 2015).

10 424 U.S. 1, 64 (1976) (collecting authority; internal citations omitted).

governmental interest” and the disclosure burden imposed on the speaker.<sup>11</sup> To the extent a group does not have as its “major purpose” the nomination, election, or defeat of a candidate, the Supreme Court has held that the group may not be required to register and report as a PAC, as “the relation of the information sought to the [governmental interest] may be too remote.”<sup>12</sup>

**CLC Myth #6:** *There are claims that “issue ads” need not be reported to the FEC, and the FEC is not enforcing the reporting requirement for so-called “electioneering communications.”*

**Reality:** As with Myth # 5, CLC is making a “straw man argument” here to the extent it is suggesting there are claims that “issue ads” that do not expressly advocate for or against candidates are categorically exempt from FEC reporting requirements. We are not aware of anyone seriously making this claim. As with Myth #2, CLC’s point that “issue ads” are subject to “electioneering communication” reporting requirements actually belies its more general position that the existing disclosure laws are insufficient.

As for CLC’s claim that “two court decisions” have held that the FEC has failed to properly enforce the electioneering communication reporting requirements, the reality is that a federal appeals court ruled that “the District Court erred” in the first decision referenced, and the district court’s second decision also was reversed on appeal.<sup>13</sup> In short, the FEC’s electioneering communication reporting requirements have been upheld by the U.S. Court of Appeals for the D.C. Circuit. And, notwithstanding CLC’s misleadingly broad suggestion that “[t]he FEC has failed to enforce this [electioneering communications] disclosure provision,” 104 electioneering communications reports disclosing \$12.3 million in spending were filed during the 2014 election cycle.<sup>14</sup>

**CLC Myth #7:** *Court precedents construing federal laws are not applicable to state and local campaign finance laws.*

**Reality:** CLC suggests that state and local governments may implement campaign finance reporting requirements “that are more rigorous than federal law.” To the extent this suggests court rulings setting forth the outer constitutional boundaries for federal campaign finance laws do not apply to state and local governments, this is most assuredly a myth. The U.S. Constitution is the supreme law of the land, and the First Amendment applies equally against state and local governments.<sup>15</sup> In fact, many court cases considering the constitutionality of state campaign finance laws have cited as authoritative precedent decisions pertaining to the federal campaign finance laws.<sup>16</sup>

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11 *Id.*; *Citizens United*, 558 U.S. at 366-367.

12 *Buckley*, 424 U.S. at 79-80.

13 *Center for Individual Freedom, et al. v. Van Hollen, et al.*, No. 1:11-cv-0076 (D.C. Cir. Sep. 18, 2012) (order reversing district court at 4); *Van Hollen v. Fed. Election Comm’n*, No. 15-5016 (D.C. Cir. Jan. 21, 2016) slip op. Although the latest D.C. Circuit decision was issued after the publication of CLC’s briefing paper, CLC’s characterization of the first *Van Hollen* decision was inaccurate and misleading at the time CLC published its paper.

14 “Electioneering Communications Disbursements 2014,” Federal Election Commission. Retrieved on February 29, 2016. Available at: [ftp://ftp.fec.gov/FEC/ec\\_exp\\_2014.csv](ftp://ftp.fec.gov/FEC/ec_exp_2014.csv).

15 See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925).

16 See, e.g., *Wisconsin Right to Life v. Barland*, 751 F.3d 804, 810 (7th Cir. 2014) (noting that, “Like its federal counterpart, Chapter 11 [of the Wisconsin statutes] establishes an elaborate regulatory regime for campaign finance in state elections,” and that “the Supreme Court’s decision in *Buckley v. Valeo* . . . limits what [state] campaign-finance regulators may do”); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) (“Because the Supreme Court has upheld [the Federal Election Campaign Act]’s disclosure requirements, we need not invent the wheel in this case. Instead, we identify the ways in which Illinois’s disclosure law is broader or more vague than FECA and then consider whether each difference is constitutionally permissible”); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663 (5th Cir. 2006) (noting that, “[t]he challenged provisions [of the Louisiana campaign finance statute] are similar to what the [U.S. Supreme] Court confronted and upheld in *Buckley v. Valeo*” with respect to the Federal Election Campaign Act).