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Analysis of the "Judicial Ads Act" (S. 4183)

Bill Appears to Be Aimed Solely at Exposing Independent Groups' Donors to Public Disfavor and Serves No Apparent Legitimate "Disclosure" Interest

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Introduction and Executive Summary

The Judicial Ads Act would subject speech by organizations advocating on federal judicial nominations to the Federal *Election* Campaign Act ("FECA") reporting regime. This is an unprecedented and extraordinary measure.

- Federal judges are not elected by voters. For the almost 50 years the FECA has been law, it has only ever applied to campaign spending in connection with federal *elected* positions. It has never applied to groups advocating for or against nominees to appointed federal positions.

- The FECA focuses on election campaigns for good reason. As discussed in this analysis, there does not appear to be any legitimate or constitutionally recognized reason for why the FECA should be applied to groups speaking about judicial nominations.

Even if the Judicial Ads Act were to be defended as an attempt to regulate so-called "grassroots lobbying" on judicial nominations, it is unconstitutional for being both overbroad and underinclusive.

- The bill would indiscriminately regulate groups that only incidentally or occasionally advocate on judicial nominations and require them to broadly expose their donors, even if those donors had nothing to do with the judicial nomination activity.

- The bill would single out grassroots activity on judicial nominations for no good reason. Grassroots lobbying on *every other issue* that comes before Congress has not been regulated for more than 70 years – and would continue to go unregulated if this bill were to pass. This striking regulatory disparity strongly suggests the bill's sponsors simply do not like the particular groups that are speaking about judicial nominations. Such animosity toward disfavored speakers is decidedly not a legitimate basis for legislation.

Lastly, the Judicial Ads Act is unconstitutionally vague. It relies on a Frankenstein amalgamation of speech regulation standards that the Supreme Court has endorsed for limited purposes. When applied to independent groups and judicial nominations, the bill could regulate speech that actually takes no position on those nominations.

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Analysis

I. Overview of Judicial Ads Act

The Judicial Ads Act would require any organization[2] that spends a total of more than $50,000 on "Federal judicial nomination communications" during any calendar year to file reports with the Federal Election Commission (FEC). "Federal judicial nomination communications" are defined to include most forms of public communications and advertising "that [are] susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation of an individual as a Federal judge or justice."

The FEC reports would be required to identify not only the organization's spending on such communications, but also the organization's donors (if any) that have given the organization a total of $5,000 or more during the period beginning on the first day of the preceding calendar year through the date of the report.[3]

II. U.S. Supreme Court Precedents on Campaign Finance Regulation in Judicial Elections

The U.S. Supreme Court has upheld campaign finance regulation over the judicial selection process only in the context of state judicial elections.

In *Williams-Yulee v. The Florida Bar*, the Court upheld a state canon of judicial conduct prohibiting judicial candidates and incumbent judges running for reelection from personally soliciting campaign contributions (while still allowing them to establish campaign committees to solicit contributions on their behalf).[4] The Court reasoned that "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity."[5]

In *Caperton v. A.T. Massey Coal Co.*, the Court held that a justice of the West Virginia Supreme Court of Appeals was required to recuse from a case where the CEO of the appellant in the case had: (1) contributed $2.5 million to a Section 527 political organization to intervene in the justice's race; and (2) spent another $500,000 on independent expenditures of his own in connection with the race.[6] The Court "conclude[d] that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[7] The Court noted that *Caperton* was "an exceptional case" where the "temporal relationship between the campaign [spending], the justice's election, and the pendency of the [appellant's] case" before the West Virginia state court were "critical" to the Court's ruling.[8]

III. U.S. Supreme Court Precedents on Campaign Finance Reporting Requirements

The U.S. Supreme Court has recognized that campaign finance reporting requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and therefore may not be imposed indiscriminately or without sufficient justification.[9] Rather, laws requiring organizations to report their donors, such as the Judicial Ads Act, are subject to "exacting scrutiny."[10] This means the law must further "governmental interests sufficiently important to outweigh the possibility of infringement," and there must be a "substantial relation between the governmental interest and the information required to be disclosed."[11]

The Court has articulated three "sufficiently important" governmental interests for campaign finance reporting laws:

First, the Court has reasoned that identifying a candidate's sources of financial support "allows voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be re-

2 Specifically, the types of "covered organizations" under the bill are any corporation, partnership, Section 501(c) nonprofit group, labor union, Section 527 political organization, and federal PAC.

3 If an organization pays for the communications using a segregated account, the organization would only have to report the donors to that segregated account.

4 575 U.S. 433, 437, 439 (2015).

5 *Id.* at 445.

6 556 U.S. 868, 872, 873 (2009) (Technically, *Caperton* was not strictly a case about campaign finance regulation *per se*, but rather about the standards for judicial recusal. However, the case centered on campaign finance activity and therefore is directly relevant to questions about the constitutionality of the Judicial Ads Act.).

7 *Id.* at 884.

8 *Id.* at 883, 886.

9 *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

10 *Id.*

11 *Id.; id.* at 66 (internal quotation marks and citations omitted).

sponsive and thus facilitate[s] predictions of future performance in office."[12]

Second, campaign finance reporting requirements "deter actual corruption and avoid the appearance of corruption" by allowing the public "to detect any post-election special favors that may be given in return" for campaign contributions.[13]

Third, campaign finance reporting requirements aid in "detect[ing] violations of the contribution limitations" that apply to contributions to candidates.[14]

Taking these three justifications in reverse order: The third rationale – detecting violations of the contribution limits – clearly does not apply. Federal judicial nominees do not raise campaign funds and are not subject to contribution limits.

The second rationale – deterring corruption and the appearance of corruption – also is weak or nonexistent for federal judicial nominations. Since federal judicial nominees do not receive campaign contributions, the only potential source of corruption is the independent spending of groups advocating for or against the nominees.

As a matter of law, the U.S. Supreme Court has held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[15] There do not appear to be any allegations that the organizations advocating on federal judicial nominations targeted by the Judicial Ads Act or their donors are coordinating with the nominees. While the legislation itself contains no legislative findings, the bill appears to be an outgrowth of the "Captured Courts" report issued by the Senate Democratic Policy and Communications Committee.[16] That report also does not allege any coordination between these independent groups and the nominees.

Even if, as the Court found in *Caperton*, it is asserted that *elected* judges may feel beholden to supporters for their independent campaign spending on judges' behalf, there is still a fundamental difference between state elected judges and federal appointed judges.

IFS takes no position on the long-running debate over having elected or appointed judges. However, the whole point of an independent federal judiciary with lifetime tenure is that the judges are independent.[17] By design, federal judges are independent of the presidents that nominate them, the Senators who vote to confirm them, and any groups that may be supporting their nominations. Indeed, from Justice David Souter's liberal rulings to Justice Neil Gorsuch's recent majority opinion on Title VII's protection of employees' sexual orientation, members of the federal judiciary have often and famously bucked the expectations of the presidents that nominated them and of their supporters – including groups targeted by the Judicial Ads Act.[18]

In short, the independent federal judiciary is already a "prophylactic measure"[19] against judicial bias that is fundamental to and baked into our constitutional structure. Therefore, any pretense the Judicial Ads Act may have of further protecting federal judges from feeling beholden to groups supporting their nominations (and those groups' donors) is the type of "prophylaxis upon prophylaxis approach" that is strongly disfavored for laws that burden political speech, such as the Judicial Ads Act.[20]

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12 *Id.* at 66-67; *see also Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (noting that the Court upheld the Bipartisan Campaign Reform Act amendments to the FECA in *McConnell v. FEC*, 540 U.S. 93 (2003), "on the ground that they would help citizens 'make informed choices in the political marketplace.'") (quoting *McConnell*, 540 U.S. at 197).

13 *Buckley*, 424 U.S. at 67.

14 *Id.* at 67-68.

15 *Citizens United*, 558 U.S. at 357.

16 "Captured Courts," Democratic Policy & Communications Committee. Retrieved on July 22, 2020. Available at: https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf (May 2020) at 47. ("Over the coming months, Democrats in the Senate . . . will propose legislative reforms" to address the issues raised in the report.).

17 *See* U.S. CONST. art. III, § 1.

18 *See*, *e.g.*, David Von Drehle, "George Herbert Walker Bush, the 41st President of the United States and the Father of the 43rd, Dies at 94," *Time.com*. Retrieved on July 22, 2020. Available at: https://time.com/longform/president-george-hw-bush-dead/ (Dec. 1, 2018) ("Believing that he was getting a pragmatic conservative, [President George H.W.] Bush was disappointed to see Souter move steadily to the left during his 20 terms on the high court."); Howard Kurtz, "Gorsuch draws personal attacks for breaking ranks on gay rights," *FoxNews.com*. Retrieved on July 22, 2020. Available at: https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights (Jun. 17, 2020) ("Carrie Severino, president of the Judicial Crisis Network, which spent millions to help confirm Gorsuch and Brett Kavanaugh, said Gorsuch had acted 'for the sake of appealing to college campuses and editorial boards. This was not judging, this was legislating – a brute force attack on our constitutional system.'"); Brett Samuels, "Trump says 'we live' with SCOTUS decision on LGBTQ worker rights," *The Hill*. Retrieved on July 22, 2020. Available at: https://thehill.com/homenews/administration/502812-trump-says-we-live-with-scotus-decision-on-lgbtq-worker-rights (Jun. 15, 2020) ("'I've read the decision, and some people were surprised,' [President] Trump said.").

19 *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

20 *Id.*

Indeed, reporting laws like the Judicial Ads Act may actually enhance the risk of corruption and bias rather than alleviate such concerns. There are no apparent indications or allegations that federal judicial nominees are even aware of who is donating to groups supporting their nominations. This is in contrast to the situation in *Caperton*, where the West Virginia judge would know or could easily find out that a litigant appearing before him had spent millions supporting the judge's election, because that information was required to be publicly reported.[21]

This illustrates the double-edged sword of "disclosure." Where donors to groups supporting or opposing government decisionmakers would otherwise remain anonymous, "disclosure" laws essentially create lists of "friends" and "enemies" that aid government officials in rewarding and retaliating against those who ponied up and those who didn't.[22] Indeed, while Senate Democrats[23] are now the ones proposing the Judicial Ads Act, they have made this very point in the past in opposing disclosure requirements.[24]

This leaves us with the first and only remaining rationale the U.S. Supreme Court has recognized for campaign finance reporting requirements – which is that they help voters identify candidates' place "in the political spectrum" and identify the interests to which they are likely to be responsive. Again, federal judges are not elected. Therefore, this rationale would have to be applied by analogy to informing the Senators voting to confirm nominees about the sources of the nominees' support.

However, this is decidedly not the rationale that appears to be underlying the Judicial Ads Act. Rather, to the extent the aforementioned Senate Democratic Policy and Communications Committee report appears to articulate the bill's rationale, the bill's goal is to expose the donors to groups: (1) supporting "judges [who] were chosen not for their qualifications or experience – which are often lacking – but for their demonstrated allegiance to Republican Party political goals"; and (2) "work[ing] to ensure that corporate America, the ultra-rich, and the Republican Party would succeed in the courts."[25]

In other words, Senate Democrats already have determined that the judicial nominees put forward by the Trump White House have a certain judicial philosophy and are inclined to rule a certain way. At a macro level, this is rather matter-of-fact. We know with almost metaphysical certainty that judicial nominees put forward by a Democratic president also will tend to have a certain and different judicial philosophy. Indeed, President Trump made his intention to nominate certain types of federal judges a mainstay of his campaign, and it was no secret what type of judicial philosophy those nominees would have.[26]

Therefore, to the extent that: (1) federal judicial nominees' approach to the law is already generally well-known; and (2) the Senate Democrats supporting the Judicial Ads Act and voting on nominees appear to have already made up their minds on the nominees' (a) judicial philosophies, (b) ideological leanings, and (c) affinity toward certain interests,[27] there does not appear to be any serious argument that exposing the finances of the groups supporting those nominees would add any heuristic value to the nomination process.

Instead, the sole goal of the Judicial Ads Act appears to be exposing the donors of groups supporting federal judicial nominees that the bill's sponsors oppose for the purpose of ginning up public disfavor. This is decidedly not a legitimate justification for campaign finance reporting requirements. Indeed, it is precisely why the Supreme Court and lower courts (all of the tribunals with future nominations that this bill would impact) have recognized that such laws infringe on core First Amendment rights.[28]

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21 *Caperton*, 556 U.S. at 884; *see also* 26 U.S.C. § 527(j)(3)(B) (requiring Section 527 political organizations, such as the one the litigant in *Caperton* had contributed to, to report their donors); *Caperton*, 556 U.S. 873 (noting that the litigant also was required to file "state campaign finance disclosure filings" for his own independent expenditures in support of the judge).

22 *See*, *e.g.*, *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J. *dubitante*) (noting that campaign finance reporting requirements "make[] it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped"); *Akins v. FEC*, 66 F.3d 348, 356 (D.C. Cir. 1995) (noting that when a contribution made to a candidate is reported, "the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents").

23 The Institute for Free Speech is a nonpartisan organization. By identifying the Judicial Ads Act's sponsors' political affiliation, IFS does not mean to impugn their political affiliation in any way, but merely to note that members of their party previously have taken the opposite (and what IFS believes to be the correct) position on the downsides of "disclosure."

24 Alexander Bolton and Mike Lillis, "Opposition to contractors disclosure rule grows among Dems," *The Hill*. Retrieved on July 22, 2020. Available at: https://thehill.com/homenews/senate/161007-opposition-to-disclosure-rule-grows-among-dems (May 13, 2011) (reporting that former Senators Joe Lieberman and Claire McCaskill wrote at the time, "The requirement that businesses disclose political expenditures as part of the offer process creates the appearance that this type of information could become a factor in the award of federal contracts").

25 Captured Courts, *supra* note 16 at 3-4.

26 *See*, *e.g.*, Nick Gass, "Trump unveils 11 potential Supreme Court nominees," *Politico*. Retrieved on July 22, 2020. Available at: https://www.politico.com/story/2016/05/trumps-supreme-court-nominees-223331 (May 18, 2016).

27 Captured Courts, *supra* note 16 at 3-4.

28 *See Buckley*, 424 U.S. at 64; *see also*, *e.g.*, *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) ("'public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute' and 'expose contributors to harassment or retaliation.' [] Ironically, these two values the *Buckley* Court acknowledged would be harmed by the disclosure requirements were the very same values the *McIntyre* Court later believed 'exemplified the purpose behind the Bill of Rights and of the First Amendment in particular' – namely, 'protecting unpopular ideas from suppression'

IV. U.S. Supreme Court Precedent on Lobbying Reporting Requirements

While the Judicial Ads Act proposes to amend federal campaign finance law, the bill nonetheless might be defended as a measure to regulate so-called "grassroots lobbying," insofar as it would regulate activity directed at the U.S. Senate's role in confirming judicial nominees. Even when analyzed under the rubric of the federal lobbying laws, however, the bill fares no better.

In *U.S. v. Harriss*, the U.S. Supreme Court upheld the federal lobbying reporting laws on the grounds that members of Congress have the prerogative to evaluate "the myriad pressures to which they are regularly subjected" in the form of lobbying.[29] The Court explained that Congress may require "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" so as "to know who is being hired, who is putting up the money, and how much."[30]

The lobbying law that *Harriss* upheld was quite "narrow," as the Court emphasized multiple times.[31] Specifically, under the law the Court upheld:

> (1) the person must have solicited, collected or received contributions; (2) *one of the main purposes of such person, or one of the main purposes of such contributions*, must have been to influence the passage or defeat of legislation by Congress; and (3) the intended method of accomplishing this purpose must have been through *direct communication* with members of Congress.[32]

The Judicial Ads Act is materially different from the lobbying law upheld in *Harriss*. The bill would indiscriminately apply to all groups speaking about judicial nominations, regardless of whether their advocacy on such nominations is "one of the[ir] main purposes." The bill also would require such groups to indiscriminately report their donors, regardless of whether "one of the main purposes of such contributions" was to advocate on judicial nominations.

These differences are significant. With respect to the bill's failure to target only those groups whose "main purpose" is to advocate on judicial nominations, the Court has cautioned that "the relation of the information sought to the purposes of the [law] may be too remote" in such circumstances.[33] Similarly, "[t]o [e]nsure that the reach of [the law] is not impermissibly broad," the Court has required contributor reporting mandates to apply only to "contributions earmarked" for the purposes the law purports to regulate.[34]

This type of narrowing not only is good law, it is sound policy and common sense. As IFS has explained many times before, to indiscriminately require groups to report donors who had nothing to do with the types of communications being regulated would result in "junk disclosure" that serves no legitimate public interest.[35]

Equally fatal to the Judicial Ads Act is its singling out of judicial nomination communications for regulation of so-called "grassroots lobbying" – i.e., ads disseminated openly and widely to influence public opinion, as opposed to one-on-one direct communications with members of Congress and their staff. For the more than 70 years that federal lobbying has been regulated,[36] only direct lobbying has been regulated. Proposals to regulate federal grassroots lobbying have been proposed numerous times throughout the years and rejected.[37]

While the Senate's role in confirming federal judges is an important constitutionally prescribed function, it is only one of the innumerable issues that Congress votes on. The Judicial Ads Act's singular and unprecedented focus on grassroots lobbying on judicial nominations is therefore peculiarly underinclusive. When a law that regulates First Amendment activity is underinclusive in this manner, it "raises a red flag" and creates "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or

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and 'individuals from retaliation.'") (quoting *Buckley*, 424 U.S. at 68 and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)) (brackets and ellipses in the original omitted).

29 347 U.S. 612, 625 (1954).

30 *Id*.

31 *Id*. at 623.

32 *Id*. (internal quotation marks omitted, emphasis added).

33 *Buckley*, 424 U.S. at 80.

34 *Id*.

35 *See, e.g.*, Matt Nese, "House Floor Amendment 1 to Kentucky Senate Bill 75: A Threat to Nonprofit Groups' Speech and Kentuckians' Privacy," Institute for Free Speech. Retrieved on July 22, 2020. Available at: https://www.ifs.org/wp-content/uploads/2017/04/2017-03-07_House-Talking-Points_KY_HFA-1-To-SB-75_EC-Disclosure.pdf (Mar. 7, 2017); Matt Nese, "Constitutional Issues with California Assembly Bill 45," Institute for Free Speech. Retrieved on July 22, 2020. Available at: https://www.ifs.org/wp-content/uploads/2013/04/2013-04-23_Assembly-ER-Comments_CA_AB-45_Multipurpose-Organization-Donor-Disclosure.pdf (Apr. 23, 2013).

36 *See* Federal Regulation of Lobbying Act of 1946, 2 U.S.C. § 261 *et seq*.; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq*.

37 *See, e.g.*, R. Eric Petersen, "Lobbying Disclosure and Ethics Proposals Related to Lobbying Introduced in the 109th Congress: A Comparative Analysis," Congressional Research Service. Retrieved on July 22, 2020. Available at: https://fas.org/sgp/crs/misc/RL33234.pdf (Mar. 23, 2006) at 9.

viewpoint."[38] As discussed previously, that appears to be precisely the case here: Senate Democrats have minced no words in expressing their disapproval of the groups advocating on judicial nominations that this bill would regulate."[39]

V. The Judicial Ads Act Is Unconstitutionally Vague

As discussed, speech would trigger regulation under the Judicial Ads Act if it "is susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation of an individual as a Federal judge or justice." This Frankenstein of a regulatory standard is a mish-mash of what are known as: (1) the "functional equivalent of *express advocacy*" standard that Supreme Court Chief Justice John Roberts articulated in *FEC v. Wisconsin Right to Life* ("*WRTL*");[40] and (2) the "PASO" (promote, attack, support, or oppose) standard the Court upheld in a footnote in *McConnell v. FEC*.[41]

There are critical differences between what the Court has endorsed and what the Judicial Ads Act proposes. "Express advocacy" is a relatively objective and bright-line standard.[42] Speech "that is susceptible to no reasonable interpretation other than" express advocacy (i.e., the "functional equivalent") is a vaguer and imperfect regulatory standard that agencies like the FEC have struggled with.[43] However, the vagueness and imprecision inherent in the standard at least is limited to some extent by its being tethered to an objective standard (i.e., express advocacy). By contrast, the PASO standard is a far fuzzier concept, and the functional equivalent of PASO standard that the Judicial Ads Act actually sets forth is even fuzzier.

In *McConnell*, the Court upheld the PASO standard as being sufficiently clear for "set[ting] forth the confines within which potential *[political] party* speakers must act in order to avoid triggering the [law]."[44] The Court's conclusion was based on the premise that "actions taken by political parties are presumed to be in connection with election campaigns."[45] Moreover, the Court reasoned that, if political parties "need further guidance" on what the PASO standard covers, "they are able to seek advisory opinions [from the FEC] for clarification."[46]

The Court has subsequently and sharply soured on the notion that any fuzziness in regulatory standards for political speech may be resolved by seeking an advisory opinion from the FEC. The Court has condemned this so-called remedy as "the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."[47] Therefore, to the extent the Court relied on the FEC's advisory opinion process as a backstop to cure any fuzziness in the PASO standard in the 2003 *McConnell* decision, that part of the holding is arguably no longer "good law."

Moreover, while PASO may be a permissible standard for regulating political parties that "are presumed to be [acting] in connection with election campaigns," there is no basis for presuming anything about the groups the Judicial Ads Act proposes to regulate. For example, civil rights groups like the NAACP and Alliance for Justice, pro-choice or pro-life groups like NARAL or National Right to Life, and gun control or Second Amendment groups like Everytown for Gun Safety or the NRA, all clearly engage in a vast array of activities other than advocacy on judicial nominations. All of these groups may occasionally speak about issues that somehow impact or relate to judicial nominations, or they may directly advocate on judicial nominations. Yet, there is no reason to presume that they are always acting in connection with judicial nominations, which is the premise for the PASO standard that the Supreme Court endorsed that would have to apply here.

The First Amendment entitles these groups to a bright-line, objective standard, under which they can easily determine with metaphysical certainty whether laws such as the Judicial Ads Act will regulate their speech. The bill's functional equivalent of PASO standard provides no such certainty. Under the Judicial Ads Act, a group's ad could trigger regulation as a "Federal judicial nomination communication" even if it does not refer to a clearly identified judicial nominee. Such a broad and open-ended regulatory standard could apply to any speech that merely addresses an issue that impacts a judicial nomination, even if a group is not taking a position on the nomination itself.

38 *Williams-Yulee*, 575 U.S. at 448-49 (internal quotation marks and citation omitted).
39 *See* Captured Courts, *supra* note 16 at 3-4.
40 551 U.S. 449, 469-70 (2007) (emphasis added).
41 540 U.S. 93, 170 n. 64 (2003).
42 *See Buckley*, 424 U.S. at 44 n.52.
43 *See, e.g.*, FEC Adv. Op. No. 2012-11 Draft B at 7-8, *available at* https://saos.fec.gov/aodocs/1206386.pdf; *compare id. with id.* [undesignated] Draft [A] at 8, 25, *available at* https://saos.fec.gov/aodocs/1206385.pdf.
44 540 U.S. at 170 n. 64 (emphasis added).
45 *Id*. (citing *Buckley*, 424 U.S. at 79).
46 *Id*.
47 *Citizens United*, 558 U.S. at 335.

For example, if a judicial nominee's rulings on abortion, the Affordable Care Act, or gun control become a flashpoint in the confirmation process, can a group's ads about those issues be viewed as "promoting, supporting, attacking, or opposing the nomination" – even if they are issues the group regularly speaks about irrespective of the nomination? Under the Judicial Ads Act, such ads may be regulated, or they may not be.[48] And that ambiguity is precisely the problem: Regulatory standards for political speech may not "put the speaker wholly at the mercy of the varied understandings of his hearers."[49]

Conclusion

The Judicial Ads Act furthers no apparent legitimate disclosure interest – whether as the campaign finance bill it purports to be or as a "grassroots lobbying" measure. Rather, the bill appears to weaponize "disclosure" to target groups its sponsors disfavor for taking positions on judicial nominees the sponsors oppose. But if such a bill were to become law, such a weapon also may be used to target groups the sponsors favor. This will simply exacerbate the rancor in the judicial nomination process and is not a proper basis for legislation.

48 The Judicial Ads Act does not use a straight PASO standard. Rather, the bill qualifies it by adding a "susceptible to no reasonable interpretation other than" antecedent. Adding such a qualifier makes the PASO standard less clear and more subjective.

49 *WRTL*, 551 U.S. at 469 (quoting *Buckley*, 424 U.S. at 43) (internal ellipses and quotation marks omitted).

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