A Progress Report to Supporters of the Institute for Free Speech

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1150 Connecticut Avenue NW, Suite 801
Washington, DC 20036
(202) 301-3300
www.ifs.org

Mission

The Institute for Free Speech (IFS), through strategic litigation, communication, activism, training, research, and education, works to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment.

Vision

Free speech. It's fundamental to American democracy. The First Amendment to the Constitution says we have the right to freely speak, associate, assemble, publish, and petition the government. Government and society can't be improved without free speech. Equally important, our free political speech rights help protect every citizen from abuse of governmental power. Free speech can mean the difference between liberty and tyranny.

Today, our free speech rights are under assault. Some politicians seek to stifle dissent, quash opposition, and expand their power. They do this by passing laws that aim to suppress and limit speech about government and candidates, threaten our privacy if we speak or join groups, and impose heavy burdens on organizing. To further their agendas, some organizations want powerful politicians to decide what speech is acceptable and what is not. Others want the government to decide how much can be spent on speech or organizing groups. Such limits make it difficult or impossible for those with differing views to make their voices heard. And if we cannot speak, others cannot hear our ideas, consider them, and act. The result is a democracy that is less vibrant, less dynamic, and less free.

The *Institute for Free Speech* exists to protect and defend the First Amendment's speech freedoms. We believe that differing opinions and new, challenging ideas make for a more robust democracy. We believe free speech makes it possible to improve our country and our lives. We believe free speech makes those in power more accountable to the people. We believe government should never decide who can speak and who can't. We believe government should never decide how much speech is too much.

We put those beliefs into practice by championing free speech for all: those less powerful, those who think differently, those with ideas that may be unpopular at the moment, and those who believe there may be a better way forward. Every day, we go to work and dedicate ourselves to protecting and defending every American's ability to exercise their First Amendment rights to free political speech.

The nonpartisan *Institute for Free Speech* defends the First Amendment on many fronts. We go to court to help clients protect their rights and set new precedents. We work with government officials to craft laws that expand free speech and are consistent with the

Constitution. We produce research on which we build a strong case for speech rights. We communicate with and educate the public, legislators, organizations, and the media to enable every American to understand the importance of the First Amendment's speech freedoms. Our many successes in these areas have served to expand free political speech protections for individuals and organizations.

Free speech for all. That is our vision, our goal, our quest. If you believe in that vision as well, we ask for your support and assistance. Please join us in enhancing and defending free speech rights.

Scope of this Report

This report covers activities related to the use of funds in 2020 through August 15, 2021 from supporters of our efforts to protect and advance free political speech and donor privacy.

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Strategic Litigation

During the time covered in this report, the Institute for Free Speech represented clients in 13 cases defending and/or expanding free speech. IFS also filed 18 new amicus briefs in other important cases during the time covered by this report.

Active Cases as of August 15, 2021

The title of each case, the date our participation began, and its general subject follows:

- *Alaska Policy Forum v. Alaska Public Offices Commission*, August 11, 2021. (Disclosure.)
- *Heatherington v. Madden*, April 15, 2021. (Candidate speech ban.)
- *Institute for Free Speech v. Bonta*, March 7, 2014. (Disclosure of giving to charities.)
- *Institute for Free Speech v. Jarrett*, August 2, 2021. (Disclosure and pro bono legal services.)
- *Joe Markley and Rob Sampson v. State Elections Enforcement Commission*, May 7, 2018. (Limits on candidate speech.)
- *Lakewood Citizens Watchdog Group v. City of Lakewood*, June 2, 2021. (Disclosure and the right to a free press.)
- *Mazo and McCormick v. Way, et al.*, July 2, 2020. (Ballot slogan restrictions.)
- *Mobilize the Message, LLC v. Bonta*, June 23, 2021. (Labor law that discriminates against political speech.)
- *Wyoming Gun Owners v. Buchanan*, June 1, 2021. (Disclosure and vague campaign finance law.)

Notable Institute for Free Speech court and agency wins during the time covered by this report include:

- On July 1, 2021, the United States Supreme Court struck down a California mandate that nonprofit groups soliciting funds in the state reveal their major supporters to state officials. This was the culmination of a years-long effort begun when the Institute for Free Speech was the first organization to sue California for attempting to enforce this requirement in 2014. Although our case was not heard on the merits by the Supreme Court for procedural reasons, IFS was instrumental in organizing dozens of center-left groups and other nonprofit organizations to file or join amicus briefs in support of striking down the previous Ninth Circuit ruling upholding the mandate in *Americans for Prosperity Foundation v. Bonta* and *Thomas More Law Center v. Bonta*.

  In its ruling, the Supreme Court cited several of the briefs that we played a key role in organizing. The opinion noted, “The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici

curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors."

Among the many amicus briefs filed in the case, ours was one of only four discussed by the U.S. Supreme Court justices at oral argument. Justice Gorsuch asked both Solicitor General Prelogar and California's attorney some hypotheticals pulled straight from our brief—whether the government could compel people to turn over their holiday card lists or a list of people they had dated.

On July 2, the Supreme Court vacated the Ninth Circuit's ruling in our case, giving us a win that took over seven years to accomplish.

These results are major victories for protecting Americans' right to support nonprofit causes without fear of official or public retaliation and harassment for their beliefs.

- On May 26, 2020, the IRS finalized a rule to end the agency's collection of the personal information of most nonprofits' major donors. The Institute for Free Speech filed two sets of comments in support of this rule and testified before the IRS in favor of it. We had been pushing for abolishing this requirement for years.

- We won an important ruling at the Connecticut Supreme Court challenging the state's Election Enforcement Commission. Our clients (then-State Sen. Joe Markley and then-State Rep. Rob Sampson) were fined $2,000 and $5,000, respectively, over campaign mailers promoting them as opponents of then-governor Dannel Malloy's tax increase in 2014.

  Acting on a complaint filed by Sampson's opponent, the State Elections Enforcement Commission (SEEC) ruled that the mailers constituted an illegal expenditure on behalf of the governor's opponent. After the SEEC delayed its consideration of an administrative appeal, the agency then argued that because of its own delay the appeal to the court was filed too late to be considered. The state Supreme Court, reversing the lower court, ruled that dismissal would "effectively penalize the plaintiffs for the commission's mistake."

- After the U.S. Supreme Court rejected Tennessee's cert petition in the summer of 2020, a new precedent brought about by our litigation in the Sixth Circuit became final. The Court barred Tennessee from tearing down a sign praising Team USA belonging to our client.

  The key principle at stake in this case goes far beyond a patriot being prohibited from saluting the Olympic team. As the court noted in its opinion, "The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech." As such, the state's law enabled outrageous discrimination against political and public policy speech.

Amicus Briefs

The Institute for Free Speech filed briefs as *amicus curiae* in the following cases that remained active during at least a part of the time covered in this report (dates listed are dates the brief was filed). These cases are described in detail in the appendix.

- *State of Washington v. Grocery Manufacturers Association*, Washington Supreme Court, August 13, 2021 and March 11, 2021. (An $18 million fine for a minor campaign finance filing error violates the Eighth Amendment prohibition on excessive fines.)
- *Federal Election Commission v. Cruz*, United States Supreme Court, August 5, 2021. (Suppression of political speech.)
- *Burwell v. Portland School District 1J*, United States Ninth Circuit Court of Appeals, June 17, 2021. (Compelled speech of K-12 students.)
- *Campbell v. Pennsylvania School Boards Association*, United States Supreme Court, April 16, 2021. (First Amendment retaliation.)
- *Nicole K. v. Stigdon*, United States Seventh Circuit Court of Appeals, April 16, 2021. (Abstention doctrine impeding civil rights claims.)
- *FDRLST Media v. National Labor Relations Board*, United States Third Circuit Court of Appeals, March 29, 2021. (Use of the National Labor Relations Act to silence political speech.)
- *Lowell v. Wright*, Oregon Supreme Court, March 19, 2021 and December 4, 2020. (First Amendment double standard between media and nonmedia speakers.)
- *Americans for Prosperity v. Bonta*, United States Supreme Court, March 1, 2021. (Disclosure.)
- *Rentberry, Inc., et al. v. City of Seattle*, United States Supreme Court, November 23, 2020. (Mootness and First Amendment injuries.)
- *Uzuegbunam v. Preczewski*, United States Supreme Court, September 29, 2020. (Can a nominal damage claim avoid mootness in First Amendment litigation?)
- *Campaign Legal Center v. FEC (Hillary for America and Correct the Record)*, United States District Court for the District of Columbia, September 9, 2020. (Freedom of the press guarantees protect all publishers, not just media corporations.)
- *Multnomah County, et al. v. Mehrwein, et al.*, Circuit Court of the State of Oregon, Multnomah County, August 17, 2020 and October 1, 2019. (Remand from the Oregon Supreme Court to determine whether the contribution limits are unconstitutionally low under the First Amendment.)
- *CIC Services, LLC v. IRS*, United States Supreme Court, July 22, 2020. (Preserving the right to challenge IRS regulations impacting free speech in court.)
- *Campaign Legal Center v. FEC*, United States District Court for the District of Columbia, May 29, 2020. (The court should avoid issuing a default judgment

against the FEC, which until recently did not have a quorum, because that would put speakers at risk.)

- *McKesson v. Doe*, United States Supreme Court, April 9, 2020. (The right to protest.)
- *National Association of Gun Rights v. Mangan*, United States Supreme Court, January 15, 2020. (Freedom of association.)
- *Amawi v. Pflugerville*, United States Fifth Circuit Court of Appeals, December 6, 2019. (Texas law violates the First Amendment right to engage in political boycotts.)
- *Barr v. American Association of Political Consultants*, United States Supreme Court, September 25, 2019. (Content-based ban on political speech using autodialed or prerecorded calls to cell phones violates the First Amendment, particularly since such calls for other purposes are permitted.)
- *Jones v. Jegley*, United States Eighth Circuit Court of Appeals, September 4, 2019. (An Arkansas law prohibiting contributions more than two years before a candidate's next election infringes First Amendment rights.)
- *Arkansas Times LP v. Waldrip*, United States Eighth Circuit Court of Appeals, April 15, 2019. (Political boycotts are protected under the First Amendment.)
- *Crossroads GPS v. CREW, et al.*, United States Court of Appeals for the District of Columbia Circuit, March 18, 2019. (An FEC regulation limiting donor disclosure protected First Amendment privacy in association and should not have been struck down.)
- *Woodhull Freedom Foundation, et al. v. U.S., et al.*, United States Court of Appeals for the District of Columbia Circuit, February 20, 2019. (First Amendment standing doctrine provides standing for a pre-enforcement challenge to a statute of broad scope and uncertain meaning that allows numerous parties, including private litigants and state attorneys general, to bring lawsuits against alleged violators.)
- *Citizens Union of the City of New York, et al. v. Attorney General of the State of New York*, United States District Court for the Southern District of New York, July 2, 2018. (A broad disclosure law is unconstitutional.)
- *Public Citizen v. Federal Election Commission*, United States District Court for the District of Columbia, September 17, 2014. (The court should defer to the findings of the three FEC Commissioners concerning a political committee status determination.)

New Staff and Promotions

Alan Gura, Vice President for Litigation

Alan joined the Institute for Free Speech as Vice President for Litigation in February 2021, replacing Legal Director Allen Dickerson who was confirmed to a seat on the Federal Election Commission in December 2020. In this role, Gura directs our litigation and legal advocacy, leads our in-house legal team, and is managing and expanding our network of volunteer attorneys.

Gura has extensive experience as a First Amendment and appellate litigator. He has argued and won landmark constitutional cases before the United States Supreme Court. He has also argued cases before ten federal courts of appeals and numerous federal district courts throughout the country. Gura was the founding member of Gura PLLC, where he focused on appellate litigation and constitutional law. In 2013, he was named among the 100 Most Influential Lawyers in America by *The National Law Journal*.

Gura is an Adjunct Professor of Law at the Georgetown University Law Center and is a highly sought-after speaker on legal matters in professional and academic settings. He previously served as a Deputy Attorney General for the State of California and as Counsel to the United States Senate Judiciary Committee.

Gura and the Institute for Free Speech previously worked together as co-counsel for the Libertarian National Committee in a case that challenged whether contribution limits may be applied to bequests. Gura also served as local counsel in our challenge to California's demand to see charitable donor lists before granting permission to ask residents for funds.

Owen Yeates, Deputy Vice President for Litigation and Senior Attorney

Owen Yeates joined the Institute for Free Speech in 2015 and served as Acting Legal Director between Dickerson’s departure to join the FEC in December and Alan Gura becoming Vice President for Litigation in February. He is now taking on an expanded role as Deputy Vice President for Litigation and Senior Attorney. During his time with IFS, Yeates has played a key role in many cases and most recently headed a precedent-setting case, *Thomas v. Bright*, in Tennessee. Yeates received his J.D. from Stanford Law School after completing a Ph.D. in Political Science at Duke University.

Don Daugherty, Senior Attorney

Don Daugherty joined the Institute for Free Speech in April 2021 as Senior Attorney after previously serving as Senior Counsel at the Wisconsin Institute for Law & Liberty. Hailed among the “Best Lawyers in America” and Wisconsin’s “Super Lawyers,” Daugherty has over 30 years of experience in trial and appellate litigation and has been a partner at three of Wisconsin’s largest law firms. Daugherty earned his J.D. from Northwestern University School of Law and holds a B.A. from the University of Virginia. He recently served as President of the Eastern District of Wisconsin Bar Association.

Del Kolde, Senior Attorney

Del Kolde joined the Institute for Free Speech in April 2021 as Senior Attorney after over 20 years as a government attorney in Washington state. He has extensive experience as a litigator of criminal cases in state court and civil cases in state and federal court, including over 60 jury trials as lead attorney. Most recently, he spent over a decade handling civil cases for government clients, including First Amendment cases. Kolde earned his J.D. at the University of Chicago Law School and is a graduate of the University of Washington.

Julie Smith, Senior Attorney

Julie Smith joined the Institute for Free Speech in May 2021 as Senior Attorney after serving as Vice President at Cause of Action Institute, where she litigated against federal government overreach and argued before U.S. Courts of Appeals. Previously, Smith was Of Counsel at the law firm Willkie Farr & Gallagher and was a Partner at Foley & Lardner. She also served as a Senior Counsel in the Securities and Exchange Commission's Division of Enforcement and Office of General Counsel. Smith earned her J.D. from Harvard Law School and was an editor of the *Harvard Law Review*.

Martha Astor, Attorney

Martha Astor rejoined the Institute for Free Speech in May 2021 after serving as a staff attorney at the Goldwater Institute since 2019. Astor was previously a summer legal fellow at IFS in 2017, where she contributed to several amicus briefs, including our brief to the Supreme Court in *Carpenter v. United States*. Astor earned her J.D. from Notre Dame Law School in 2019 and has been an Adjunct Professor and Clinical Instructor at Northern Arizona University.

New Washington, D.C. Office

The Institute for Free Speech said goodbye to its longtime home in Alexandria, Virginia and moved into new offices in Washington, D.C. at the beginning of 2020.

Thanks to your generous investment, the Institute for Free Speech has seen significant growth in recent years. Our new location features more offices, a larger conference room, and space for additional desks and offices. The more IFS grows, the more we can lead the fight against restrictions on First Amendment political speech rights.

Our new office is conveniently located between Dupont Circle and downtown D.C., bringing us closer to Congress, the Supreme Court, the Federal Election Commission, and the vibrant community of think tanks and advocacy groups in Washington. We invite you to stop by and tour our new office space the next time you're in town. After all, your investment in our work made it possible.

Research

The Institute for Free Speech firmly believes that long-term success cannot come solely though court action but must include moving both the law and public opinion. It is not necessary to win over majorities (though we strive to do so), but it is necessary to have strong minorities interested in preserving speech rights if we are to improve existing laws, prevent bad bills from becoming law, and secure positive court decisions over time.

To this end, our research efforts are aimed at improving public understanding of the impact of political speech regulations as well as reinforcing our litigation and external relations efforts with solid arguments in support of (or opposition to) speech-related proposals in Congress and state legislatures.

Significant Progress on Two New Free Speech Ratings of the States

Our second free speech rating of the states is nearly completed. These ratings provide incentives for policymakers to examine where their laws fall short in protecting free speech. Our work also provides a roadmap for reform. They are a great resource for members of the American Legislative Exchange Council (ALEC), National Conference on State Legislatures (NCSL), and State Policy Network (SPN). This same information also provides guidance for litigation by exposing the most vulnerable legal targets.

We also commissioned a new rating of the states on each state's anti-SLAPP (Strategic Lawsuit Against Public Participation) law. We hope this rating, which is also nearly complete, will add momentum to a recently adopted model anti-SLAPP law from the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws.

Issue Analyses and Explainers

Institute for Free Speech staff wrote the following publications:

- Do Out-of-State Donations Lead to Electoral Success?
- Has Citizens United Increased Corruption? An Examination of Public Corruption Prosecutions
- The Truth About "Microtargeting" and Political Speech: Why a Ban Is a Bad Idea
- Benefits of "Microtargeting": Why Online Ad Targeting Tools Are Good for Free Speech and Democracy
- Industry-Based Contribution Bans: Should Your Line of Work Determine Your First Amendment Rights?
- Presidential Nominating Convention Accounts' Expenditure Limit: A Cap on Political Expression
- "Paid For By": Principles for Accurate and Effective Political Ad Disclaimers in the 21st Century

- Citizens United After 10 Years: More Speech, Better Democracy

External Relations

To prevent or improve bad legislation and regulations, it is essential that lawmakers understand their constitutional responsibilities, that regulators are made aware of constitutional limits, and that the public be informed of such threats and opportunities.

IFS continuously monitors the federal government and all 50 state legislatures as well as relevant regulatory bodies for proposals that infringe on First Amendment rights.

State-Level Activity

Threats to Free Speech

IFS experts authored educational analyses reviewing the constitutional and real-world impact of proposed donor exposure measures in Colorado, Montana, Nebraska, Ohio, Rhode Island, and South Carolina. These educational resources were distributed to key national and state-based organizations that share our concerns about privacy in association. The Colorado bill died, as lawmakers in both parties were concerned about its impact. The Montana Governor vetoed a proposal over concerns about its dubious constitutionality. IFS staff were invited to appear on Montana talk radio to discuss the constitutional issues with the measure and its potentially devastating impact on nonprofits. The Nebraska measure was never voted on in committee but will carry over to the 2022 session. The Ohio effort is alive thanks to the state's year-round legislative session, but key in-state partners received our detailed policy education analysis. The Rhode Island proposals died without any substantive action upon the General Assembly's adjournment in early July 2021. A subcommittee did not act on the South Carolina proposal, and it will carry over to the 2022 session.

In addition to authoring educational analyses, the Institute has done considerable work to raise awareness of legislative proposals that could impact free speech and to ensure state-level allies understand how pending bills would change current law and how they might violate citizen privacy and impact their constitutional rights. Our experts were active educating the public about the impact of proposals in Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania, and Texas. IFS raised awareness of these anti-speech and anti-privacy efforts and worked with numerous national and state-level organizations. We offered a variety of policy education support functions, including informal analyses, existing IFS resources on related issues, and staff time to explain these concepts and their impact on organizations concerned about First Amendment rights.

Expert Commentary and Analysis

In addition to state-level activity, Institute for Free Speech experts have been a national leader in alerting, analyzing, and messaging the myriad of First Amendment issues in H.R. 1 and S. 1, which propose unprecedented burdens on political speech.

- Our experts produced a substantive analysis of three key components of H.R. 1 that impact free political speech and citizen privacy.
- IFS Chairman and Founder Bradley Smith spearheaded a letter from nine former Federal Election Commission commissioners that criticizes the portions of H.R. 1 that would transform the FEC into a partisan agency.
- Smith was invited as one of just two witness experts on the First Amendment to testify before congressional committees that held hearings on the measures.
- To date, IFS experts authored eight op-eds and eight blog posts, were quoted in over 50 media outlets, appeared on at least five TV news shows and 17 radio shows in cities across the country, and spoke at 13 events where nonprofit organization leaders sought information about the impact of H.R. 1 and S. 1 on First Amendment rights.

Supporting Citizen Privacy in Congress

Senator Mike Braun and Republican Leader Mitch McConnell introduced the "Don't Weaponize the IRS Act" (S. 1777) in May 2021. That bill, which is cosponsored by over 40 senators, would codify the Trump administration's important Schedule B reform that ended the requirement that most nonprofits report the names of their major donors to the IRS. The bill also comes in response to congressional efforts to reverse the Schedule B reform through legislation and pressure on from some leaders in Congress on Treasury Secretary Janet Yellen and IRS Commissioner Charles Rettig to reverse the regulation ending Schedule B filing mandates.

IFS experts were asked for input on the measure and authored an op-ed in *The Hill* to draw attention to the importance of safeguarding citizens who support nonprofits from potential IRS abuse.

Comments Supporting Free Speech Filed at the IRS, FEC and State Agencies

The Institute for Free Speech continually monitors federal and state agencies that may threaten First Amendment rights, including the Internal Revenue Service, Federal Election Commission, and others around the country. When it comes to regulation of political advocacy, the devil is often in the details. Careful attention to detail is one reason the Institute for Free Speech has become the nation's most effective voice for free political speech.

Comments filed with regulators include:

- Comments to the Securities and Exchange Commission on Proposed Climate Change Disclosure
- Comments to the Financial Crimes Enforcement Network on the Advance Notice of Proposed Rulemaking Implementing Beneficial Ownership Information Reporting Requirements

- Comments to the Federal Election Commission on a Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process
- Comments to the Internal Revenue Service Concerning New Information Reporting Required to Treat Contributions from Donor Advised Funds as Public Support

Educating the Public through Speaking Engagements

We strive to educate the public, judges, lawmakers, and regulators about the importance of free speech. Since January 2020, IFS staff spoke at 50 conferences and forums. Notable speaking engagements featuring IFS representatives included:

- Former IFS Litigation Director (and now-FEC Commissioner) Allen Dickerson participating in a Federalist Society Teleforum on associational privacy at the Supreme Court;
- Dickerson speaking at a Yale Law School event on online political advertising regulation;
- IFS Chairman Bradley A. Smith's briefing of several Attorneys General on donor privacy;
- Smith's presentation at the National Conference of State Legislatures' annual Legislative Summit on the intersection of money and political speech;
- IFS Communications Director Luke Wachob explaining to young activists with the Junior State of America Foundation the importance of defending political speech rights;
- IFS President David Keating briefing attendees at the Philanthropy Roundtable's Annual Meeting on the importance of associational privacy to effective philanthropy;
- External Relations Director Matt Nese speaking at an American Legislative Exchange Council Annual Meeting workshop on threats to citizen privacy on a panel that included former Wisconsin Governor Scott Walker;
- Smith briefing reporters on an IFS-hosted media call focused on government censorship of U.S. media;
- Numerous events on legislation in Congress that would impact free speech hosted by various groups, including the Committee for Justice, DonorsTrust, The Federalist Society, the Raleigh-based John Locke Foundation, and Massachusetts Fiscal Alliance, among others;
- Smith headlining a breakfast discussion on donor privacy at the State Policy Network's Annual Meeting;
- Smith discussing *AFPF v. Bonta* and its impact on freedom of association at the Cato Institute's 20th Annual Constitution Day symposium; and

- IFS External Relations Director Matt Nese presenting on various topics relating to protecting donor privacy and First Amendment political speech rights at multiple American Legislative Exchange Council (ALEC) and State Policy Network (SPN) meetings.

IFS experts also spoke at regular meetings and events hosted by Americans for Tax Reform, the First Amendment Lawyers Association, Free Expression Network, multiple state chapters of The Federalist Society, The Fund for American Studies, National Press Foundation, the U.S. Senate Steering Committee, Brigham Young University's Washington Semester Program, Cornell Law School, and Stanford University, among many others.

Communications and Media Outreach

A crucial component of the Institute for Free Speech's overall mission is to educate the public about the dangers of excessive regulations on political speech. In the long term, without an informed public that shares our skepticism of laws limiting free speech rights, there is little possibility of holding back the most excessive and extreme demands of anti-First Amendment activists.

The Institute for Free Speech's communications efforts strengthen and complement our other work. For example, the lawsuits we file provide excellent opportunities for news coverage. This helps to influence public opinion about speech restrictions and how they impact First Amendment rights.

An important aspect of our media outreach and communications efforts is the daily distribution of our signature Media Update. It compiles the top stories of the day on political speech issues and also promotes the Institute for Free Speech's litigation, op-ed placements, original blog posts, and research. The Media Update is distributed every weekday morning by email to nearly 600 reporters, nonprofit attorneys, campaign finance experts, and other influencers of public policy on free speech.

Institute for Free Speech experts also write regular posts of our pro-First Amendment views on the influential Election Law Listserv hosted by University of California Irvine School of Law, which is monitored by many reporters who cover campaigns or campaign finance issues.

In addition, Institute for Free Speech Chairman Bradley A. Smith and President David Keating are regular contributors on topical political speech issues to the *Washington Examiner*. This partnership allows us to broaden the reach of our arguments to a larger audience.

Recapping the Institute's Media Outreach

The Institute for Free Speech lived up to its reputation as the go-to source for journalists seeking to understand political speech issues. IFS experts appeared in nearly 500 news articles and reports, including in national outlets such as *The Wall Street Journal*, *Associated Press*, *Reuters*, *The Atlantic*, *The New York Times*, *The Washington Post*, the *New York Post*, *NPR*, *Business Insider*, *CNN*, *Fox News*, *Newsweek*, and *Politico.*

IFS experts were also quoted in major regional or state newspapers, including *The Detroit News*, *Cleveland Plain-Dealer*, the *Hartford Courant*, *Arkansas Democrat-Gazette*, *Los Angeles Times*, *The Tennessean*, *San Francisco Chronicle*, and *Columbus Dispatch*.

Institute for Free Speech staff had 50 op-eds and letters to the editor published. These pieces have been featured in national and state-based publications across the country, including but not limited to *The Wall Street Journal*, *Detroit News*, *New York Daily News*, *Real Clear Politics*, *Washington Examiner*, *The Hill*, *The Federalist*, *National*

Review, *City Journal*, *New Jersey Star-Ledger*, and *Reason*. Several of these outlets have published multiple op-eds by IFS experts.

In addition to authoring op-eds, Institute for Free Speech staff contributed 85 posts to our blog. The Institute for Free Speech's blog offers IFS experts a platform to dig deep on policy issues, contribute to ongoing debates about political speech regulation, and comment on stories that failed to receive adequate attention in media coverage. Our blog also creates additional opportunities to promote and discuss IFS research, legislative analyses, and legal cases through the lens of current events.

Four Star Charity

Institute for Free Speech Awarded Charity Navigator's Top Ranking for the Seventh Consecutive Year

For the seventh year in a row, the Institute for Free Speech was awarded a 4-star rating by Charity Navigator for "demonstrating strong financial health and commitment to accountability and transparency."

Charity Navigator first rated the Institute for Free Speech in 2015; we received a 4-star rating that year and every year since. Our 4-star status was reaffirmed on June 1, 2021.

Charity Navigator's coveted 4-star rating indicates that the Institute for Free Speech exceeds industry standards in pursuing our mission in a financially efficient way. We received our highest point total ever in 2021, receiving 97.68 out of a possible 100 points.

Appendix

Litigation Detail

The following are short descriptions of each case we were litigating as of August 2, 2021 (in alphabetical order):

Alaska Policy Forum v. Alaska Public Offices Commission **(Disclosure.)**

This case is an excellent example of out-of-control donor disclosure mandates. The Alaska Policy Forum (APF) spent less than $1,000 on five minor communications on its website that discussed ranked-choice voting (RCV). Even though none of the communications mentioned a 2020 ballot measure on RCV, and several didn't even mention Alaska or that November's election, the Alaska Public Offices Commission (APOC) ruled the communications were express advocacy against the ballot question. APF would have to disclose donors or pay an $8,000 fine. We are representing the group in an appeal to Alaska state court of this outrageous decision.

Hetherington v. Madden **(Candidate speech ban.)**

Kells Hetherington is running for the Escambia County School Board to offer his experience in finance to help cut costs and improve performance in the county's public schools. But he fears being punished for sharing his party membership with potential voters, and for good reason. The last time he ran for school board, the Florida Elections Commission fined him $200 for stating that he is a "lifelong Republican."

With the help of the Institute for Free Speech, Hetherington filed a federal lawsuit challenging the Florida law he was punished for violating. Candidates have a First Amendment right to speak to voters about their political views and background. States can establish nonpartisan offices, but they cannot prohibit candidates from mentioning their membership in a political party.

Fining a candidate for telling voters their party affiliation is a clear violation of the First Amendment. Florida's law bans speech that is important to voters, and the candidates appealing to them, at precisely the time it is most relevant.

Party membership is one of the most valuable pieces of information about a candidate to the voting public. It gives an immediate impression of the candidate's outlook and perspective. States should not prohibit candidates from sharing truthful information about their political background.

"I did nothing wrong when I told voters that I am Republican. The Florida Elections Commission fined me $200 under a law that blatantly infringes on my constitutional right to free speech," said Hetherington. "It's an outrage that in the Sunshine State, of all places, we can be punished for telling people what party we belong to. I'm eternally

grateful for the assistance of the Institute for Free Speech in fighting this injustice. Perhaps with the court's help, we can truly have a sunshine state."

Hetherington wrote that he was a "lifelong Republican" in his candidate statement on a county website during his 2018 campaign for school board. Acting on a complaint filed against him, the Florida Elections Commission sought to fine Hetherington $500 for stating his partisan affiliation. Although the Commission eventually reduced the fine, it still forced him to pay $200 for saying that he was a member of a political party.

The law at issue, Florida Statute 106.143(3), states: "A political advertisement of a candidate running for nonpartisan office may not state the candidate's political party affiliation. This section does not prohibit a political advertisement from stating the candidate's partisan-related experience. A candidate for nonpartisan office is prohibited from campaigning based on party affiliation."

Hetherington and the Institute for Free Speech are asking a federal court to strike down this provision as unconstitutional and to ensure Florida officials do not continue to violate candidates' First Amendment right to express their party membership. Hetherington has registered to run for the Escambia County School Board again in 2022. This time, he wants to be able to inform voters of his party affiliation without the threat of being fined.

On July 14, 2021 a federal judge ordered the state not to enforce the law, writing that the law banning "all speech that mentions party affiliation [was] 'an instance of burning the house to roast a pig.'" Florida has yet to indicate whether it will appeal the decision.

The case is *Hetherington v. Lee*. It is before the United States District Court for the Northern District of Florida, Pensacola Division.

Institute for Free Speech v. Bonta **(Disclosure of giving to charities.)**

As in most jurisdictions, charities soliciting contributions in California are required to register with the state. Each year, registered charities are required to file a copy of their IRS Form 990 tax returns with the California attorney general's office as a condition of maintaining their constitutionally protected ability to solicit contributions. On Schedule B of the Form 990, charities are required to report to the IRS the names, addresses, and amount donated for major contributors during the year. The Schedule B is submitted to the IRS on a confidential basis and, under federal law, the agency is prohibited from releasing this information to anyone, except in very narrowly defined circumstances and only on a confidential basis.

Historically, the California attorney general did not require registered charities to file copies of their confidential, unredacted Form 990 Schedule B donor lists with the state. The attorney general only began demanding this information in recent years, and the sudden demands did not arise from any changes in, and were not specifically authorized by, the state's laws and regulations. The attorney general also had not cited any recent change in circumstances warranting these demands. Because the attorney general is not legally entitled to this information and has no good reason for demanding it, the Institute for Free Speech filed suit to stop this practice.

We argued that the California attorney general's demand for our donor information was an infringement of the Institute for Free Speech and its donors' First Amendment rights to free speech and association. Donors who may not necessarily wish to speak on their own about an issue may choose to exercise their right to speak by giving to an organization speaking on their behalf. This is particularly true for unpopular or controversial issues – precisely the type of speech for which the First Amendment's protections are most important.

Donors must be free to give to any lawful cause of their choosing without government intrusion. If government officials are looking over citizens' shoulders and reviewing which groups they give to, they will chill donors' willingness to give to certain groups, thereby reducing their ability to speak, and the effectiveness of their association.

The attorney general also claimed that the default rule should be for individual charities opposing demands for their donor information to demonstrate that they will face particularized harm from turning the data over to the government. In effect, this creates a catch-22 in which organizations and their donors can claim an exemption only after they have already suffered harm or threats, but organizations and donors would have no protection against potential future harm. First Amendment case law does not support such a backwards-looking rule.

The Ninth Circuit ruled for California, prohibiting nonprofits from engaging in protected First Amendment speech if they maintain the privacy of their supporters. The Institute for Free Speech was banned from speaking with potential donors in California unless it reported its donors to the state. Since filing the lawsuit, the Institute has refused to accede to the state's demands and as a consequence stopped soliciting contributions in the state.

On December 18, 2019, IFS asked the U.S. Supreme Court to hear the case and reaffirm its longstanding precedents on freedom of association. On July 2, 2021, the U.S. Supreme Court granted our petition. The Ninth Circuit's ruling was vacated and the case was remanded back to the Ninth Circuit for reconsideration after the Supreme Court's ruling in *Americans for Prosperity v. Bonta* the previous day.

Institute for Free Speech v. Jarrett **(Disclosure and pro bono legal services.)**

IFS filed a lawsuit in federal court against Washington state Attorney General Bob Ferguson and the members, a former member, and executive director of the Washington Public Disclosure Commission (PDC). We argue that the state's campaign finance laws infringe on the First Amendment right to offer *pro bono* legal services in PDC enforcement matters.

We want to represent Tim Eyman, a prominent tax-cut activist, on appeal in a case where a court ruled that he, personally, is a "continuing political committee." The treatment of an individual citizen as a regulated political committee has serious and far-reaching implications for First Amendment rights. Yet we are concerned that representing Eyman could force us to register with the state, file reports, and expose the identities of our confidential donors as if we were involved in an election campaign.

We contend the state has no right to hinder a citizen from receiving *pro bono* legal services. When we asked the PDC if we could provide free legal representation in a court case without having to file campaign finance reports, it failed to answer our questions. One of the commissioners we're suing even admitted the law was 'clearly unclear.'"

In the past, the PDC has aggressively pursued nonprofits that provide *pro bono* representation to political committees. The PDC previously argued in court that the Institute for Justice's *pro bono* representation of a recall campaign constituted an in-kind contribution to the recall. The agency lost that case but never published guidance reflecting the court's decision.

Our lawsuit argues that the state's interference in the provision of *pro bono* legal services is unconstitutional under the First Amendment.

Long ago, the Supreme Court recognized that the First Amendment rights of speech and association protect the right to solicit *pro bono* clients and advocate for the civil rights of those clients in our courts, without burdensome interference by state authorities," as our complaint filed in court explains. Although the Supreme Court recognizes a governmental interest in disclosing the identity of donors to electoral campaigns, no such interest attaches to the provision of *pro bono* legal services provided in a defense posture during a campaign-finance enforcement action or appeal.

The Institute for Free Speech is not able to represent Tim Eyman until there is a final ruling that doing so will not trigger the state's campaign finance laws. Consequently, we are asking the court to issue summary judgment in the case.

The case is *Institute for Free Speech v. Jarrett* in the United States District Court for the Western District of Washington.

***Joe Markley and Rob Sampson v. State Elections Enforcement Commission* (Limits on candidate speech.)**

At issue in this case is a state's effort to restrict voters from hearing important information about elections and candidates. Connecticut's State Elections Enforcement Commission (SEEC) fined two General Assembly members for campaign mailers that discussed the governor's policies. With the help of IFS, the two candidates are fighting back.

Joe Markley, then a state senator, and Rob Sampson, then a state representative (and now a state senator), were ensnared by the law after they decided to split the costs on a series of standard campaign mailers highlighting their achievements in office. The mailers promoted Markley and Sampson as opponents of Governor Dannel Malloy's policies on taxes and government spending. Malloy was also on the ballot that year.

By criticizing the governor's record, the SEEC argued that Markley and Sampson made an illegal expenditure on behalf of the governor's opponent. The SEEC ordered Sampson to pay a $5,000 fine and ordered Markley to pay a $2,000 fine. In order for the ads to be

legal, the SEEC believes the governor's opponent would have had to approve and share in the costs of the ads. This is highly unrealistic and would result in legislative candidates being effectively prohibited from speaking about a governor's policies in campaign ads if the governor is running for reelection.

We asked a Connecticut court to dismiss the fines and declare the law unconstitutional. After the state court ruled that it could not rule on the case because too much time had passed, our clients appealed.

The Connecticut Supreme Court agreed to hear the case before the lower appeals court had even ruled on it. The Supreme Court reversed the lower court and ruled that dismissal of the appeal would "effectively penalize the plaintiffs for the commission's mistake" that delayed a judicial appeal. Now we seek victory on the merits of the case.

Lakewood Citizens Group v. City of Lakewood **(Disclosure and the right to a free press.)**

Lakewood, Colo. city officials claim that a local watchdog group broke the law when its regularly published newsletter reported on candidates in a recent election. The city said it should have exposed its supporters and included campaign disclaimers on its articles. Represented by IFS attorneys, the Lakewood Citizens Watchdog Group filed a federal lawsuit challenging the law as an unconstitutional restriction on freedom of the press.

The Watchdog is asking the court to rule that its newsletter, *The Whole Story*, is protected by the First Amendment and that the city's laws that attempt to regulate its speech are unconstitutional. The group says it has a First Amendment right to report on local issues, including city and county government, elections, and candidates.

From 2015 to 2018, the Watchdog published *The Whole Story* without any legal issues. But in 2019, the city council passed a new ordinance that ensnared the group's speech. The new law regulates any entity that spends over $500 on communications referencing a candidate within 60 days of a municipal election. The law provides no media exemption, making it virtually impossible for news organizations to report on local elections without potentially being forced to register with the city, publish disclaimers on articles, and expose their supporters.

That was a problem for the Watchdog's fall 2019 issue, which covered that November's elections for mayor and city council. After a complaint was filed against the group, a city adjudicator determined that the Watchdog was guilty of making "unambiguous references to current candidates" in *The Whole Story* and ordered it to pay $3,000 in fines. To cover future local elections, the group would have to file invasive reports about its supporters with city officials and print campaign-style disclaimers in its newsletter.

While Lakewood's laws pose a threat to any media outlet, it is no surprise that the Watchdog was targeted first. The law itself appeared targeted at the Watchdog when, the day after passage, Councilwoman Dana Gutwein took to Facebook to celebrate that groups "like the Watchdog must [now] disclose who is paying for it." Laws regulating speech are often used to silence critics of government.

“We report stories other media outlets won’t, and we aren’t afraid to blow the whistle on the city government. The council may not like it, but that’s what the First Amendment is for,” said Dan Smith, President of the Lakewood Citizens Watchdog Group.

The Watchdog is not owned or controlled by any candidate, political party, or political committee. The group mails *The Whole Story* to Lakewood residents two to three times per year, with a circulation of approximately 22,000. The Watchdog first began publishing news articles on its website in 2014 and began publishing *The Whole Story* in 2015.

By failing to exempt independent news gathering and reporting from its campaign finance laws, Lakewood has unconstitutionally infringed on the freedom of the press. That freedom is essential to a functioning democracy, even more so in the context of elections. Politicians may wish to control who can speak about them, but they can’t regulate *The Whole Story*.

Mazo and McCormick v. Way, et al. **(Ballot slogan restrictions.)**

IFS attorneys are representing two candidates for Congress in New Jersey, Eugene Mazo and Lisa McCormick, in a federal lawsuit asking the court to declare the state's restrictions on campaign slogans unconstitutional.

New Jersey law allows candidates in primary elections for Congress to include a slogan of up to six words next to their name on the ballot. The law, however, prohibits slogans from naming or referring to any other person or any incorporated entity in New Jersey, unless the candidate receives their permission. This has fueled a competition in the state to incorporate entities in order to own the rights to their names for ballot slogans and exclude others from using them.

Eugene Mazo is a law professor who is seeking the Democratic nomination to the U.S. House of Representatives in New Jersey's 10th Congressional District. Mazo submitted three slogans, but all were rejected by the state because each named an incorporated entity in New Jersey. To avoid having no slogan appear on the ballot, Mazo did what other candidates do: he registered corporations of his own in the state, named after slogans he wished to use.

Lisa McCormick is a small business owner who is seeking the Democratic nomination for the House in New Jersey's 12th Congressional District. State officials denied her choice of slogan – “Not Me. Us.” – because McCormick did not have permission from an incorporated entity organized in New Jersey under that name. A second slogan naming Bernie Sanders was also denied because she did not have Sanders' permission to use his name. Ultimately, McCormick was able to secure permission to use the slogan, “Democrats United for Progress.”

Candidates have the right to use the rhetoric and language of their choice in their slogans. Yet New Jersey's law allows anyone to claim ownership of a slogan simply by incorporating an entity under that name. This system is unwise and unconstitutional.

The case is *Mazo and McCormick v. Way, et al.* in the United States District Court for the District of New Jersey, Newark Division.

***Mobilize the Message, LLC v. Bonta* (Labor Law that discriminates against political speech.)**

"California allows independent contractors to ask passersby to sign a credit card application, but not a ballot measure petition. It allows them to go door-to-door selling home goods, but not promoting candidates. It allows them to drop off newspapers, but not campaign literature," notes our Vice President for Litigation Alan Gura. "The First Amendment prohibits discrimination against speech based on its content, and that's exactly what's happening" in California after Assembly Bill 5 (AB 5) became law.

IFS attorneys filed a lawsuit in federal court on behalf of a California nonprofit, a political committee, and a company that provides door-knocking and signature-gathering services contending that California's Assembly Bill 5 (AB 5) discriminates against political speech.

The passage of AB 5, which effectively bars campaigns from hiring canvassers as independent contractors, has forced the plaintiffs to cease their longstanding practice of hiring contractors to collect signatures for ballot petitions and engage California voters in discussion. The costs of hiring canvassers as employees, as required by California's new law, makes them unaffordable to many campaigns.

"California lacks a compelling state interest in classifying signature gatherers differently from direct sales salespersons, newspaper distributors, and newspaper carriers, based on the content of their speech," reads the complaint.

The plaintiffs are: Mobilize the Message LLC, a Florida-based company that provides signature-gathering and door-knocking services to campaigns across the country, including in California; Moving Oxnard Forward Inc., a California nonprofit organization that works to create and enact ballot measures in Oxnard, California; and the Starr Coalition for Moving Oxnard Forward, a related political committee.

"The First Amendment guarantees our right to speak to our neighbors about politics, to share with them important information about campaigns, and work together to directly effect change at the ballot box," said Aaron Starr, Founder and President of Moving Oxnard Forward. "California is wrong in holding this form of speech is less protected than speech related to selling consumer products. We hope the courts will agree."

Unable to hire canvassers as employees and fearful of fines from the state for "misclassifying" them as independent contractors, the groups must now cease canvassing activity or rely solely on volunteers.

The case is *Mobilize the Message, LLC v. Bonta* in the United States District Court for the Central District of California.

Wyoming Gun Owners v. Buchanan **(Disclosure and vague campaign finance law.)**

"Americans' right to speak freely about candidates for elected office includes the right to publicly examine candidates' positions," begins the complaint we filed in federal court for our client, Wyoming Gun Owners (WyGO). "Americans also have a right to know what a law means, especially one that may sanction them for engaging in political speech. Vague laws invite arbitrary enforcement and chill speech."

The lawsuit tells the court that the state's electioneering-communications regime is both overbroad and vague in its definition of reportable speech, fails to clearly define contributions and expenditures that must be reported, and violates people's interest in maintaining the privacy of their political associations and preferences.

WyGO made multiple communications to its members and the public about the policy views of candidates for the 2020 election but did not directly support the election or defeat of any candidate. Nevertheless, the Wyoming Secretary of State's Office investigated WyGO's political speech after receiving a complaint from a frequent opponent of the group's policy views. Deputy Secretary of State Karen Wheeler ultimately assessed a $500 fine against WyGO after determining that one of its radio ads "can only be reasonably interpreted as an appeal to vote" for the candidate whose views it praised and against the candidate it criticized.

Speakers in Wyoming, however, cannot predict when state officials will determine that their criticism or praise of a candidate's views has crossed the line into advocacy for their election or defeat, the lawsuit explains. Wyoming's laws fail to clearly advise speakers of what messages are regulated or what information must be reported by the speaker. The Secretary of State's Office has not created regulations clarifying the scope of the law, and the state provides no mechanism for groups to request guidance on how the law applies to their speech.

"We want to speak to our members and the public about what the candidates' positions mean for their Second Amendment rights. The state has left us completely in the dark about how to do that without running afoul of the law," said Aaron Dorr, Director of the Wyoming Gun Owners.

Making matters worse, Wyoming allows private individuals to file complaints alleging that someone else's speech violates the law. This system turns the law into a weapon to silence political opponents. Even if a speaker ultimately prevails against a state investigation, they will have been forced to spend precious time and resources defending their rights instead of fulfilling their mission.

If the First Amendment means anything, it means that government cannot punish Americans for speaking about politics and public policy. Wyoming's laws exceed the state's constitutional authority and create a cloud of uncertainty for any speaker who wishes to communicate with the public about a candidate's views. If the court does not vindicate WyGO's right to speak about candidate policy positions free from state regulation, the group will be forced to cut back its speech and Wyomingites will be

deprived of its views, especially during campaign season, when such speech matters the most.

The case is *Wyoming Gun Owners v. Buchanan* in the United States District Court for the District of Wyoming.

Cases Closed

Calzone v. Missouri Ethics Commission (Lobbying disclosure.)

Our representation of Ron Calzone, a citizen activist in Missouri, began in August 2015. Some legislators and lobbyists in the state attempted to silence Mr. Calzone, who has for many years advocated for individual liberty, free markets, and constitutionally limited government. Unfortunately, as Mr. Calzone says, "My activism has made some powerful enemies… Maybe high-paid lobbyists don't like having to explain to their clients why average citizens, using nothing more than facts, reason, and speech, beat them at their own game time and again."

Mr. Calzone's difficulties with state regulators began on Election Day 2014, when the Society of Government Consultants, a lobbyist guild in Missouri, filed a complaint with the Missouri Ethics Commission. The complaint alleged that when Mr. Calzone spoke with legislators during his advocacy, he was acting as a lobbyist. This claim was surprising because Calzone had never been paid or in any way compensated, nor had he given any gifts to lawmakers. Yet his alleged failure to register as a lobbyist with the state could subject him to fines and possibly even jail time.

The Institute for Free Speech's legal team stepped in to defend Mr. Calzone against these absurd charges, representing Calzone in September 2015 when his case came before the Missouri Ethics Commission. The Commission hearing was a travesty of justice. For over four hours, behind closed doors, the Commission violated basic Constitutional guarantees and ignored the plain words of Missouri laws. Witnesses that the Institute for Free Speech's attorneys had never been informed about testified against Mr. Calzone, documents were entered as evidence that were never verified, and the investigator for the Commission quoted interviews she allegedly conducted with lawmakers, despite admitting that she had deleted all of her notes.

In the end, the Commission concluded that Mr. Calzone was a lobbyist and sought to fine him $1,000 for not properly registering with the state before expressing his opinions about Missouri legislative proposals to state legislators.

Our attorneys appealed the Commission's ruling in Missouri state court. A state court judge ended the proceedings against Mr. Calzone because the initial complaint was filed by a corporation instead of an individual as required by law.

Since another complaint by an individual could again trigger an investigation and fine, our attorneys immediately filed a lawsuit in federal court on October 21, 2016 seeking to have the law declared unconstitutional.

After a loss in federal district court, we appealed to the Eighth Circuit Court of Appeals where a panel of three judges ruled against Calzone, but the opinion drew a sharp dissent. We appealed to the full en banc Eighth Circuit Court of Appeals, which agreed to review the ruling.

On November 1, 2019, the full Eighth Circuit Court of Appeals ruled in favor of our client Ron Calzone's right to petition the government. The Court set a new precedent establishing that unpaid volunteers like Calzone who talk to state legislators, without trying to influence them with gifts, cannot be fined for failing to register as lobbyists.

The case finally ended in March 2020 when the district court judge approved an award for attorney's fees.

South Dakota Newspaper Association, et al. v. Barnett, et al. **(Constitutionality of ban on out-of-state contributions.)**

Americans have the right to support or oppose state ballot measures, even if they are not residents of the state. This was the issue at the heart of this case.

On behalf of our clients, the Institute for Free Speech filed a federal lawsuit to defend this important First Amendment right.

This case began when South Dakota voters approved Initiated Measure 24 in 2018. The law banned "any contribution to a statewide ballot question committee by a person who is not a resident of the state at the time of the contribution, a political committee that is organized outside South Dakota, or an entity that is not filed as an entity with the secretary of state for the four years preceding such contribution."

Such a ban on out-of-state contributions is detrimental to the First Amendment. Courts have long recognized that contributions to ballot measure campaigns promote robust debate about public issues. They therefore receive significant First Amendment protections. This is no less true for contributions from residents of other states.

The plaintiffs in this case were four trade associations that wish to spend funds to speak about ballot measures in South Dakota, and one national nonprofit and one former South Dakota resident who wish to donate funds to groups that speak about South Dakota ballot issues. All six would have been prevented from exercising their First Amendment rights because of the ban.

The South Dakota Newspaper Association is a nonprofit founded in 1882 that represents South Dakota's 114 weekly and 11 daily newspapers. The South Dakota Retailers Association is a nonprofit founded in 1897 that represents nearly 4,000 South Dakota retailers across the state. The South Dakota Broadcasters Association is a nonprofit that represents 26 TV and 118 radio stations in the state. And the South Dakota Chamber Ballot Action Committee is an evergreen committee affiliated with the South Dakota Chamber of Commerce, an organization created by business leaders to promote public policy in the state.

These four groups all advocate for the policies they think are best for South Dakota. To do so, they advocate for and against ballot measures. But all four of these groups also wanted to receive out-of-state contributions to help fund their advocacy. By banning such funds, South Dakota was limiting the First Amendment rights of these groups.

The plaintiffs also included Thomas Barnett, Jr., a former South Dakota resident who has long been active in ballot measure campaigns, who had recently retired to Florida.

This ban thus presented serious harm both to in-state groups looking to accept out-of-state funds and out-of-state groups and citizens looking to speak in the state.

The government had no legitimate interest in enforcing this ban. Far from benefiting the people of South Dakota, this ban would harm them by removing valuable voices in debates about ballot measures. Many state issues have national or regional implications, and voters may wish to hear from non-state residents or businesses who will be affected by state policy. Voters may also wish to hear from national organizations with expertise in specific policy areas.

The lawsuit also argued that the ban was unconstitutional under the Commerce Clause because it discriminates against and burdens the interstate flow of financial contributions from out-of-state individuals.

On May 9, 2019, a federal judge agreed with the Institute for Free Speech's argument that this ban was unconstitutional under both the First Amendment and the Commerce Clause. The state chose not to appeal, and the case formally ended on January 9, 2020 when the federal judge ordered an award for attorney's fees in the case.

Thomas v. Bright **(Constitutionality of Tennessee political sign regulations on private property.)**

The Institute for Free Speech represented William H. Thomas, Jr. in the state's appeal of a federal district court ruling that Tennessee's sign rules are unconstitutional. In March 2017, a federal judge ruled for Thomas, saying Tennessee law violated the First Amendment by creating "an unconstitutional, content-based regulation of speech."

Mr. Thomas owns several roadside signs. This appeal concerned one such sign, which he has used to express various non-commercial messages and opinions, such as cheering on U.S. athletes during the Olympics and celebrating holidays.

Tennessee has sought to tear down Mr. Thomas's sign, but crucially, it would not attempt to do so had it advertised on-site commercial activity or the sale of his property. Such ads are exempt under the law governing billboards in Tennessee. So if a nearby auto body shop wanted to advertise a sale on tires with the same-sized billboard, it could do so. As a result of this exemption, the state must look to a sign's content to determine whether it should be regulated. This creates a major First Amendment problem.

A law that permits a sign that says “cheap cigarettes here,” but prohibits an identical-sized sign that reads “cut the property tax” or “pass the clean water act” is a content-based restriction on speech. Such restrictions must survive strict scrutiny.

Tennessee appealed the lower court’s ruling in October 2017. The Institute for Free Speech represented Thomas during the appeal but was not involved in the case previously.

On September 11, 2019, the United States Sixth Circuit Court of Appeals ruled that the Tennessee Billboard Act is unconstitutional. This ruling set a new precedent in the Sixth Circuit and will be influential in other federal courts. The Court barred Tennessee from tearing down a sign praising Team USA that belonged to our client.

The key principle at stake in this case goes far beyond a patriot prohibited from saluting the Olympic team. As the court noted in its opinion, “The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech.” As such, the state’s law enabled discrimination against political and public policy speech.

Tennessee petitioned the U.S. Supreme Court for review, but the Court denied the petition on July 9, 2020. The case ended with a September 2, 2020 ruling by the District Court Judge providing an award of $259,055 in attorney’s fees for our work in this case.

***Yes on Prop B v. San Francisco* (Compelled speech, including top five donor disclosure on face of communication.)**

Disclaimers must be simple and straightforward so that viewers can remember them and speakers are not forced to read lengthy government scripts. Yet San Francisco has created disclaimer requirements for campaign ads that can take up 28 seconds of ad time or over 30% of printed ads. Such a lengthy disclaimer chills protected political speech and was the subject of the lawsuit, *Yes on Prop B v. San Francisco*.

San Francisco political activist Todd David formed the committee Yes on Prop B to support the passage of a March 2020 ballot initiative to improve his city’s fire, earthquake, and emergency response facilities and services. To support the proposal, Yes on Prop B (“YPB”) intended to purchase digital video ads, yard and window signs, and Chinese language newspaper ads. The group’s efforts to persuade the electorate were effectively silenced by San Francisco’s unconstitutional disclaimer requirements.

On January 28, 2020, Yes on Prop B filed a lawsuit in the U.S. District Court for the Northern District of California to secure its right to speak about elections in common, cost-effective formats. After hearing oral arguments, the court granted only limited relief covering newspaper advertisements and audio and video ads of 30 seconds or less. The ruling upheld the disclaimer regime outside of these narrow categories and determined that the risk of the disclaimers chilling speech was “modest.” In doing so, the district court went against precedent of both the U.S. Supreme Court and the Ninth Circuit.

On March 20, 2020, YPB appealed to the U.S. Court of Appeals for the Ninth Circuit. Represented by attorneys from the Institute for Free Speech, the appellants asked the court to declare San Francisco's disclaimer regime unconstitutional in its entirety.

Unfortunately, on October 21, 2020, the Ninth Circuit ruled that our client's claims were moot and dismissed them without reaching the merits of their arguments.

Amicus Briefs Detail

The following are short descriptions of each case in which the Institute for Free Speech filed an amicus brief during the time period covered in this report or relevant to cases that remained during that time. The list appears in reverse chronological order.

***State of Washington v. Grocery Manufacturers Association*, Washington State Supreme Court and Washington State Court of Appeals, Division II. (An $18 million fine for a minor campaign finance filing error is unconstitutional under the First and Eighth Amendments and chills campaign speech.)**

Can a group be fined $6 million or even more for not properly filing campaign finance reports? The Institute for Free Speech's briefs warn that such a massive penalty is unconstitutional under the Eighth Amendment to the Constitution that bars "excessive fines." Such large fines also harm the First Amendment right to free speech.

The case started in 2013 when the Grocery Manufacturers Association (GMA), a national trade group, opposed a ballot measure that would have mandated GMO labeling. To do so, the group contributed to a Washington state ballot committee and was properly reported as a donor. The funds were fully under the trade group's control, and GMA said it consulted multiple lawyers to ensure it complied with Washington law.

Nevertheless, the State of Washington, pursuing a complaint filed by supporters of the ballot measure, thought the group had acted improperly. The state demanded that GMA file as a political committee and disclose all of its donors. GMA promptly complied, filed the appropriate paperwork, and disclosed all of its contributions and spending involving the Washington ballot measure.

Despite this, the State of Washington sued the trade group. In a shocking decision, Judge Anne Hirsch of the Thurston County Superior Court found that not only was GMA guilty of violating Washington's campaign reporting rules, it also intentionally evaded the law, allowing for the fine to be tripled. The court fined GMA an unprecedented $18 million.

The Institute for Free Speech has filed five briefs in this case. Our first brief was filed July 20, 2017 with a state appeals court. That court reduced the fine to $6 million.

We filed two more briefs with the Washington State Supreme Court. The first brief, filed February 5, 2019, urged the state's highest court to review the lower court's ruling. After the Court agreed to review it, we filed a second brief September 6, 2019 on the merits of the case. Unfortunately, that Court reimposed the original $18 million fine, but remanded the case back to the lower court to determine whether "the penalty imposed in this case violates the excessive fines clauses of the federal and state constitutions."

The lower court ruled that the $18 million fine was constitutional under the Eighth Amendment. On March 11, 2021, we filed another brief with the Washington Supreme Court urging it to grant review of the fine. Review was granted and on August 13, 2021

we filed a brief on the merits urging the Court to "hold that the massive fine imposed on GMA fails the exacting scrutiny required by the First Amendment."

Such fines have incalculable First Amendment harms. As the Institute for Free Speech's brief noted, the court has imposed a massive fine – a death sentence for most groups – with tremendous potential to chill specially protected speech. Fines of this severity are only reasonable to punish truly reprehensible conduct. As noted in our final brief to the Court, "The fine imposed here is massively incommensurate to fines in similar cases, while GMA's conduct bears none of the hallmarks of cases where truly reprehensible conduct justified a punitive fine."

***Federal Election Commission v. Cruz*, United States Supreme Court. (Closely drawn scrutiny.)**

Senator Ted Cruz's recent victory over the Federal Election Commission in a loan-repayment case clarified important First Amendment principles. On August 5, the Institute for Free Speech asked the Supreme Court to make those principles the law of the land. This amicus brief urges the Justices to not merely affirm the district court's ruling in favor of Cruz but also to adopt its reasoning nationwide, providing guidance to lower courts and potential future litigants.

Cruz challenged a provision of the Bipartisan Campaign Reform Act of 2002, otherwise known as McCain-Feingold, that restricts candidates' ability to use campaign donations received after the election to pay back personal loans to their campaign. The D.C. District Court's decision in the case should serve as a model for other courts in two respects. First, the decision focuses on the real-world effect of restrictions on political speech. Our amicus brief notes that in ruling for Cruz, the court recognized that "laws that disincentivize candidates from loaning money to their campaigns will result in less political speech."

Second, the Supreme Court should embrace the district court's careful application of closely drawn scrutiny. Courts have long differed over just how closely to evaluate the government's evidence for speech restrictions under this standard. The Institute's amicus brief notes *Libertarian National Committee v. FEC* and *Lair v. Motl* as recent cases where closely drawn scrutiny was misapplied to uphold restrictions on contributions despite a lack of evidence.

***Burwell v. Portland School District* 1J, United States Ninth Circuit Court of Appeals. (Compelled speech of K-12 students.)**

The courts would never tolerate religious coercion in a public school. But because the subject of the teacher-assigned performative rituals in this case were political rather than religious, the Ninth Circuit panel washed the government's hands of any responsibility for implementing a coercive program of official indoctrination that steamrolls students' First Amendment rights of conscience and dissent.

The appellate court panel's error is profound. The line between religious and political coercion is illusory, but the line between teaching students about controversial subjects

and "asking" them to demonstrate fealty to official political dogma by word and deed is quite bright. School officials trampled that line here, along with the students' First Amendment rights.

The Institute's brief encourages the Court to grant a rehearing en banc, but unfortunately it was denied.

***Campbell v. Pennsylvania School Boards Association,* United States Supreme Court. (First Amendment retaliation.)**

The Third Circuit agreed that the government defendants in this case suppressed or punished Petitioners' use of the Pennsylvania Right to Know Law by filing objectively baseless state tort claims for defamation, tortious interference with contractual relations, and abuse of process. However, it applied the Noerr-Pennington doctrine— a judicially created defense securing First Amendment rights against certain business torts—to bar Petitioners' action alleging government retaliation. Thus, the Third Circuit held that the First Amendment shielded government defendants from Petitioners' retaliation claim.

Our amicus brief urged the U.S. Supreme Court to grant review of the case, focusing on the threshold question of whether a state entity has a First Amendment "right" to petition by filing a lawsuit in court that may provide immunity from liability for violating constitutional rights.

Unfortunately, the Court denied the petition on June 28, 2021.

***Nicole K. v. Stigdon*, United States Seventh Circuit Court of Appeals. (When federal courts should abstain in civil rights cases.)**

When citizens' rights have been violated, they are entitled to their day in court. If you have a federal claim, you are likewise presumptively entitled to your day in federal court.

This basic tenet of the law is, shockingly, at issue in this case, *Nicole K. v. Stigdon*. While the facts of this case do not concern a First Amendment issue, continued expansion of "abstention" doctrines – the idea that federal courts should abstain from hearing a case if there is or could be a state proceeding – could severely limit federal court challenges to state actions that violate your First Amendment rights. The Supreme Court carefully limited what is known as *Younger* abstention, and the district court here erred in its application of the doctrine. But a panel of the Seventh Circuit went even further, ignoring all the restrictions on *Younger* abstention and allowing a court to abstain whenever it felt that respect for the state courts required it to do so.

On April 16, 2021, the Institute for Free Speech joined the Institute for Justice, the ACLU of Illinois, and the Southern Poverty Law Center to call for the rehearing of this case *en banc* before the entire Seventh Circuit.

Correcting this error is crucial to allow future litigation to protect citizens' First Amendment rights clearly and robustly in federal court, without being mired in years of state court litigation.

***FDRLST Media v. National Labor Relations Board,* United States Third Circuit Court of Appeals. (Political speech and labor law.)**

In Ben Domenech's case, a third-party interloper wielded the National Labor Relations Act (NLRA) as a weapon to silence purely political speech with which he disagrees. Particularly in the age of the Internet and social media, expanding the NLRA's definition of "aggrieved party" to include any person, regardless of his or her potential interest in or injury by an employer, will chill constitutionally protected speech of employers and employees alike. The Board's decision should be vacated.

***Lowell v. Wright,* Oregon Supreme Court. (Freedom of the press belongs to every American who publishes.)**

Does freedom of the press belong to the institutional media or to every American who wishes to publish?

The Institute for Free Speech helped write and joined two amicus briefs to the Oregon Supreme Court in an important case on this question. In *Lowell v. Wright*, an Oregon court ruled that plaintiffs in defamation cases can more easily sue and obtain damages from regular citizens than from incorporated media entities. This ruling contradicts consistent Supreme Court rulings that the institutional press has no greater constitutional privilege than ordinary Americans.

The amicus briefs were filed on behalf of IFS, the Electronic Frontier Foundation, Oregon Law Professors William Funk, Ofer Raban, and Kyu Ho Youm, and legal bloggers Professor Glenn Reynolds, Howard Bashman, SCOTUSblog, and Professor Eugene Volokh.

We filed two briefs in this case. The first urged the Court to grant review of the lower court decision. The second argued the merits of the case, and we were granted a portion of the June 24, 2021 oral argument time.

***Americans for Prosperity Foundation v. Bonta,* United States Supreme Court. (Disclosure.)**

The First Amendment protects the right of all Americans to "to pursue their lawful private interests privately and to associate freely with others in so doing." The Supreme Court has issued ruling after ruling reaffirming that cardinal principle, repeatedly striking down donor disclosure regimes. There is one limited exception: in the context of money given and spent on political campaign advocacy, some donor disclosure has been found constitutional. The Ninth Circuit, however, messily grafted that narrow exception onto the Attorney General's dragnet demand for the major donors to all federally registered charities operating in California.

IFS previously filed an amicus brief urging the Supreme Court to hear the case on September 25, 2019. Following the Court's decision on January 8, 2021 to accept the

case, we filed a second amicus brief on March 1, 2021 supporting petitioners on the merits of the case.

On July 1, 2021, the United States Supreme Court struck down California's mandate that nonprofit groups soliciting funds in the state reveal their major supporters to state officials.

***Rentberry, Inc., et al. v. City of Seattle,* United States Supreme Court. (Allowing plea for nominal damages as an exception to mootness.)**

The majority of circuits in the nation allow a plea for nominal damages to serve as an exception to the mootness doctrine. In *Uzuegbunam* (described immediately below), the petitioners argued this simple rule should be applied nationwide, which will allow cases to be litigated to judgment if plaintiffs plead nominal damages, rather than being mooted by the conclusion of an election cycle or the strategic gamesmanship of a government defendant. Such a ruling should be paired with a decision for Petitioners in this case: making plain that there is no need for magical incantations in a prayer for relief, beyond a general statement, to ensure that litigants seeking redress for violations of fundamental freedoms are protected by the *Uzuegbunam* decision.

Our brief was filed and joined by the Council on American-Islamic Relations. On January 11, 2021, the U.S. Supreme Court denied the petition for certiorari.

***Uzuegbunam v. Preczewski,* United States Supreme Court. (Preventing government from changing the rules after appealing and asking for the decision to be vacated.)**

The case began when Georgia Gwinnett College (GCC) prevented a student, Chike Uzuegbunam, from distributing religious literature and speaking about his religious views on campus. Uzuegbunam and Joseph Bradford, a fellow GCC student who refrained from similar activities for fear of the same repercussions, sued the school for violating their First and Fourteenth Amendment rights.

In the middle of the lawsuit, the school abruptly changed its suppressive rules and motioned to have the case dismissed. The district court agreed, and the Eleventh Circuit Court of Appeals affirmed its dismissal. This ruling sets a dangerous precedent for free speech, the Institute's brief explains.

"Should a challenge threaten a law or policy that a school district, public university, or state commission wants to preserve, it can solemnly put the tool away, but in an easy to reach place, until the courts are no longer looking. And if a plaintiff succeeds in obtaining an unfavorable decision, the government may simply change the rules after appealing and ask for the decision to be vacated."

On March 8, 2021, the U.S. Supreme Court reversed the Eleventh Circuit by an 8-1 vote and ruled in favor of Uzuegbunam, and thus the ruling will help ensure standing in future political speech cases that can take years to resolve.

Campaign Legal Center v. FEC (Hillary for America and Correct the Record), United States District Court for the District of Columbia. (Freedom of the press guarantees protect all publishers, not just media corporations.)

The Institute for Free Speech filed an amicus curiae brief on September 9, 2020 before the federal district court in the District of Columbia in support of neither party in the dispute.

Campaign Legal Center (CLC) filed a complaint about the 2016 campaign of Hillary Clinton, alleging that its cozy relationship with an independent group called Correct the Record (CTR) constituted illegal coordination. The Federal Election Commission dismissed this complaint, and CLC brought a lawsuit seeking a court order forcing the Commission to accept the complaint's theory of wrongdoing.

But our brief wasn't about that question – hence the reason we filed in support of neither party in the case. Rather, we noticed an alarming sentence in an opinion by the judge assigned to the case, and we wished to, if you will, "correct the record."

The Clinton campaign and Correct the Record briefly asserted to the FEC that CTR's activities were exempt from regulation under the so-called press or media exemption. Although this defense wasn't the reason for the FEC's dismissal of CLC's complaint, Judge James E. "Jeb" Boasberg weighed in on the issue in denying the Clinton campaign's motion to dismiss the case. Specifically, Judge Boasberg opined that the federal media exemption – the immunity from campaign finance law that lets CNN and Fox News hustle for their preferred candidates – is "for the media" as a class.

But this is wrong. A better understanding of the relationship between the Speech and Press Clauses of the First Amendment is that the protection of free speech applies to what comes out of one's mouth, and the free press guarantee protects what one writes and distributes.

This is not to say the press exemption does not protect "press activities." It just means the FEC cannot interpret the law to privilege a specific class of businesses. (Although, as we observed in our brief, if applying campaign finance obligations to the media "brings about a feeling of trepidation… that might say something about the comprehensive onerousness of our political speech rules.")

***Multnomah County, et al. v. Mehrwein, et al.*, Oregon Supreme Court. (Multnomah County law limiting independent expenditures, limiting contributions to groups making independent expenditures, and requiring donor names be included on communications violates multiple aspects of the First Amendment. The contribution limits are unconstitutionally low or impermissible.)**

We filed two amicus briefs in this litigation.

Since 1976, the U.S. Supreme Court and lower federal courts have repeatedly held, across circumstances and regardless of the speaker, that government cannot prohibit, or even limit, expenditures for communications supporting or criticizing candidates, as long

as those communications are made independently of a candidate. The government cannot even limit contributions that groups receive to fund such expenditures.

Nevertheless, Multnomah County Measure 26-184, which became law, did just that. It appeared to limit each individual and group to making no more than $5,000 and $10,000, respectively, in independent contributions or expenditures, no matter how many candidates they wish to support or oppose. It prohibited groups other than political committees from making expenditures at all. And political committees were strictly limited in the donations they may use to make expenditures.

The measure facilitates efforts to silence ideas by requiring the names of donors to be identified on the face of a communication, discouraging donors from giving. And, by serving donors' names up on the face of the communication, the measure not only discourages donors from giving in the first place, but alters the speaker's message or swallows it entirely. While the Supreme Court has upheld laws requiring reporting to the government, it has held that compelled speech like that at issue here must meet the highest levels of constitutional scrutiny, and that it fails that scrutiny when alternatives are available—such as the government itself publishing the messages, instead of forcing the content out of others' mouths.

The Institute for Free Speech on October 1, 2019 filed an amicus brief to the Oregon Supreme Court in support of the Taxpayers Association of Oregon challenging this law.

On April 23, 2020, the Oregon Supreme Court issued its ruling. It interpreted the law so that the contribution limits would apply only to candidate committees or political committees that made contributions to candidates. It affirmed the lower court's decision that the expenditure limits were unconstitutional. By the time the Court ruled on the disclaimer provisions, the county had amended the law and thus the Court ruled that portion of the challenge was moot. The Court also remanded the case back to the lower court to review whether the measure's contribution limits were constitutional.

We filed a second amicus brief with the Circuit Court of the State of Oregon, Multnomah County on August 17, 2020 and were granted oral argument time.

***CIC Services, LLC v. IRS*, United States Supreme Court. (Preserving the right to challenge IRS regulations impacting free speech in court.)**

Our brief urged the Court to reverse a lower court ruling that could effectively close courthouse doors to lawsuits challenging IRS regulations that impact free speech.

The Sixth Circuit Court of Appeals barred a lawsuit brought by CIC Services, LLC against informal IRS guidance. Citing the Anti-Injunction Act (AIA), a federal law that prevents lawsuits intended to restrain the assessment or collection of taxes, the court ruled that fines for noncompliance with the guidance constituted a "tax" that could not be challenged in court until paid.

That rationale could force nonprofits to pay potentially devastating penalties before challenging IRS actions as unconstitutional, as we explained in our brief. Few groups

have the resources to gamble on a "pay now, fight later" system. Instead, most would choose not to engage in activity, including First Amendment-protected speech, that could potentially trigger a huge penalty.

The Supreme Court heard arguments in the case and on May 17, 2021 issued a strong ruling that will make it easier to mount court challenges to IRS speech regulations.

***Campaign Legal Center v. FEC,* United States District Court for the District of Columbia. (The court should avoid issuing a default judgment against the FEC, which until recently did not have a quorum, because that would put speakers at risk.)**

In *Campaign Legal Center v. Federal Election Commission*, the FEC blew past a court deadline to "show cause" why it had not responded to CLC's complaint in the U.S. District Court for the District of Columbia. The problem was the FEC was without a quorum of Commissioners.

It seemed that CLC took advantage of the FEC's loss of quorum. CLC's administrative complaint was filed on September 12, 2019 – nearly a year after the underlying facts but just twelve days after Commissioner Matthew S. Petersen left the agency without the four vote quorum needed to authorize its attorneys to litigate a case. This tactic should not be encouraged: it is political gamesmanship and a weaponization of campaign finance laws.

As the D.C. Circuit recognized, the FEC's job is "[u]nique among federal administrative agencies" because it "has as its sole purpose the regulation of core constitutionally protected activity." This is why Congress deliberately set up an independent agency to oversee campaign finance law that requires a bipartisan vote before interfering with core First Amendment rights. These are important safety measures to ensure the law isn't made into a sword to attack ideological enemies.

And so the Institute for Free Speech, which often challenges the FEC's actions in court, filed an amicus curiae brief in support of the FEC.

The IFS legal team argued that the Commission should be given more time to defend itself in light of the confirmation of James E. "Trey" Trainor III on May 19, 2020, which restored a quorum at the FEC. Given a little time to meet and begin voting, the FEC would have been able to direct its lawyers how to proceed on CLC's allegations. Our amicus brief also highlighted that CLC may not have had standing to bring its lawsuit in the first place.

A few days after we filed our brief, the judge extended the deadline for the FEC to answer the complaint. The case was dismissed on July 21, 2020.

***Mckesson v. Doe*, United States Supreme Court. (The right to protest.)**

The First Amendment right to protest can be threatened by harassing lawsuits that seek to hold activists accountable for illegal actions they neither committed nor encouraged. In

Mckesson v. Doe, the Institute for Free Speech asked the Supreme Court to institute a heightened pleading standard that protects activists from such speech-chilling lawsuits.

After a police officer was injured at a protest in Louisiana, the officer sought damages against DeRay Mckesson, a leader of the Black Lives Matter movement. Despite no serious allegation that Mckesson caused or encouraged the assault, the Fifth Circuit Court of Appeals allowed the case to proceed.

The lower court's ruling "will serve as a weapon against a particular type of group: those who organize protests which may spawn unauthorized acts of illegality and violence. Such a precedent would inevitably chill future civil rights protests directly, and encourage organizers to remain silent," the Institute's brief explained.

In a *per curiam* decision that was a victory for free speech, on November 2, 2020 the Supreme Court sent the case back to the Fifth Circuit to first determine whether Louisiana law could possibly have made Mckesson liable and to seek "guidance on potentially controlling Louisiana law from the Louisiana Supreme Court."

***National Association of Gun Rights v. Mangan*, United States Supreme Court. (Freedom of association.)**

The Supreme Court established in *Buckley v. Valeo* that the registration and disclosure burdens of PAC status only fall on those groups whose "major purpose" is electoral advocacy. The Ninth Circuit Court of Appeals, however, abandoned the major purpose test, creating a severe danger of overregulation of issue advocacy groups, the Institute's brief explained. The Institute's brief urged the Supreme Court to grant cert and preserve the *Buckley* major purpose test.

"*Buckley*'s rule shields civil society from overregulation, and this Court has repeatedly held that political committee regulations can place undue burdens on community groups focused on issue advocacy," the brief notes.

Unfortunately, the Supreme Court denied the petition on June 1, 2020.

***Amawi v. Pflugerville*, United States Fifth Circuit Court of Appeals. (Texas law violates the First Amendment right to engage in political boycotts.)**

A Texas law violates the First Amendment right to engage in political boycotts. The First Amendment does not allow government to restrict political boycotts it disagrees with. This principle is critical to free speech.

The Texas law prohibits state entities from contracting with companies that boycott goods and services from Israel. It was passed as a response to the "BDS movement," an effort to pressure the Israeli government through boycotts, divestment, and sanctions of Israeli businesses.

IFS filed this brief on December 6, 2019 along with FIRE (Foundation for Individual Rights in Education).

The plaintiffs in the case included five individuals who had lost employment opportunities or potential employment opportunities because of the law. A district court struck down the law on First Amendment grounds on April 25. The state then appealed the ruling to the Fifth Circuit Court of Appeals.

Supreme Court precedent instructs lower courts to analyze a boycott's source, context, and nature to determine if it is protected expressive activity. A political boycott of a foreign government clearly passes that test, IFS and FIRE wrote.

"A boycott is more than the sum of its parts, and its nature and context as a whole must be examined to determine if it is a protected political boycott. The nature and context of the boycotts prohibited by Texas's H.B. 89 squarely place them among the political boycotts protected by the First Amendment and the district court correctly found the provision facially invalid," the brief explained.

The Fifth Circuit ruled the case as moot on April 27, 2020 because "Texas enacted final legislation that exempts sole proprietors" from the no boycott certification requirement.

***Barr v. American Association of Political Consultants*, United States Supreme Court. (Content-based ban on political speech using autodialed or prerecorded calls to cell phones violates the First Amendment, particularly since such calls for other purposes are permitted.)**

Under the Telephone Consumer Protection Act of 1991, the use of automatic dialing or prerecorded calls to cell phones is generally prohibited. The Federal Communications Commission, however, exempts many categories of speech from this prohibition. These include calls made to collect a federal debt, calls from a medical provider reminding recipients of appointments, and calls made for emergencies.

The respondents in this case wished to use an automated dialing system or prerecorded voice to solicit political donations and to circulate political and governmental information. Their inability to do so amounts to an unconstitutional content-based restriction on speech, the Institute's amicus brief explained.

In its landmark 2015 ruling, *Reed v. Town of Gilbert*, the Supreme Court held that such restrictions are plainly unconstitutional. The TCPA and FCC effectively ban political speech in autodialed or prerecorded calls to cell phones while permitting other types of calls. This violates the First Amendment's protection of free political speech.

On July 6, 2020, the Supreme Court decided that the content-based restriction on speech should be severed from the statute.

***Jones v. Jegley*, United States Eighth Circuit Court of Appeals. (State blackout period prohibiting contributions more than two years before a candidate's next election infringes First Amendment rights.)**

The Institute for Free Speech filed an amicus brief September 4, 2019 urging a federal appeals court to allow an Arkansas citizen to make campaign contributions, within legal limits, at a time of her choosing. Arkansas resident Peggy Jones was challenging an unusual blackout period in state law that prohibited contributions more than two years before a candidate's next election. But the state sought to have her case dismissed because she had not been threatened with prosecution for violating the law.

Ms. Jones wanted to contribute to the campaign of State Senator Mark Johnson, who faces re-election in 2022. Under state law, this donation would have been illegal until late 2020. But the state also said Jones could not challenge the law unless she was prosecuted for violating it.

If Arkansas were correct, states could chill the exercise of First Amendment rights by anyone who lacks the resources or willingness to fight back in court. Indeed, Jones refrained from making such a contribution to avoid liability for herself and Senator Johnson. The Institute's brief explained that courts have relaxed requirements for First Amendment challenges to prevent precisely this sort of outcome.

The appeals court ruled for Jones on January 27, 2020.

***Arkansas Times LP v. Waldrip*, United States Eighth Circuit Court of Appeals. (Political boycotts are protected under the First Amendment.)**

Justice Louis D. Brandeis said, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." So it is with Arkansas's law requiring that government contractors certify that they will not boycott Israel for the duration of their contracts or pay a penalty. Although it does not engage in such boycotts, in 2018 the *Arkansas Times* refused to continue making the pledge as a condition of publishing ads for a local college, and the state refused to renew its contract with the paper.

Represented by the ACLU, the *Arkansas Times* filed a lawsuit challenging the law as violating the First and Fourteenth Amendments. Unlike district courts in other states, the district court here upheld the law, holding that the First Amendment does not protect purchasing decisions.

The Institute for Free Speech and the Foundation for Individual Rights in Education filed an amicus brief on April 15, 2019 before the Eighth Circuit Court of Appeals, emphasizing the holistic nature and context test established by the Supreme Court as critical to protecting the associational interests involved in political boycotts. Political boycotts combine associational and expressive activities that are each protected by the First Amendment. And, just as the political boycott is more than the sum of its parts, so is the First Amendment protection it receives. Accordingly, the Supreme Court has determined that the government may restrict boycotts only in narrowly defined instances.

The government may not craftily cripple a boycott by targeting some component of the law that is not speech or "expressive," as the district court allowed the state to do here. Such a test would be ineffective, because every effective boycott has an expressive component, and because it would allow the government to sidestep the First Amendment. Rather, a court must examine the nature and context of the boycott to determine if it is political, and thus constitutionally protected, or if it is organized to further the organizer's economic advantage. The district court here failed to uphold the First Amendment because it dissected the law to see if the spending decision was expressive, ignoring the First Amendment protections given to the political activities as a whole under the nature and context test.

The appeals court overturned the district court ruling on February 12, 2021, but the en banc Eighth Circuit Court of Appeals on June 10, 2021 granted review and vacated the panel's opinion.

***Crossroads GPS v. CREW, et al.,* United States Court of Appeals for the District of Columbia Circuit. (An FEC regulation limiting donor disclosure protected First Amendment privacy in association and should not have been struck down.)**

In August 2018, the U.S. District Court for the District of Columbia struck down a 37-year-old Federal Election Commission regulation that limited donor disclosure triggered by groups that make independent expenditures. In doing so, the district court claimed it was fulfilling Congressional intent, but the court did not consider that Congress had an unconstitutional intent. In such circumstances, the rote application of administrative law is insufficient.

The Institute's brief argued that the district court decision should be reversed, both in order to vindicate the privacy in association that the regulation was designed to protect and to prevent additional, inadvertent constitutional issues that would inevitably follow from the district court's opinion.

The Institute for Free Speech filed the amicus brief on March 18, 2019. On August 24, 2020, the Court upheld the lower court's ruling.

***Woodhull Freedom Foundation, et al. v. U.S., et al.,* United States Court of Appeals for the District of Columbia Circuit. (First Amendment standing doctrine provides standing for a pre-enforcement challenge to a statute of broad scope and uncertain meaning that allows numerous parties, including private litigants and state attorneys general, to bring lawsuits against alleged violators.)**

The Woodhull Freedom Foundation challenged the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) because it "chills sexual speech and harms sex workers." After a federal district court judge ruled the group didn't have standing to challenge the law in court, the Foundation appealed the ruling. The IFS brief supported the Foundation's appeal.

Courts have long recognized "the danger that citizens will not risk speaking in the face of ambiguous or merely possible governmental action," the brief explained. As a result, they have historically relaxed the traditional rules of standing in order to allow Americans to challenge such laws in court.

"This is precisely the kind of case for which First Amendment standing doctrine was developed," the Institute's brief stated. "It is a pre-enforcement challenge to a statute of startling scope and uncertain meaning, directly regulating a major frontier of First Amendment-protected activity. And Congress chose to decentralize its enforcement, permitting numerous parties – including private litigants and state attorneys general – to bring lawsuits against alleged violators."

The Institute for Free Speech filed an amicus brief in support of the Woodhull Freedom Foundation's standing to bring the case on February 20, 2019. On January 24, 2020, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Woodhull Freedom Foundation had standing to bring the case and sent it back to the district court for further consideration.

***Citizens Union of the City of New York, et al. v. Attorney General of the State of New York*, United States District Court for the Southern District of New York. *(*Argues that a broad disclosure law is unconstitutional.)**

This amicus brief was filed on behalf of a wide coalition of groups in support of a challenge to New York state's extremely burdensome donor disclosure laws. These laws would have eliminated donor privacy for almost all nonprofits seeking to speak about public policy. David French, then of *National Review,* wrote that this case was "one of the more important First Amendment challenges that you've likely never heard of." We are committed to defeating such assaults on free speech. Protection for anonymous speech on political issues is critical to preserving the First Amendment.

The Institute for Free Speech was the only group to file an amicus in support of this challenge. We are pleased to report that the Alliance for Justice, a national association of 130 organizations committed to progressive values, and The Philanthropy Roundtable joined our brief.

On September 30, 2019, U.S. District Judge Denise Cote struck down a New York state donor disclosure law violating the right to private association. The state agreed to settle the case and not appeal the ruling, and the case was formally closed on January 20, 2020.

***Public Citizen v. Federal Election Commission*, United States District Court for the District of Columbia. (Argues the court should defer to the findings of the three FEC commissioners concerning a political committee status determination.)**

Public Citizen filed a complaint alleging that Crossroads GPS, a social welfare group organized under Section 501(c)(4) of the Internal Revenue Code, had conducted enough political activity to become a political committee under the Federal Election Campaign Act. After the FEC dismissed the complaint, Public Citizen filed this lawsuit, arguing that the dismissal was "contrary to law."

Our brief, filed September 17, 2014, agreed with the FEC that there is "extensive precedent that the decision of the 3 Commissioners voting not to proceed is entitled to full *Chevron* deference because those Commissioners constitute the controlling group preventing an investigation from proceeding." The "traditional administrative law rubric, however, ignores certain aspects of the Act that in fact support an even more deferential approach to Commission decisions (including evenly split [3-3] decisions) to refrain from exercising its powers."

The brief went on to note that "[t]here is good reason to have both an evenly divided bi-partisan Commission and a requirement that ties go to the accused rather than the accuser. Campaign finance regulation poses a heightened danger that complaints will be used for partisan advantage to silence or hamper a political opponent. Allowing either party to bring the weight of the Commission down on a speaker without bi-partisan support is an invitation for abuse. The requirement of 4 votes to initiate an investigation is an important safeguard against such abuse."

Later, the brief said that First Amendment "concerns rightly place a heavier burden on the Commission when it seeks to burden, punish, or restrict election speakers and conversely provide ample inherent support for Commission decisions declining to so impinge on free speech and association. The asymmetrical First Amendment impact of decisions to proceed or not proceed with investigations is entirely consistent with the asymmetrical voting requirements for proceeding (4 votes) or not proceeding (3 votes)."

"In short," the brief concluded, "the history and structure of our limited government places a significant thumb on the scale favoring inaction over action. Even where, as here, Congress has expressly provided for limited review of a Commission decision to take no further action on a complaint, the historical thumb limiting government action supports keeping such review in this case narrowly confined and not implying greater powers of review that would effectively turn this Court into a tie-breaking vote."

On March 17, 2021, the District Court dismissed the case, holding that the FEC had engaged in an act of unreviewable prosecutorial discretion by declining to pursue charges against Crossroads.

External Relations Detail

Letters and Coalition Statements

- Letter to U.S. House of Representatives in Opposition to H.R. 1
- Letter to U.S. House Administration Committee on H.R. 1's Harms to Speech and Assembly Rights
- Letter to Londonderry, New Hampshire Town Council Concerning Councilors' First Amendment Rights
- Coalition Statement Supporting the Right to Protest During the Pandemic
- Letter to U.S. House Committee on Natural Resources (National Park Service proposed rule regarding demonstrations and special events in the National Capital Region.)

Select Legislative Testimony and Analysis

- Testimony of Bradley A. Smith before the U.S. Senate Rules and Administration Committee on S. 1
- Analysis of H.R. 1
- Analysis of the "Judicial Ads Act" (S.4183)
- Constitutional Concerns with Proposed Code of Wyoming Rules Chapter 002.0005.28
- House Draft Covid-19 Emergency Bill Contains Hidden Threats to First Amendment Rights (Analysis)
- Testimony of Bradley A. Smith before the U.S. House Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Select Regulatory Testimony and Comments

- Comments to SEC on Proposed Climate Change Disclosure
- Comments to FinCen on ANPRM Implementing Beneficial Ownership Information Reporting Requirements
- Comments to FEC on Draft Statement of Policy
- Comments to IRS on Notice 2017-73 Regarding Donor Advised Funds