A New Transparency: How to Ensure Disclosure from "Mixed-Purpose" Groups After *Citizens United*

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Introduction

POLITICAL TRANSPARENCY HAS LONG BEEN HERALDED as the "best of disinfectants" for government.[1] Indeed, as recently as its 2010 decision in *Citizens United v. Federal Election Commission*, the Supreme Court recognized that campaign finance disclosure is a vital measure to "enable[ ] the electorate to make informed decisions and give proper weight to different speakers and messages."[2] Yet the 2010 federal elections following this decision were marked by an unprecedented dearth of disclosure in connection with the independent campaign-related spending of a newly-energized sector: namely, tax-exempt, non-profit corporations organized under section 501(c) of the Internal Revenue Code ("IRC").

Citizens United freed corporations and unions to make expenditures to influence federal and state candidate elections for the first time in over six decades.[3] It did not, however, invalidate any disclosure laws; to the contrary, eight Justices upheld the federal disclosure law that was also challenged in the case.[4] Nevertheless, *Citizens United* led to a period of deficient disclosure by authorizing new campaign-

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1. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting LOUIS D. BRANDEIS, *What Publicity Can Do*, *in* OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. 1933) (1914)).
2. 130 S. Ct. 876, 916 (2010).
3. The prohibition on corporate and union expenditures in elections was first enacted in 1947 as a part of the Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 304, 61 Stat. 136, 159 (superseded by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 112, § 321(a), 90 Stat. 475, 490 (codified as amended at 2 U.S.C. § 441b(a) (2006))).
4. *Citizens United*, 130 S. Ct. at 914–16.

related expenditures that existing federal disclosure requirements were ill-equipped to handle. Under existing federal campaign finance law, a corporation that makes *direct* expenditures on campaign-related advertisements is required to disclose its involvement to the public.[5] If, on the other hand, the corporation contributes to certain 501(c) tax-exempt groups and those groups use such contributions for campaign-related advertisements, in most cases the group is not required to disclose the corporation's contributions under either federal campaign finance law or federal tax law.[6] Only the name of the 501(c) front group is reported.

Unsurprisingly, given this regulatory landscape, corporations and other wealthy interests increasingly turned to 501(c) groups as vehicles to conceal their campaign-related independent spending in the 2010 federal elections. Ultimately, tax-exempt groups that did not disclose their donors financed almost half of the $300 million in independent spending in 2010.[7]

Why did federal campaign finance law fail so spectacularly to capture this spending, or more specifically, to require donor disclosure in connection with this spending? Most immediately, the federal disclosure requirements applicable to independent campaign-related spending were fatally weakened by the Federal Election Commission ("FEC") in 2007, prior to the *Citizens United* decision. But more fundamentally, these 501(c) conduits for corporate money were able to evade disclosure because they engaged in—or claimed to engage in—*both* campaign-related advocacy *and* issue advocacy. These groups were "mixed-purpose" in nature; they allegedly did not have campaign-related activity as their major purpose.

Mixed-purpose groups have long confounded efforts to ensure effective disclosure in connection with independent spending to influence candidate elections. First, it is difficult to tailor laws to target the donors to a mixed-purpose group who intended to fund, or in fact funded, the group's campaign-related advocacy, instead of its issue advocacy or other activities. Second, laws that are not carefully tailored in this respect may be vulnerable to constitutional challenge under the First Amendment.

5. *See infra* Part II.A.

6. *See infra* Parts I.B, II.B.

7. *See Outside Spending*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), http://www.opensecrets.org/outsidespending/index.php (last visited Oct. 8, 2011) [hereinafter *Total Outside Spending*] (looking at the chart entitled "Total Outside Spending by Election Cycle, Excluding Party Committees").

This Article will analyze the legal and constitutional challenges to obtaining meaningful disclosure of donors funding the campaign-related spending of mixed-purpose groups. The first Part of this Article will discuss the effect of *Citizens United* on the 2010 elections and the specific disclosure deficit that arose from the decisions of corporations and other special interests to route their campaign money through mixed-purpose 501(c) groups. Second, this Article will review the disclosure requirements for independent campaign-related spending in federal campaign finance law and describe the FEC's actions that undermined these requirements. Third, this Article will analyze the broader constitutional considerations that arise when donor disclosure is required of mixed-purpose groups and discuss the large-scale legal effort by opponents of campaign finance reform to invalidate or limit disclosure in this area. The final Part will present several models for obtaining donor disclosure in connection with mixed-purpose groups and will assess the constitutionality and effectiveness of such proposals. This Article concludes that the enhanced disclosure required by these models—some of which have already been implemented at the state level—is necessary to maintain transparency in candidate elections, and furthermore, is constitutional under the Supreme Court's First Amendment jurisprudence.

I. The Effect of *Citizens United* on the 2010 Elections

A. Change in the Law and Supreme Court Jurisprudence

In *Citizens United*, the Supreme Court overruled its decision in *Austin v. Michigan State Chamber of Commerce*[8] and part of its decision in *McConnell v. Federal Election Commission*,[9] which collectively had established the constitutional rationale for the restriction of independent spending by corporations to influence candidate elections. Prior to this decision, corporations and unions were prohibited from using treasury funds to finance two types of independent spending: independent "expenditures" ("IEs") and "electioneering communications" ("ECs").[10] But in *Citizens United*, the Court struck down these federal restrictions on corporate expenditures in federal elections,[11] which

8. 494 U.S. 652 (1990).
9. 540 U.S. 93 (2003).
10. *See* 2 U.S.C. § 441b(a)(1), (b)(2) (prohibiting corporate and union expenditures and electioneering communications); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (narrowing funding restriction applicable to corporate and union electioneering communications); *see also* Part II.A.
11. 2 U.S.C. § 441b (2006), *invalidated by Citizens United*, 130 S. Ct. at 913.

had the effect of invalidating the parallel restrictions on union spending as well. The decision also threw into legal jeopardy the statutes in twenty-four states that had restricted corporate campaign-related spending in state elections.[12] As a result, in the 2010 elections, corporations and unions for the first time in decades could spend their treasury funds independently to influence candidate elections.

Prior to *Citizens United*, corporations and unions were required to establish a political action committee ("PAC") to make either political contributions or expenditures, as defined by the law, to influence a federal election.[13] This choice was often referred to as the "PAC option." However, corporate PACs were barred from using corporate treasury funds to finance their campaign contributions or expenditures.[14] Instead, they were required to fund their campaign activities exclusively with contributions raised under the federal contribution limits[15] and solicited only from the corporation's "restricted class" of officers, employees, and shareholders.[16] Further, as a federal political committee, a corporate PAC was subject to comprehensive political committee disclosure requirements, including that it report all of its contributions and disbursements in regular filings with the FEC.[17] This will be discussed in detail in Part II.A. *infra.*

Following *Citizens United*, corporations and unions were released from all restrictions on their independent campaign-related spend-

12. ALA. CODE §§ 10A-21-1.02, 10A-21-1.03 (LexisNexis through 2011 Reg. Sess.); ALASKA STAT. §§ 15.13.135, 15.13.400 (LEXIS through 2010 Reg. Sess.); ARIZ. REV. STAT. ANN. § 16-921 (2011); COLO. CONST. art. XXVIII, § 3(4)(a); CONN. GEN. STAT. ANN § 9-613(a) (Supp. 2009); IOWA CODE ANN. § 68A.503 (West 2011); KY. REV. STAT. ANN. § 121.035 (West 2011); MASS. ANN. LAWS, Ch. 55, § 8 (LexisNexis 2011); MICH. COMP. LAWS ANN. §§ 169.251, 169.254 (West 2011); MINN. STAT. ANN. § 211B.15 (West 2011) (*invalidated by* Minn. Chamber of Commerce v. Gaertner, 710 F. Supp. 2d 868 (D. Minn. 2010)); MONT. CODE ANN. § 13-35-227(1) (2011) (*invalidated by* Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021, 1023 (9th Cir. 2009)); N.Y. ELEC. LAW § 14-116 (McKinney 2011); N.C. GEN. STAT. ANN. § 163-278.19 (West 2011); N.D. CENT. CODE ANN. §§ 16.1-08.1-03.3, 16.1-08.1-03.5 (West 2011); OHIO REV. CODE ANN. § 3599.03 (West 2011); OKLA. STAT. ANN. tit. 74 ch. 62 app. 257:10-1-2 (2011); 25 PA. CONS. STAT. ANN. § 3253 (West 2011); R.I. GEN. LAWS ANN. § 17-25-10.1(h)(1) (West 2011); S.D. CODIFIED LAWS § 12-27-18 (2011); TENN. CODE ANN. § 2-19-132 (West 2011), *repealed by* 2010 Pub. Acts, c. 1095, § 1, eff. June 23, 2010; TEX. ELEC. CODE ANN. §§ 253.094, 253.104 (West 2010); W. VA. CODE ANN. § 3-8-8 (West 2011); WIS. STAT. ANN. § 11.38(1)(a)1 (West 2011); WYO. STAT. ANN. § 22-25-102 (West 2011).

13. *See* 2 U.S.C. § 431(8)(A)(i) (defining "contribution"); *id.* § 431(9)(A)(i) (defining "expenditure"); *see also id.* § 441b(b)(2)(C) (authorizing formation of separate segregated fund).

14. *Id.* § 441b(b)(2).

15. *Id.* § 441a(a)(1); 11 C.F.R. § 114.5(f) (2011).

16. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §§ 114.5–114.8.

17. 2 U.S.C. §§ 432, 433, 434(a)(4), 441d (2006).

ing.[18] The practical impact of this decision was a vast change in the magnitude of the political money available. The differential was particularly acute in the case of corporations. Compare a corporate PAC spending hundreds of thousands of dollars of voluntary contributions from its restricted class to a corporation tapping a treasury that could total millions or even billions of dollars in potential funds. Predictably, independent campaign-related spending in the 2010 federal elections surged, topping out at approximately $304.7 million—a fourfold increase from the total independent spending in the last federal midterm election in 2006.[19]

Because *Citizens United* eliminated the requirement that corporations and unions establish a PAC in order to spend in federal elections, it also effectively eliminated the comprehensive PAC reporting requirements that had formerly applied to corporate or union campaign-related spending. Consequently, the decision also allowed these actors to evade disclosure of their campaign activity. It is important to reiterate, however, that the *Citizens United* decision did not itself invalidate any campaign finance disclosure law, but rather strongly endorsed the federal disclosure law that was also challenged in the case.[20] Nevertheless, *Citizens United*, by both releasing a vast new reservoir of political money and eliminating the PAC requirement for corporate campaign-related expenditures, put increased pressure on federal campaign finance law governing the disclosure of campaign-related spending.

B. The Search for Anonymous Vehicles for Spending

The freedom created by *Citizens United* for corporate and union political activity also came with certain risks. In particular, corporations are often reluctant to be publicly associated with express campaign advertisements, because overt political advocacy can alienate their shareholders and customers and complicate their branding and marketing strategies.[21] Consequently, following *Citizens United*, corpo-

18. Because *Citizens United* considered only the federal restriction on corporate expenditures, the decision did not change the federal law requiring corporations to create PACs in order to give direct contributions to candidates and parties. *See id.* § 441b(a), (b)(2).

19. *See Total Outside Spending*, *supra* note 7. R

20. Citizens United v. FEC, 130 S. Ct. 876, 916 (2010).

21. The cautionary tale for corporate spending in 2010 was Target Corporation. In 2010, Target contributed $150,000 to MN Forward, a Minnesota PAC that was required to disclose its donors under state law. When that PAC made an expenditure to support the campaign of the antigay marriage Republican candidate for governor, Tom Emmer, Tar-

rations wishing to become politically active had an incentive to find spending vehicles that could shield their campaign-related spending from the public. In the 2010 elections, it appeared that the vehicles of choice for corporations and other wealthy interests were tax-exempt, not-for-profit corporations organized under section 501 of the IRC that were not required to publicly disclose their donors under federal tax law.[22]

The IRC provides tax-exempt status to many types of organizations for a range of exempt purposes.[23] A number of these tax-exempt organizations are permitted to engage in "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"[24] (i.e., "campaign intervention") without publicly disclosing their donors under the federal tax laws.[25] These include "social welfare organizations" organized under section 501(c)(4) of the IRC, labor organizations organized under section 501(c)(5), and trade associations organized under section 501(c)(6).[26]

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get came under fire for engaging in political activities that appeared to contradict its own gay-friendly employment policies and public image. *See* Jia Lynn Yang & Dan Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bull's-eye*, WASH. POST (Aug. 19, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081806759.html?wprss=rss_nation. This disclosure led to protests and boycotts of Target led by gay rights groups and other activists. *See* Jennifer Martinez & Tom Hamburger, *Target Feels Backlash from Shareholders*, L.A. TIMES (Aug. 19, 2010), http://articles.latimes.com/2010/aug/19/nation/la-na-target-shareholders-20100820; Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, CBS NEWS (July 28, 2010), http://www.cbsnews.com/8301-503544_162-20011983-503544.html.

22. Prior to *Citizens United*, non-profit corporations were also barred from using treasury funds to make campaign-related contributions or expenditures unless they qualified for an exemption under the Supreme Court decision in *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986). The "MCFL exemption" allowed non-profit advocacy corporations to make expenditures to influence candidate elections if they did not accept contributions from business corporations or unions. *See id.* at 264. Thus, prior to the *Citizens United* decision, non-profit corporations were barred from making IEs if they served as a conduit for business corporate funds. After the decision, non-profit corporations could—and likely did—become vehicles for the campaign-related spending of business corporations and unions.

23. I.R.C. § 501(c) (2006).

24. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1990).

25. Tax-exempt organizations generally are required to file an IRS Form 990, an annual information return with the IRS. *See* I.R.C. § 6033 (2006). Section 501(c)(4), (c)(5), and (c)(6) organizations must report the aggregate costs of their lobbying and campaign activities in their Form 990, which is public information. *See* IRS Form 990, Sched. A, Public Charity Status and Public Support (OMB No. 1545-0047). These organizations must also report the names and addresses of significant donors, but this information is not publicly disclosed. *See* IRS Form 990, Sched. B, Schedule of Contributors (OMB No. 1545-0047).

26. I.R.C. § 501(c)(4)–(6); *see id.* § 501(h)(3).

Importantly, however, a 501(c)(4), (c)(5), or (c)(6) organization is not permitted under its tax status to have campaign intervention as its "primary activity."[27] Thus, a 501(c)(4) group that focuses primarily or exclusively on campaign intervention is vulnerable to revocation of its tax-exempt status. However, for the true mixed-purpose group that engages in both issue advocacy and campaign intervention, 501(c)(4) status may be the appropriate vehicle for its operations and would allow such groups to engage in a broad range of political activities while shielding its donors from public disclosure under the tax laws.

A group seeking tax-exempt status that engages primarily in campaign intervention, on the other hand, is required to organize under a different section of the federal tax code, section 527, which carries with it significant disclosure requirements.[28] The IRC defines a section 527 group as a "political organization . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."[29] The IRC further provides that an "exempt function" in this context is "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . . ."[30]

Virtually all state and federal political committees are organized under section 527 because their primary purpose is campaign-related. On the other hand, not all section 527 groups are required to register as political committees, because some will not meet the definition of political committee under the applicable federal or state campaign finance law.

Although groups organized under section 527 are permitted to make unlimited expenditures for campaign intervention, they are required to provide full disclosure of their activities under either the tax law or federal or state campaign finance laws.[31] Since 2000,[32] the federal tax law required 527 groups that do not report as political com-

27. *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (1960); Rev. Rul. 81–95, 1981–1 C.B. 332 ("Although the promotion of social welfare within the meaning of section 501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is engaged primarily in activities that promote social welfare.").

28. *See* I.R.C. § 527 (2006).

29. *Id.* § 527(e)(1).

30. *Id.* § 527(e)(2).

31. *See id.* § 527(j); *see also* 2 U.S.C. §§ 432, 433, 434(a)–(b).

32. *See* Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (2000) (codified as amended in scattered sections of 26 U.S.C.).

mittees under federal or state campaign finance law to file regular disclosure reports with the Internal Revenue Service ("IRS").[33] These reports must include every contributor who gave over $200 to the 527 during the year, along with the amount and date of the contribution.[34] Alternatively, a 527 group that is registered as a federal political committee must comply with comprehensive disclosure requirements under the federal campaign finance law, which will be outlined in further detail Part II.A. *infra*.

Faced with this regulatory structure, corporations, unions, and other wealthy interests wishing to route their campaign spending through independent groups in the 2010 federal elections had to make a trade-off between the anonymity of a 501(c) group and the political focus of a 527 group. In the 2010 elections, the available public reporting indicated that these interests utilized both types of tax-exempt vehicles.[35]

According to the Center for Responsive Politics, approximately half of the independent spending to influence the 2010 federal elections was attributable to 527 organizations or other groups that provided full donor disclosure to either the FEC or IRS.[36]

The key development in the 2010 election, however, was the shift in independent political spending from relatively transparent vehicles to the mixed-purpose 501(c) groups which do not provide donor disclosure. In the 2006 midterm election 501(c) groups conducted virtually no independent spending, whereas in 2010, 501(c) groups accounted for approximately 42% of independent spending.[37] Indeed, in 2010, the largest two spenders were the U.S. Chamber of Commerce, a 501(c)(6) group, and American Action Network, a

33. *See* I.R.C. § 527(j)(2), (j)(5); *see also* IRS Form 8872, Political Organization Report of Contributions and Expenditures (OMB No. 1545-1696) [hereinafter IRS Form 8872], *available at* http://www.irs.gov/pub/irs-pdf/f8872.pdf.

34. *See* I.R.C. § 527(j)(3); IRS Form 8872, *supra* note 33. The failure to make such disclosure is subject to a penalty equal to the highest corporate tax rate multiplied by the amount of contributions and/or expenditures to which the failure relates. I.R.C. § 527(j)(1). R

35. *See 2010 Outside Spending, by Groups*, OPENSECRETS.ORG (CENTER RESPONSIVE POL.), http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=A&chrt=D (last visited Nov. 12, 2011) [hereinafter *2010 Outside Spending*]; *see also* Spencer MacColl, Citizens United *Decision Profoundly Affects Political Landscape*, OPENSECRETSBLOG (May 5, 2011, 11:16 AM), http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

36. *See 2010 Outside Spending*, *supra* note 35 (filter by "Non-Party Committees"); *see also* MacColl, *supra* note 35. R R

37. MacColl, *supra* note 35. R

501(c)(4) group, spending $32.9 and $26.1 million respectively.[38] In short, in the 2010 elections, donors in significant numbers chose the anonymity provided by a mixed-purpose group over the political focus provided by a 527 group.

Disclosure declined precipitously as a result. In 2006, only about 1% of independent spending in the election was undisclosed; by contrast, in 2010, approximately 47% of all independent electoral spending was made through groups that did not disclose their donors.[39]

Given the lack of disclosure, it is difficult to quantify the degree to which this shift to 501(c) groups in 2010 was specifically fueled by *Citizens United* and the corporate and union expenditures that the decision authorized. However, the prominence of groups affiliated with corporate interests, such as the U.S. Chamber of Commerce, strongly suggests a significant corporate role.

In this manner, *Citizens United* played a part in fueling the turn to 501(c) groups for independent spending in 2010. But the *reason* that these 501(c) groups had so few disclosure obligations was the FEC's decision to undermine the existing federal campaign finance laws that would have required donor disclosure in connection with at least some portion of this spending by 501(c) groups. Thus, the independent spending unleashed by *Citizens United*—and the fact that many deep-pocketed donors apparently preferred to make expenditures through anonymous 501 groups—exacerbated pre-existing weaknesses in federal campaign finance law. But *Citizens United* did not create the problem of disclosure in connection with mixed-purpose groups.

II. The Legal Dimensions of Disclosure

Mixed-purpose groups engaging in campaign-related advocacy have long raised challenges with respect to disclosure. As discussed above, federal tax law does not require a number of tax-exempt corporations organized under section 501 to publicly disclose their donors. Federal campaign finance law has not proven to be much more effective. This was particularly the case in 2010, when independent spending disclosure requirements were either inapplicable to mixed-

38. *See 2010 Outside Spending*, *supra* note 35. R

39. MacColl, *supra* note 35. *Compare 2010 Outside Spending*, *supra* note 35, *with 2006 Outside Spending*, OpenSecrets.org (Center Responsive Pol.), http://www.opensecrets.org/outsidespending/summ.php?cycle=2006&chrt=D&disp=O&type=P (last visited Nov. 12, 2011). R

purpose groups, or if applicable, had been so weakened by the FEC as to be ineffective.

A. The Federal Campaign Finance Disclosure Regime

The Federal Election Campaign Act ("FECA")[40] creates a two-tier structure for the disclosure of independent spending[41] to influence federal candidate elections. First, "political committees" whose major purpose relates to campaign-related advocacy are required to comply with comprehensive disclosure requirements.[42] Second, individuals and mixed-purpose groups are required to file more limited, ad-specific reports in connection with certain types of independent campaign-related advertisements.[43]

With respect to the first tier of disclosure requirements, federal political committees are subject to detailed organizational, reporting, and disclaimer requirements.[44] Upon formation, a political committee must register with the FEC by filing a statement of organization, as well as appointing a treasurer responsible for the committee's compliance with the federal campaign finance laws.[45] The key disclosure requirement is a continuous reporting requirement.[46] All committees must file periodic reports with the FEC on a monthly, quarterly, or semiannual basis[47] that itemize all receipts and disbursements of the committee exceeding $200.[48] These reports must include the name, address, and employer of each contributor and the amount of his or her contribution.[49] Finally, any public communications made by a political committee must display a disclaimer disclosing the name of the committee and its address, telephone number, or website address.[50]

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40. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–456 (2006)).

41. An expenditure is "independent" if it "is not made in concert or cooperation with or at the request or suggestion of [a] candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17)(B).

42. *Id.* §§ 432, 433, 434(a)–(b).

43. *Id.* § 434(c), (f).

44. *Id.* §§ 432, 433, 434(a)–(b).

45. *Id.* §§ 432, 433.

46. *Id.* § 434(a).

47. *Id.* § 434(a)(4).

48. *Id.* § 434(b)(3). Several types of receipts must be itemized regardless of amount, including contributions from political committees, transfers from affiliated committees, and loans received. 11 C.F.R. § 104.3(a)(4) (2011).

49. 2 U.S.C. § 434(b)(3), (h)(i)(1); *see also id.* § 431(13)(A) (defining "identification" of individuals as meaning "the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer").

50. *Id.* § 441d(a); 11 C.F.R. § 110.11(a)–(c).

Importantly, however, the Supreme Court narrowed the scope of permissible political committee regulation in *Buckley v. Valeo*.[51] FECA defines a federal "political committee" as any group that "receives contributions" or "makes expenditures aggregating in excess of $1,000 during a calendar year."[52] Fearing that this definition raised overbreadth and vagueness concerns, the *Buckley* Court limited the definition of political committee status to encompass only those "organizations that are under the control of a candidate *or the major purpose* of which is the nomination or election of a candidate."[53] The disbursements of such "major purpose" groups, according to the Court, can be regulated because they "can be assumed to fall within the core area sought to be addressed by Congress."[54] Such disbursements "are, by definition, campaign related."[55] Thus, since *Buckley*, federal political committee status can only be imposed on those independent groups whose major purpose is campaign-related. It should be noted, however, that at the time *Buckley* was decided, political committee status entailed not only these disclosure requirements but also strict limits and source restrictions on the contributions committees could accept.[56]

For individuals and groups engaged in independent spending that are not major purpose groups, FECA requires only ad-specific reports in connection with two types of independent advertisements: IEs and ECs.[57]

Since its enactment, FECA has required persons making IEs exceeding $250 in a calendar year to report these expenditures to the

51. 424 U.S. 1 (1976).

52. 2 U.S.C. § 431(4)(A).

53. *Buckley*, 424 U.S. at 79 (emphasis added).

54. *Id.*

55. *Id.*

56. In terms of fundraising, a "nonconnected" political committee must comply with a $5000 contribution limit, 2 U.S.C. § 441a(a)(1)–(2), and a prohibition on corporate and union contributions, *id.* § 441b(a). Notably, in 2010, the FEC authorized a subcategory of political committees to operate without these fundraising constraints in response to *Speech Now.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). There, the en banc D.C. Circuit Court of Appeals invalidated the federal contribution limits as applied to federal political committees that make only IEs and do not contribute to candidates or political parties. Following this decision, the FEC made clear that political committees that make only independent expenditures, colloquially dubbed "Super PACs," are no longer bound by the federal contribution and source restrictions. *See* Club for Growth, Advisory Op. 2010-09 (F.E.C. July 22, 2010); Commonsense Ten, Advisory Op. 2010-11 (F.E.C. July 22, 2010).

57. 2 U.S.C. § 434(c), (f).

FEC and to include disclaimers on the advertisement.[58] FECA originally defined "expenditure" as any disbursement "for the purpose of influencing any election for Federal office."[59] The Supreme Court found this definition overbroad and unconstitutionally vague with respect to non-major purpose groups, however, and narrowly construed the term to cover only "communications that *expressly advocate* the election or defeat of a clearly identified candidate."[60] Thus, only express advocacy advertisements give rise to the IE disclosure requirements.

An IE report typically must be filed at the end of the first calendar quarter in which a person's IEs exceed the $250 statutory threshold and then in each subsequent quarter that year in which additional IEs of any amount are made.[61] The reports must disclose the identity of the sponsor funding the express advocacy, the recipients of disbursements for the ad, and each person who made a contribution of over $200 to the ad sponsor "*for the purpose of furthering* an independent expenditure."[62] This "for the purpose of furthering" language present in one section of the statute[63] significantly limits donor disclosure, at least under the current FEC interpretation of the law, because it requires only the disclosure of those contributors who have "furthered" the group's advertisements, not necessarily all donors to a group engaged in campaign-related spending.[64]

The second type of independent advertisement that mixed-purpose groups and individuals must disclose is ECs. Congress in 2002 enacted the Bipartisan Campaign Reform Act ("BCRA")[65] to regulate ECs after the express advocacy construction of the IE disclosure provi-

58. *Id.* § 434(c)(1). IEs must also include disclaimers on the face of the ad disclosing the sponsor's name, address, telephone number, and World Wide Web address, but not any of the donors to the sponsor group. *Id.* § 441d(a)(3).

59. *Id.* § 431(9)(A)(i) (defining "expenditure").

60. *Buckley*, 424 U.S. at 79–80 (emphasis added) (footnote omitted).

61. 11 C.F.R. § 109.10(b) (2011); *Instructions for Preparing FEC FORM 5*, FEC, at 1 http://www.fec.gov/pdf/forms/fecfrm5i.pdf (last visited Nov. 12, 2011). IEs exceeding $1000 in the twenty day window before an election must be reported within twenty-four hours of the expenditure, 2 U.S.C. § 434(g)(1), and IEs exceeding $10,000 prior to this twenty day window must also be reported within twenty-four hours, *id.* § 434(g)(2). Political committees are also required to file these twenty-four hour reports in connection with their independent expenditures. *Id.* § 434(g)(1)(A), (g)(2)(A).

62. 2 U.S.C. § 434(c)(2)(C) (emphasis added); *see also id.* § 434(c)(1).

63. Another section of FECA suggests that persons making IEs of over $250 are required to report all donors of over $200 in the reporting period. *See* 2 U.S.C. § 434(c)(1) (cross-referencing *id.* § 434(b)(3)(A)).

64. 11 C.F.R. § 109.10(e)(1)(vi).

65. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

sions proved too narrow to capture the full range of campaign-related advertising. ECs are defined as: (1) a broadcast, cable, or satellite communication that clearly identifies a candidate for federal office; (2) airs within thirty days of a primary election or convention or sixty days of a general election; and (3) is targeted to the relevant electorate.[66]

The BCRA requires all persons and groups to report any payments for ECs exceeding $10,000 in a calendar year to the FEC within twenty-four hours of the expenditure.[67] The law sets forth two options for this reporting. If the ECs are financed from a segregated bank account with funds donated by individuals, the group sponsoring the ad must disclose all contributors of $1000 or more to *such account*. On the other hand, if the ECs were financed from the group's general treasury, the group is required to report *all* of its contributors of $1000 or more.[68] The BCRA thus omitted the narrowing "for the purpose of furthering" language present in FECA's independent expenditure reporting provision and instead required comprehensive donor disclosure.[69]

Unfortunately, in response to the Supreme Court's decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[70] the FEC in 2007 adopted a rule that effectively gutted the EC reporting requirements. Following *Wisconsin Right to Life*, the FEC initiated a rulemaking to clarify, among other matters, the reporting requirements for corporations and unions making ECs that the decision had newly authorized. The final rule, however, did not adhere to the statutory language in the BCRA that required the disclosure of *all* contributors to persons and groups making ECs.[71] Instead, the FEC imported the "for the purpose of furthering" language from the IE reporting requirement and required corporations and unions to disclose only those persons who contributed $1000 or more "*for the purpose of furthering* electioneering communications."[72] In the Explanation and Justification, the FEC further narrowed the reach of the rule by explaining that only those donations that were "*specifically designated* for [ECs] by

66. *See* 2 U.S.C. § 434(f)(3)(A)(i).

67. *Id.* § 434(f).

68. *Id.* § 434(f)(2)(F).

69. In addition to this reporting requirement, ECs are also subject to disclaimer requirements similar to those applicable to independent expenditures. 2 U.S.C. § 441d(a).

70. 551 U.S. 449 (2007).

71. *See* 11 C.F.R. § 104.20(c)(9) (2011).

72. *Id.* (emphasis added).

the donor" would meet this "purpose" standard.[73] Thus, the final rule compelled disclosure only of those contributors who affirmatively designated their contributions for the purpose of funding ECs. Any donor who was silent as to the intended purpose of his or her contributions could evade disclosure.

Further exacerbating the new loophole in the law, three of the FEC's six Commissioners refused even to enforce the regulation as written. During a 2010 enforcement action against Freedom's Watch, these Commissioners blocked an investigation into the group's failure to provide donor disclosure. The Commissioners argued that the 2007 regulation required disclosure of only those donors who contributed "for the purpose of furthering the electioneering communication that is the *subject of the [disclosure] report*."[74] This ruling meant that only those donors who indicated that their donation was for the purpose of funding a *specific* EC, not the group's ECs generally, would be subject to disclosure. Because many ads are developed and aired only after an advocacy group raises the funds to finance them, this interpretation of the regulation effectively eliminates donor disclosure altogether.[75]

B. Application of Federal Campaign Finance Law to Mixed-Purpose Groups

Although federal law established two tiers of disclosure requirements for independent spending, neither required disclosure of the donors to many of the mixed-purpose 501(c) non-profit corporations active in the 2010 elections.

As discussed above, the comprehensive disclosure requirements for federal political committees are only applicable to major purpose groups. Hence, groups that are mixed-purpose in nature—as claimed by many of the 501(c) groups active in the 2010 election—cannot be

73. *See* Electioneering Communications, 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007) (to be codified at 11 C.F.R. pts. 104, 114) (emphasis added) (relating to the rules governing ECs).

74. Freedom's Watch, Inc., MUR 6002, at 5 (F.E.C. Aug. 13, 2010), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf (emphasis added); *see also* Paul S. Ryan, Citizens United *and the 'Effective Disclosure' System That Wasn't*, CAMPAIGN LEGAL CENTER BLOG (Jan. 24, 2011), http://www.clcblog.org/index.php?option=com_content&view=article&id=412&Itemid=1 (quoting 2 U.S.C. § 434(c)(2)(C)).

75. In April 2010, U.S. Representative Chris Van Hollen (D-MD) filed a lawsuit challenging the FEC's 2007 rule narrowing the EC reporting requirements, arguing that the rule was arbitrary, capricious, and contrary to law. *See* Complaint, Van Hollen v. FEC, No. 1:11-cv-00766-ABJ (D.D.C. Apr. 21, 2011). This case is pending before the U.S. District Court of the District of Columbia. Attorneys from the Campaign Legal Center are co-counsel for plaintiff.

required to register as federal political committees. Only groups meeting the major purpose test set forth in *Buckley* can constitutionally be required to assume this status.

While the IE and EC reporting requirements do apply to mixed-purpose groups, these reporting requirements were fatally weakened by the FEC's 2007 rule and subsequent FEC actions interpreting this rule. An analysis by Public Citizen indicated that the percentage of groups running ECs that disclosed their donors dropped from almost 97% in the 2006 elections to 49% in the 2008 elections following the FEC's 2007 rule and then dropped again to a dismal 34% in the 2010 elections.[76]

To conclude, mixed-purpose 501(c) non-profit corporations evaded disclosure in 2010 because political committee disclosure did not apply to non-major-purpose groups and more modest independent spending disclosure requirements were rendered ineffective.

III. Constitutional Dimensions of Political Disclosure

The FEC's feckless enforcement of the federal campaign finance laws aside, the difficulty of ensuring meaningful disclosure of the independent campaign-related advocacy of mixed-purpose groups is not attributable entirely to the agency's failures. Further, the constitutional ramifications of such laws are complicating attempts to craft laws to require donor disclosure from such groups. The Supreme Court has consistently approved greater regulation of *campaign-related* advocacy rather than *issue* advocacy.[77] Because a mixed-purpose group, as defined here, engages in both types of speech, attempts to obtain meaningful donor disclosure must take into account the Court's bifurcated analysis of issue speech versus campaign speech.

These constitutional concerns have prompted legal challenges to legislative efforts to compel donor disclosure from mixed-purpose groups. At least ten states are currently defending their disclosure laws applicable to the independent campaign-related spending of mixed-purpose groups and other persons in state elections.[78] This Article

76. *Disclosure Eclipse: Nearly Half of Outside Groups Kept Donors Secret in 2010; Top 10 Groups Revealed Sources of Only One in Four Dollars Spent*, PUB. CITIZEN, 3 (Nov. 18, 2010), http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf.

77. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 231–32 (2003); FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 249 (1986); Buckley v. Valeo, 424 U.S. 1, 66 (1976).

78. *See* Nat'l Org. for Marriage v. Daluz, 654 F.3d 115 (1st Cir. 2011); Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Vt. Right to Life Comm., Inc. v. Sorrell, 2:09-cv-00188 (D. Vt. filed Aug. 14, 2009); Iowa Right to Life Comm., Inc. v. Tooker (*IRTL*), 795 F. Supp. 2d 852 (S.D. Iowa 2011); Yamada v. Kuramoto, No. 10-00497, 2010

takes the position that the lawsuits are unfounded and that these disclosure laws largely will be found constitutional, but this issue is still under active dispute.

A. The Supreme Court's Political Disclosure Jurisprudence

The Supreme Court has recognized that political disclosure requirements have "the potential for substantially infringing the exercise of First Amendment rights" and has required heightened scrutiny.[79] But because disclosure laws "impose no ceiling on campaign-related activities,"[80] and "do not prevent anyone from speaking,"[81] the Court has declined to subject disclosure to strict scrutiny. Instead, it applies a relatively relaxed level of scrutiny, "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.[82]

Pursuant to this standard of review, the Supreme Court has almost without exception upheld disclosure statutes connected to campaign-related spending or spending that relates to the nomination or election of a candidate for public office. The Court, however, has on occasion turned a more skeptical eye to disclosure connected to political "issue advocacy" or advocacy on political issues that is not related to candidate election. To be sure, the line between campaign-related speech and issue speech has sometimes proven difficult to draw[83] and

WL 4603936 (D. Haw. Oct. 29, 2010), *appeal dismissed*, No. 10-17280 (9th Cir. June 10, 2011); Wis. Right to Life Comm., Inc. v. Myse, No. 10-C-0669, 2010 WL 3732300 (E.D. Wis. Sept. 17, 2010) (order granting motion to abstain and stay); Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115 (D. Minn. 2010), *aff'd*, 640 F.3d 304 (8th Cir. 2011), *vacated and reh'g en banc granted*, (8th Cir. July 12, 2011); Ctr. for Individual Freedom v. Madigan, 735 F. Supp. 2d 994 (N.D. Ill. 2010); Nat'l Org. for Marriage, Inc. v. Roberts, No. 1:10-cv-00192 (N.D. Fla. Aug. 8, 2011) ("Roberts II"); Center for Individual Freedom, Inc. v. Tennant, Nos. 1:08-cv-00190, 1:08-cv-01133, 2011 WL 2912735 (S.D. W. Va. July 18, 2011).

79. *Buckley*, 424 U.S. at 66.

80. *Id.* at 64.

81. *McConnell*, 540 U.S. at 201 (internal quotation marks and alteration omitted).

82. Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (internal quotation marks omitted); *McConnell*, 540 U.S. at 231–32; *see also Buckley*, 424 U.S. at 64–66.

83. The legal history of the evolving definitions of "issue advocacy" and "campaign-related advocacy" is long and complicated, and somewhat tangential to the focus of this Article.

With respect to political committees, i.e. organizations whose "major purpose" relates to "the nomination or election of a candidate," the Supreme Court has "assumed" that that all their spending is campaign-related. *Buckley*, 424 U.S. at 79. As such, their activities can permissibly be subject to comprehensive disclosure and contribution restrictions.

With respect to non-major purpose groups, the task of line drawing between campaign-related advocacy and issue advocacy has been more difficult. In *Buckley*, the Court may "dissolve in practical application."[84] Nonetheless, one may fairly state that the Court has approved far greater regulation of spending connected to candidate elections than spending for issue advocacy.

Applying exacting scrutiny, the Supreme Court has upheld a wide range of disclosure laws pertaining to campaign-related speech, including disclosure requirements applicable to candidate, political party, and independent political committees.[85] In *Buckley*, the Court set forth the three fundamental governmental interests generally served by campaign finance disclosure. First, the Court noted that disclosure is substantially related to the governmental interest in "provid[ing] the electorate with information as to where political campaign money comes from."[86] This information in turn enables voters to "place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches" and "also alert[s] the voter to the interests to which a candidate is most likely to be responsive."[87] Second, disclosure laws "deter

suggested that the only independent speech that was sufficiently related to a candidate election and therefore regulable was speech that "expressly advocate[d] the election or defeat of a clearly identified candidate." *Id.* at 79–80 (alteration in original) (footnote omitted); *see also* MCFL, 479 U.S. 238, 249 (1986) (applying express advocacy construction to federal corporate expenditure restriction). The BCRA then added "electioneering communications" to the category of regulable campaign-related spending. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C). The *McConnell* Court approved this addition, noting that the "vast majority" of ECs had an "electioneering purpose." *McConnell*, 540 U.S. at 193. *McConnell* thus rejected the notion that disclosure could only constitutionally extend to express advocacy, noting that "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command." *Id.* at 105, 191–92.

Although this case law suggests that the Supreme Court considers both IEs and ECs to be campaign-related, its decision in *Wisconsin Right to Life* casts some doubt upon this classification. Applying strict scrutiny, the Court struck down the BCRA's prohibition on the use of corporate and union treasury funds to finance ECs as applied to any ECs that were *not* the "functional equivalent of express advocacy." FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, 469–70 (2007). Although this holding suggests that some subcategory of ECs are *not* campaign-related, the decision has since been superseded by the *Citizens United* decision, which struck down all restrictions on corporate and union independent spending, even when such spending could be classified as "express advocacy" or "the functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. Further, applying exacting scrutiny, the Court in *Citizens United* upheld the EC disclosure requirements as to *all* ECs regardless whether they constituted the functional equivalent of express advocacy. *See id.* at 916. Consequently, although the parameters of what constitutes campaign-related speech are less than certain, this precedent suggests that "campaign-related" speech, at the least, includes IEs and the "vast majority" of ECs.

84. *Buckley*, 424 U.S. at 42.

85. *Id.* at 62–64; *see also* Burroughs v. United States, 290 U.S. 534 (1934) (upholding the disclosure provisions of the Federal Corrupt Practices Act of 1925).

86. *Buckley*, 424 U.S. at 66–67 (internal quotation mark omitted).

87. *Id.* at 67.

actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[88] Lastly, the Court has recognized that disclosure requirements are "an essential means of gathering the data necessary to detect violations" of the substantive campaign finance laws.[89]

Importantly, the Court has on at least three occasions specifically upheld federal laws applicable to *independent* campaign-related spending by non-major purpose groups. In *Buckley*, the Court upheld FECA's IE disclosure requirements on the basis of the government's "informational" interest, finding that it "increase[d] the fund of information concerning those who support the candidates" and "help[ed] voters to define more of the candidates' constituencies."[90] In *McConnell*, the Supreme Court upheld the federal ECs disclosure requirements on their face, finding that *all* of the "important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" justified the BCRA's disclosure requirements as to "the entire range of 'electioneering communications.'"[91] In *Citizens United*, the Court by an 8-1 margin again upheld the EC disclosure requirements both facially and as-applied to certain commercial advertisements promoting a campaign-related film.[92] The Court focused principally on the state's "informational interest" in EC disclosure,[93] noting that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[94]

This series of Supreme Court decisions makes clear that disclosure requirements connected to candidate elections—specifically *independent* "campaign-related" spending—are constitutional. Less clear is the constitutionality of disclosure in connection with political issue ad-

88. *Id.*

89. *Id.* at 68.

90. *Id.* at 81.

91. McConnell v. FEC, 540 U.S. 93, 196 (2003).

92. Citizens United v. FEC, 130 S. Ct. 876, 914–16 (2010).

93. Because the Court found that the information interest alone was sufficient to justify the disclosure requirements, it found it "not necessary to consider the Government's other asserted interests." *Id.* at 915–16.

94. *Id.* at 916.

vocacy. As a general matter, the Supreme Court has recognized "a respected tradition of anonymity in the advocacy of political causes."[95] Further, many forms of issue advocacy, such as ballot referenda campaigns, do not raise the same corruption concerns as candidate elections.[96] Accordingly, in *Talley v. California*, the Court struck down a city ordinance requiring all handbills to include disclaimers disclosing the names and addresses of their sponsors on grounds that such an identification requirement "would tend to restrict freedom to distribute information and thereby freedom of expression."[97] In a similar vein, in *McIntyre v. Ohio Elections Commission*, the Court declared unconstitutional an Ohio statute requiring ballot initiative literature to include a disclaimer identifying the literature's sponsor.[98]

Further, in its campaign finance case law, the Supreme Court has also discussed the goal of shielding issue speech from undue regulation. In *Buckley*, the Court formulated the express advocacy test to narrow the federal independent expenditure reporting requirements because it feared that the original definition of "expenditure" potentially "encompass[ed] both *issue discussion* and advocacy of a political result."[99] Similarly, the Court established the major purpose test because it had concerns that the original statutory definition of political committee could be interpreted "to reach groups engaged purely in *issue discussion*."[100]

The Supreme Court's concern with disclosure in connection with issue advocacy, however, has been balanced by its recognition of the informational benefits of such disclosure. Although the Court struck down disclaimer requirements for ballot initiative literature in *McIntyre*, it has expressed approval of statutes requiring the disclosure of expenditures or contributions connected to advocacy for and against ballot initiatives.[101] Indeed, the Court's support for financial disclo-

95. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1995).

96. *See, e.g.*, Buckley v. Am. Constitutional Law Found. (*Buckley II*), 525 U.S. 182, 203 (1999) ("[B]allot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates.").

97. 362 U.S. 60, 64 (1960).

98. 514 U.S. at 357.

99. Buckley v. Valeo, 424 U.S. 1, 78–79 (1976) (emphasis added).

100. *Id.* at 79 (emphasis added).

101. In *First National Bank of Boston v. Bellotti*, the Court struck down a restriction on corporate expenditures to influence ballot measures, but did so in part because "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. 765, 792 n.32 (1978). Citing *Buckley*, the Court took note of "the prophylactic effect of requiring that the source of communication be disclosed." *Id.*

sure in connection with ballot initiative campaigns has been so consistent that the Ninth Circuit Court of Appeals has declared that "[g]iven the Supreme Court's repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws."[102] The Court has also endorsed compelled disclosure in connection with issue advocacy in other contexts. It has upheld laws requiring disclosure of the financing of lobbying activity, recognizing Congress' interests in gathering information about "those who for hire attempt to influence legislation," and in protecting the "integrity of a basic governmental process."[103] Further, it has upheld provisions of the Federal Communications Act of 1934 requiring broadcasters to collect and make public information regarding the sponsors of political advertising.[104]

This Supreme Court case law hardly suggests that issue advocacy is so sacrosanct as to render any applicable disclosure law unconstitutional. Nevertheless, it is clear that some forms of political issue speech[105] have received greater protection from compelled disclosure than has campaign-related spending to influence candidate elections.

The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, where it considered a challenge to the City's ordinance that limited contributions to committees formed to support or oppose ballot measures. 454 U.S. 290 (1981). Although the Court struck down the contribution limit, it noted the disclosure that the law already required from ballot measure committees. *See id.* at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

102. Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1104 (9th Cir. 2003), *appeal after remand sub nom.* Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172 (9th Cir. 2007).

103. United States v. Harriss, 347 U.S. 612, 625 (1954) (upholding the Federal Regulation of Lobbying Act); *see also* Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009) (dismissing the First Amendment challenge to a federal lobbying disclosure law).

104. McConnell v. FEC, 540 U.S. 93, 236, 240 (2003) (upholding the Communications Act requirement that television broadcasters maintain records of requests to broadcast "message[s]" about "a national legislative issue of public importance" or "any political matter of national importance," and to make such records available to the public); *see also* 47 U.S.C. § 315(e)(1) (2006).

105. In the sphere of issue advocacy, the Court appears most concerned with disclosure laws that could potentially subject individual speakers to direct, in-person reprisals or threats, such as the disclaimer requirements in *McIntyre*, or the requirement in *Buckley II* that petition circulators wear a badge disclosing their names in face-to-face interactions. Buckley II, 525 U.S. 182, 199 (1999) ("[T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest."); *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 154–56, 164 (2002) (striking down a statute that required door-to-door canvassers to obtain a permit from the village and display upon demand the permit containing canvasser's name). The Court distinguished these types of disclosure laws from the campaign finance

B. The Constitutionality of Compelled Disclosure in Connection with Mixed-Purpose Groups

The application of disclosure requirements to mixed-purpose groups (i.e., those groups that engage in both electoral and issue advocacy) straddles the divide between campaign-related advocacy and issue advocacy in the Supreme Court's First Amendment jurisprudence. The Supreme Court has not provided any definitive guidance on the question of how much disclosure can be required from mixed-purpose groups whose major purpose does not relate to candidate elections.

On the one hand, under *Buckley* it is clear that *federal* political committee status, and its attendant disclosure requirements and contribution restrictions, can be imposed only on major purpose groups.

On the other hand, the federal EC disclosure requirements, which apply to non-major-purpose groups, have been twice upheld. Indeed, these requirements won approval from the Court in *McConnell* although the statute, prior to the adoption of the 2007 FEC regulation, required groups making ECs to report *all* their donors if they did not use a segregated fund. The Court in *McConnell* was thus apparently untroubled by the possibility that the BCRA's disclosure requirements may have required the disclosure of some donors who did not earmark their money for campaign-related ads. Indeed, the Court in both *McConnell* and *Citizens United* acknowledged that the definition of an EC itself may encompass some amount of issue advocacy, as it extends the quantum of regulable speech beyond express advocacy. For instance, in upholding the EC disclosure requirements on an as-applied basis, the Court in *Citizens United* explicitly rejected the argument that disclosure requirements must be "confined to speech that is the functional equivalent of express advocacy."[106] In so holding, the Court suggested that the disclosure requirements were constitutional even as to some amount of issue advocacy, noting that the Court previously "upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself."[107]

This mixed guidance from the Supreme Court appears to have encouraged opponents of campaign finance to challenge the constitu-

disclosure considered in *Buckley* on grounds that campaign finance disclosure is "less specific, less personal, and less provocative than a handbill . . . when money supports an unpopular viewpoint it is less likely to precipitate retaliation." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995).

106. 130 S. Ct. 876, 915 (2010).

107. *Id.*

tionality of state laws that require comprehensive donor disclosure from mixed-purpose groups following the *Citizens United* ruling. To date, however, most courts support these disclosure laws.

Opponents of such laws make two interrelated arguments. First, they argue that requiring comprehensive donor disclosure of the independent spending of mixed-purpose groups is tantamount to imposing full political committee status on such groups. For this reason, opponents argue that disclosure laws should be subject to strict scrutiny, instead of exacting scrutiny. This argument has been particularly prevalent in cases concerning "PAC-style" state disclosure laws that require mixed-purpose groups engaging in campaign-related spending to comply with some of the organizational and reporting requirements applicable to federal political committees, as will be discussed in further detail in Part IV.A. *infra*.

This demand for strict scrutiny has not been well-received by lower courts. Although there was some confusion regarding the proper level of review applicable to disclosure prior to *Citizens United*,[108] that decision confirmed that disclosure laws warranted only exacting scrutiny. Accordingly, in the wake of *Citizens United*, virtually all courts reviewing independent spending disclosure laws applicable to independent spending have declined to apply strict scrutiny to the challenged laws.[109]

108. *See, e.g.*, Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1005 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) (noting that "[r]ecent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases" by "clarify[ing] that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny").

109. *See* Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 56 (1st Cir. 2011) ("Because Maine's PAC laws do not prohibit, limit, or impose any onerous burdens on speech, but merely require the maintenance and disclosure of certain financial information, we reject NOM's argument that strict scrutiny should apply."); *Human Life of Wash.*, 624 F.3d at 997–98, 1005 (applying exacting scrutiny to state disclosure law that required groups that supported or opposed candidates or ballot propositions to register and report as political committees); Roberts II, No. 1:10-cv-00192, slip op. at 9 (finding that Florida disclosure requirements connected to ECs organizations "would not prohibit [plaintiff] from engaging in its proposed speech" and were subject only to exacting scrutiny); IRTL, 795 F. Supp. 2d 852 (S.D. Iowa 2011) (finding that Iowa disclosure requirements connected to "independent expenditure committees" were subject to exacting scrutiny); Yamada v. Kuramoto, No. 10-00497, 2010 WL 4603936, at *11 (D. Haw. Oct. 29, 2010), *appeal dismissed*, No. 10-17280 (9th Cir. June 10, 2011) (finding that recent case law "leaves no doubt [that] exacting scrutiny applies" to Hawaii's regulation of non-candidate committees); *see also* Speech Now.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 553 (2010) (applying exacting scrutiny to uphold federal political committee organizational, reporting, and disclaimer requirements as applied to a committee making only IEs).

Second, opponents have also seized upon the major purpose test, arguing that because comprehensive disclosure requirements are comparable to imposing PAC status, the requirements are unconstitutional as applied to mixed-purpose groups.[110]

Lower courts have split on this issue although many of the relevant decisions since *Citizens United* have upheld PAC-style comprehensive disclosure requirements for mixed-purpose groups engaged in independent campaign-related advocacy.

In *Human Life of Washington, Inc. v. Brumsickle*, the U.S. Court of Appeals for the Ninth Circuit upheld Washington State's public disclosure law that required groups supporting or opposing candidates or ballot propositions to register as political committees and to satisfy detailed reporting and organizational requirements.[111] Human Life complained that these disclosure requirements applied if only "*one* of the primary purposes" of a group was to support or oppose candidates or ballot propositions, which it argued did not meet *Buckley*'s major purpose test.[112] But the Ninth Circuit "rejected the notion that the First Amendment categorically prohibits the government from imposing disclosure requirements on groups with more than one 'major purpose'" and approved comprehensive disclosure for mixed-purpose groups.[113] It further cited the Fourth Circuit for the proposition that application of the "major purpose" test would "effectively encourage[ ] advocacy groups to circumvent the law by not creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure."[114]

Similarly, since *Citizens United*, the U.S. Courts of Appeals for the First Circuit,[115] and several federal district courts, have upheld or declined to enjoin laws that imposed comprehensive PAC-style disclo-

110. *McKee*, 649 F.3d at 59; *Roberts II*, No. 1:10-cv-00192, slip op. at 10; *IRTL*, 795 F. Supp. 2d at 867 n.29 (rejecting the claim that "that a state may not impose 'PAC-style burdens' on an organization unless that organization has the major purpose of making independent expenditures").

111. 624 F.3d at 997–98.

112. *Id.* at 1008–09 (emphasis added).

113. *Id.* at 1011.

114. *Id.* at 1012 (quoting N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 332 (4th Cir. 2008) (Michael, J., dissenting)).

115. The U.S. Court of Appeals for Eighth Circuit also upheld Minnesota's "PAC-style" disclosure law on May 16, 2011, but this decision was vacated on July 12, 2011 when the Court of Appeals granted appellants' request for an en banc rehearing. Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011), *vacated and reh'g en banc granted* (8th Cir. July 12, 2011). The case is still pending before the en banc court.

sure on mixed-purpose groups engaging in campaign-related independent spending.[116] These courts have recognized that the major purpose test was formulated to narrow the specific federal definition of "political committee." As the First Circuit stated, "We find no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute."[117] Lower courts have also recognized that federal political committees are subject to regulatory burdens that extend well beyond disclosure, including strict contribution limits and contribution source restrictions, and have declined to impose a major purpose test on the state disclosure-only statues on this ground.[118]

By contrast, the Fourth Circuit in *North Carolina Right to Life, Inc. v. Leake* ("*NCRTL*")[119] and the Tenth Circuit in *New Mexico Youth Organized v. Herrera* ("*NMYO*")[120] and *Colorado Right to Life Committee, Inc. v. Coffman* ("*CRTL*"),[121] have declared unconstitutional state statutes that imposed political committee status on non-major purpose groups. In 2008, in *North Carolina Right to Life v. Leake*, for instance, the Fourth Circuit struck down a North Carolina law that defined a "political committee" as a group that had influencing elections as "*a* major purpose," not "*the* major purpose."[122] However, in many of these cases the state statutes under review extended beyond basic disclosure requirements and imposed additional substantive requirements on "political committees." For example, in evaluating North Carolina's definition of "political committee," the Fourth Circuit specifically noted that "political committees" were not only subject to disclosure requirements under North Carolina law, but also "face[d] limits on the amount of donations they can receive in any one election cycle from any individual or entity."[123] Similarly, "political com-

116. Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 59 (1st Cir. 2011); Nat'l Org. for Marriage, Inc. v. Roberts, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010) ("Roberts I") (noting that "[t]here is no major purpose requirement because the [disclosure] statutes do not impose full-fledged political-committee like burdens upon NOM"); IRTL, 795 F. Supp. 2d at 867 n.29 (S.D. Iowa 2011) (rejecting claim "that a state may not impose 'PAC-style burdens' on an organization unless that organization has the major purpose of making independent expenditures").

117. *McKee*, 649 F.3d at 59.

118. *Id.* at 55–56; *Roberts I*, 753 F. Supp. 2d at 1222.

119. 525 F.3d at 287.

120. 611 F.3d 669, 678 (10th Cir. 2010).

121. 498 F.3d 1137, 1153–54 (10th Cir. 2007); *see also* S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010).

122. N.C. GEN. STAT. § 163-278.6(14) (2007); *NCRTL*, 525 F.3d at 289–90.

123. *NCRTL*, 525 F.3d at 286.

mittee" status as provided by the Colorado statute under review by the Tenth Circuit in *CRTL* entailed not only disclosure, but also strict contribution requirements.[124] Therefore, to some extent, the decisions of the Fourth and Tenth Circuits enforcing the major purpose test involved state statutes that extended beyond basic disclosure requirements and imposed substantive contribution restrictions on political committees.[125] Thus, there is a strong argument that even comprehensive PAC-style *disclosure*-only laws pass First Amendment muster.

IV. A New Transparency

Although *Citizens United* ushered in an era of undisclosed campaign-related spending, the decision—and the unequivocal support of eight Justices for transparency—also presents an opportunity to improve the federal campaign finance disclosure regime, which, as this Article has hopefully made clear, was in disrepair even prior to the Supreme Court's decision.

There are a variety of models that have been developed at the federal and state level to ensure disclosure of the donors to mixed-purpose groups engaged in independent campaign-related advocacy. More precisely, the goal would be to create a well-tailored law that "captures" all donors whose contributions are intended for use, or actually are used, for campaign-related ads, while minimizing the disclosure connected to any issue advocacy done by a mixed-purpose group.

This Part discusses three models for campaign finance reporting: (1) PAC-style disclosure; (2) the "dedicated account" model; and (3) the "presumption of donor intent" model. It also assesses the different legislative models, both in terms of practical effectiveness and constitutionality. To be sure, policymakers are considering other approaches outside of the sphere of campaign finance law to improve political transparency; for instance, tax law reform or corporate governance measures requiring shareholder notification or approval of

124. *CRTL*, 498 F.3d 1137. The district court in *CRTL* noted that "political committees are prohibited from accepting contributions or dues from any person in excess of five hundred dollars per house of representatives election cycle." Colo. Right to Life Comm., Inc. v. Davidson, 395 F. Supp. 2d 1001, 1019–20 (D. Colo. 2005) (citing COLO. CONST. art. XXVIII, § 3(5)).

125. In *NMYO*, the Tenth Circuit held that New Mexico's political committee disclosure law that applied to any group that made a contribution of over $500 for "political purposes" was unconstitutional because it required non-major purpose groups to comply with comprehensive reporting and organizational requirements. 611 F.3d at 679. This case, however, is the outlier in this area of the law, and involved the regulation of two groups which arguably did not make any campaign-related expenditures at all. *Id.*

corporate political spending.[126] But this Part will focus on approaches in the sphere of campaign finance law to obtain meaningful disclosure from mixed-purpose groups.

A. PAC-style Disclosure Model

The most comprehensive solution to the issue of donor disclosure in connection with mixed-purpose groups is the enactment of a PAC-style disclosure law. Several states, including Florida, Iowa, Maine, and Minnesota have passed statutes that require groups to (1) register a committee or political fund with the state election authority in order to make campaign-related expenditures and then (2) provide regular disclosure of the financial activities of the committee or fund.[127] In essence, these laws require groups that run independent campaign-related ads to comply with some of the key reporting and organizational requirements applicable to federal political committees, without imposing any of the substantive restrictions associated with PAC status, such as contribution restrictions.

For example, Minnesota amended its law following *Citizens United* to permit corporations to make IEs from their treasury funds to influence state elections.[128] But the law also provides that an association "that makes only independent expenditures and disbursements . . . must do so by forming and registering an independent expenditure political fund if the expenditure is in excess of $100 or by contributing to an existing independent expenditure political committee or political fund."[129] Importantly, however, use of a political fund to make

126. In the sphere of corporate governance, the Shareholder Protection Act introduced by U.S. Representative Michael E. Capuano (D-MA) in the 111th Congress, and again in the 112th Congress, would require corporations to notify their shareholders of their proposed political activities each fiscal year and obtain prior approval from their shareholders. H.R. 4537, 111th Cong. (2010); H.R. 2517, 112th Cong. (2011).

127. *See, e.g.*, FLA. STAT. ANN. §§ 106.03, 106.0703 (West 2008 & Supp. 2011) (requiring groups receiving contributions or making expenditures for "electioneering communications" exceeding $5000 in a year to file a statement of organization and regular disclosure reports); IOWA CODE ANN. §§ 68A.402B(3), 68A.404(3)–(4) (West Supp. 2011); IOWA ADMIN. CODE r. 351-4.9(15) (2011) (requiring a group making more than $750 in IEs to file statement as an "independent expenditure committee" as well as regular reports); ME. REV. STAT. ANN. tit. 21-A, §§ 1052(5), 1053, 1059 (2008 & Supp. 2011) (requiring a non-major purpose organization that spends more than $5000 in a year "for the purpose of promoting, defeating or influencing in any way the nomination or election of any candidate to political office" to register a PAC and report); MINN. STAT. ANN. §§ 10A.12(1a), 10A.121, 10A.13, 10A.14, 10A.20 (West 2005 & Supp. 2011) (requiring associations that make more than $100 in IEs to register a "political fund" and file regular disclosure).

128. *See* 2010 MINN. LAWS 2001-08.

129. MINN. STAT. ANN. § 10A.12(1a) (emphasis added).

campaign-related expenditures does not subject a corporation or association to any substantive restrictions on either its IEs or its fundraising to finance such expenditures.

To form a political fund, a corporation must register a fund with the state and appoint a treasurer, but need not create a separate bank account if the fund is financed only with general treasury money.[130] An IE political fund must file regular reports with the state[131] that disclose all of the fund's receipts and disbursements, including the name and address of each contributor of over $100 within the year and the amount and date of the contributions.[132] To dissolve, a political fund must settle its debts, dispose of its remaining assets, and file a termination report.[133]

The advantage of the PAC-style disclosure model is that due to its comprehensive nature, it is not easily gamed by regulated entities. For instance, Minnesota law requires associations to make all campaign-related expenditures through a political fund that must disclose all contributions it receives of over $100.[134] This statute includes no "intent" language (e.g., "for the purpose of furthering electioneering communications") with respect to contributors to the fund that would allow evasion of disclosure. But because this model requires disclosure of only those persons or entities whose contributions *in fact* funded the group's IE committee or fund, it is tailored to avoid disclosure of those donors whose money supported only a group's non-campaign-related issue advocacy or other activities.

The drawback of this model is that it has drawn legal challenges on grounds that PAC-style reporting should be held to strict scrutiny or limited to groups whose major purpose is the nomination or election of a candidate. The disclosure laws of Florida, Iowa, Maine, and Minnesota have all been challenged.[135] But, as discussed in Part III.B.

130. Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115, 1122 (D. Minn. 2010). If, alternatively, a corporation were to contribute to an *external* independent expenditure fund, then the recipient fund would have the disclosure obligation and would report the contribution from the corporation in its regular reporting to the state. *Id.* at 1121–22.

131. A political fund must file five reports during a general election year and one report during a non-general election year. *See* MINN. STAT. ANN. § 10A.20(2).

132. *Id.* §§ 10A.12(1a), 10A.13, 10A.14, 10A.20.

133. *Id.* § 10A.24.

134. *Id.* §§ 10A.12(1a), 10A.20.

135. *See* Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011), *vacated and reh'g en banc granted* (8th Cir. July 12, 2011); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 59 (1st Cir. 2011); Roberts I, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010); IRTL, 795 F. Supp. 2d 852, 867 n.29 (S.D. Iowa 2011).

supra, the legal basis for these challenges is questionable. Few courts have found merit to the assertion that PAC-style disclosure laws are tantamount to expenditure bans or subject to strict scrutiny. Nor have many courts agreed that the major purpose test is a prerequisite to disclosure-only statutes.[136] However, the challenges to these laws, including Minnesota's statute, are still ongoing, and thus this question has not yet been definitively resolved.

B. Dedicated Account Model

A second and related model of disclosure is to require mixed-purpose groups to finance any election advocacy through a dedicated fund or account and to report the source of the funds deposited into this account when the group finances campaign-related ads.

The foremost example of a "dedicated fund" law is the DISCLOSE Act.[137] In 2010, the U.S. House of Representatives passed the bill, but the DISCLOSE Act twice failed to clear a filibuster in the Senate—effectively falling short by just a single vote.[138]

The DISCLOSE Act creates incentives for corporations and other mixed-purpose groups to use a segregated account for all campaign-related activity. In a sense, the bill restores the federal EC disclosure provisions to their original form prior to the FEC's adoption of its 2007 regulation.

The DISCLOSE Act provides covered groups—including corporations, and 501(c)(4), (5), (6) and 527 organizations[139]—with two reporting options in the event they expend more than the statutory threshold amount for "campaign-related activity."[140] First, the group

136. *McKee*, 649 F.3d at 59; *Roberts I*, 753 F. Supp. 2d at 1222; *IRTL*, 795 F. Supp. 2d at 867 n.29.

137. DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

138. *See* S. 3628, 111th Cong. (2010); 156 CONG. REC. H4828 (daily ed. June 24, 2010); 156 CONG. REC. S7388 (daily ed. Sept. 23, 2010); *see also* Editorial, *Campaign Money to Burn*, N.Y. TIMES, Nov. 4, 2010, http://www.nytimes.com/2010/11/05/opinion/05fri3.html?scp=6&sq=disclose%20act%20filibuster&st=cse.

139. H.R. 5175 § 211 (adding 2 U.S.C. §§ 434(g)(5)(G), 434(g)(6)(F)).

140. The DISCLOSE Act defines "campaign-related activity" as (1) an IE, a transfer of funds to another person for the purpose of making such an expenditure, or a transfer of funds "deemed" to have been made for the purpose of making such an expenditure; or (2) an EC, transfer of funds for the purpose of making an EC, or a transfer of funds "deemed" to have been made for the purpose of making such a communication. *Id.* § 212 (adding 2 U.S.C. § 325(d)(2)(A)).

Importantly, the DISCLOSE Act would have also expanded FECA's definition of IEs to include both express advocacy and the functional equivalent of express advocacy, and the definition of ECs to include all broadcast ads that refer to a candidate within the period beginning 120 days before a general election. *Id.* §§ 201(a), 202(a).

has the option of establishing a dedicated account—i.e., a "Campaign-Related Activity Account"—to finance such activity.[141] If the group finances its campaign-related activity exclusively through this account, then the group is required to disclose only the contributions in this account.[142] Alternatively, if a group uses its general treasury to fund its campaign-related activity, or transfers funds from its general treasury into its Campaign-Related Activity Account, it has to report all the contributors to the group above certain thresholds.[143] The DISCLOSE Act thus grants the covered group a choice as to its disclosure method.

Significantly, the DISCLOSE Act treats transfers of funds between groups for the purpose of funding IEs or ECs as disclosable "campaign-related activity."[144] Thus, if a covered group transfers money to another group for the purpose of funding the transferee group's campaign-related ads, the transferor group, subject to certain exceptions, is required to disclose the sources of its transferred funds in the same manner as if it had spent the funds directly for campaign-related ads.[145] This feature of the Act addresses the "Russian doll" problem, wherein a group conceals its donors by transferring money to another group—or a series of groups—for the purpose of funding the recipient group's campaign-related ads.

There are numerous advantages of the DISCLOSE Act model. It is more streamlined than the PAC-style disclosure model and does not require the registration of a committee nor compliance with organizational requirements, such as appointment of a treasurer. Furthermore, the reporting requirement in the dedicated account model is ad-specific, and, like the existing federal IE and EC disclosure requirements, is triggered when a group makes expenditures on campaign-related ads that exceed the statutory threshold amount. This stands in contrast to the ongoing reporting obligation required under a PAC-style disclosure law that continues for the life of the political committee or fund.

At the same time, this model achieves the principal objective of disclosure identified by this Article, namely disclosure of the donors who fund the campaign-related ads of mixed-purpose groups. Because the reporting requirement is ad-specific, instead of continuous, some information regarding the financial activities of the regulated groups

141. *Id.* § 213 (adding 2 U.S.C. § 326).
142. *Id.*
143. *Id.* § 211(a)–(b).
144. *Id.* § 212 (adding 2 U.S.C. § 325(d)(2)(A)).
145. *Id.* § 211 (adding 2 U.S.C. §§ 434(g)(5)(B), 434(f)(6)(B)).

may be sacrificed. Care will have to be given to setting monetary thresholds that are neither so high as to miss significant campaign-related spending, nor so low as to require disclosure of de minimis activity or small donors. However, the nature of the reporting requirement also ensures that a group's campaign-related advertising is the focus of the disclosure, instead of the group's issue advocacy or other activities.

Despite the narrow tailoring of this model, the DISCLOSE Act would likely draw legal challenges if enacted, and opponents would likely raise the same strict scrutiny and major purpose arguments that have been raised in existing challenges to state PAC-style disclosure laws. Thus, enactment of a "dedicated fund" law will not likely obviate the risk of litigation although these laws would likely withstand constitutional attack.

C. Presumption of Donor Intent

Finally, a third method to secure disclosure in connection with mixed-purpose groups is to establish a standard or presumption of donor intent. This model does not require the recipient organization to segregate contributions to be used for campaign activity from its general treasury, but rather focuses on determining ex ante which contributions to a mixed-purpose group are "campaign-related."

One example of this model is a California State campaign finance regulation known as the "first bite of the apple" rule.[146] The regulation provides that a "contribution" includes:

> Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor *knows or has reason to know* that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures . . . .[147]

The regulation further establishes a rebuttable presumption that a donor knows that his or her payment will be used to make contributions or expenditures if the recipient organization "made expenditures or contributions of at least one thousand dollars ($1,000) in the aggregate during the calendar year in which the payment occurs, or

146. CAL. CODE REGS. tit. 2, § 18215(b)(1) (2011); *see also* Cal. Pro-Life Council, Inc. v. Randolph (*CPLC*), 507 F.3d 1172, 1181 (9th Cir. 2007), *abrogation recognized by* Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1004–05 (9th Cir. 2010) (noting that *CPLC* court incorrectly applied strict scrutiny to disclosure law at issue, but appropriate standard was "exacting scrutiny").

147. CAL. CODE REGS. tit. 2, § 18215(b)(1) (emphasis added).

any of the immediately preceding four calendar years."[148] The regulation defines a contribution and/or expenditure in this context as a payment for the purpose of influencing "the nomination or election of a candidate or candidates" or "the qualification or passage of any [ballot] measure."[149] Thus, once the organization has made a first bite political contribution or expenditure, all of its donors thereafter are presumed to know or have reason to know that their donations will be used for political purposes and potentially subject to disclosure.

Interestingly, California law provides that one disclosure option for a mixed-purpose organization is to report the sources of all of its receipts of over $1000 that are presumed to be contributions, but only after those contributions have been apportioned based on the percentage of the organization's receipts expended for political purposes.[150] Essentially, it creates a system of pro rata reporting. The California Fair Political Practices Commission illustrated this system by describing a hypothetical organization that raised a total of $40,000 annually but contributed a quarter of its receipts ($10,000) to candidates and committees during this time. If the threshold for donor reporting is $100, then "[a]ny person who donates $400 or more to [the organization] during this time period must be itemized . . . since one quarter of their donations are deemed contributions to the committee . . . ."[151] By allowing apportionment, the regulation takes into account the possibility that the organization may be engaged in mixed activities and that donors are funding multiple purposes.

The first bite of the apple regulation was upheld in large part in *California Pro-Life Council v. Randolph* ("*CPLC*").[152] In that case, the Ninth Circuit Court of Appeals rejected the claim of a mixed-purpose 501(c)(4) organization that the presumption was overbroad and violated the First Amendment under strict scrutiny review.[153]

148. *Id.* § 18215; *CPLC*, 507 F.3d at 1185.

149. CAL. CODE REGS. tit. 2, §§ 18215(a)(1) (defining contribution); *id.* § 18225(a)(1) (defining expenditure).

150. *Id.* § 18215(b)(1).

151. *CPLC*, 507 F.3d at 1182 n.14 (quoting California Fair Political Practices Commission, Ginger Osborne Advice Letter, No. A-03-108 ("Osborne Advice Letter"), at 2 (June 11, 2003)).

152. *Id.* at 1184–87.

153. The Ninth Circuit Court of Appeals upheld the presumption, but struck down the specific PAC-style reporting and organizational requirements applicable to the plaintiff organization as a result of this presumption. *Id.* at 1186–87. This holding turned on the fact that the plaintiff engaged only in ballot measure advocacy, but the court found that PAC-style comprehensive disclosure was appropriate only for groups engaged in advocacy for or against candidates. *Id.* at 1187. The court, however, found that the plaintiff could be required to report in an event-specific manner its expenditures of over $1000, including

A second example of a presumption of donor intent is the FEC's former "solicitation rule." This rule provided that a donation made "in response to any communication" would be a "contribution" subject to federal campaign finance law "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate."[154] The rule thus established the presumption that donations made in response to solicitations that "plainly seek funds 'for the purpose of influencing Federal elections'" were "contributions" and would be subject to disclosure.[155]

The solicitation rule was challenged as unconstitutionally vague and overbroad. Although several courts upheld the rule,[156] the D.C. Circuit Court of Appeals in *EMILY's List v. Federal Election Commission* found it unconstitutional insofar as it subjected a federal political committee with federal and non-federal accounts to the federal contribution limits.[157] Although this holding did not, for instance, consider whether the rule was permissible for the purpose of triggering disclosure, the FEC repealed the rule in response to the decision.[158]

The California regulation and former FEC solicitation regulation stand in contrast to the PAC-style model and the dedicated account model because, by focusing on donor intent, these regulations require very little organizational restructuring on the part of a mixed-purpose group. Instead, both regulations create a standard for establishing do-

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reporting all of the donors presumed to be "contributors" under the regulation. *Id.* Following *CPLC*, the state election agency promulgated a new regulation to implement this part of the decision, granting 501(c)(3) and (c)(4) organizations that engaged only in ballot measure advocacy the option of disclosing by filing an "event-based" independent expenditure report, instead of complying with full PAC reporting and organizational requirements. CAL. CODE REGS. tit. 2, § 18413 (2011).

However, it is important to note that the *CPLC* holding resulted from the improper application of strict scrutiny to the disclosure law, as the Ninth Circuit subsequently recognized in *Human Life of Wash.*, 624 F.3d at 1004–05. Arguably, the Ninth Circuit would hold differently if it considered a comparable reporting requirement in the context of candidate elections under exacting scrutiny today.

154. 11 C.F.R. § 100.57(a) (2011).

155. *See* 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, and 106).

156. EMILY's List v. FEC, 569 F. Supp. 2d 18, 60 (D.D.C. 2008), *rev'd*, 581 F.3d 1 (D.C. Cir. 2009); Real Truth About Obama, Inc. v. FEC, No. 3:08-CV-483, 2008 WL 4416282, at *12 (E.D. Va. Sept. 24, 2008), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated as moot*, 130 S. Ct. 2371 (2010).

157. *EMILY's List*, 581 F.3d at 17–18, 21.

158. *See* Funds Received in Response to Solicitations, Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13,223 (Mar. 19, 2010) (to be codified at 11 C.F.R. pts. 100 and 106).

nor intent, which the regulated group simply has to apply when determining which contributors it is required to disclose to the relevant election authority. The strength of the donor intent model is thus the relatively minimal regulatory burden it imposes on mixed-purpose groups and accordingly the strong defense that can be mounted against any charge that it is unduly burdensome from a constitutional perspective. For example, because no committee or account must be formed, the major purpose argument that has been raised against PAC-style disclosure laws would appear to have no application to the donor intent model.

The drawback of the donor intent model is potential imprecision. Application of the California regulation could lead to a scenario where virtually all donors to a mixed-purpose group are subject to disclosure because they all triggered the presumption by contributing to the group after it made a first bite expenditure. This broad disclosure could have the effect of obscuring the most important parties funding a mixed-group's election ads. Similarly, the FEC rule conceivably could capture some donors who donated to a mixed-purpose group after receiving a solicitation for campaign-related contributions but who actually wished to fund the group's issue advocacy. For this reason, a presumption of donor intent may draw legal challenges on grounds of overbreadth. But this issue could potentially be alleviated by clarifying that donors who earmark their funds for campaign ads, or otherwise affirmatively indicate a campaign-related purpose, should be disclosed in the first instance with the presumption simply serving as a default rule where the donor's intent cannot be ascertained.

The presumption of donor intent model is thus a viable alternative to PAC-style reporting or a "dedicated account" regime. To be sure, the California regulation was narrowed slightly by the Ninth Circuit, and the FEC solicitation rule has been repealed, albeit on grounds unrelated to disclosure. Nevertheless, the weight of the existing case law supports a well-tailored standard of donor intent for the purposes of disclosure.

Conclusion

For many decades, the constitutionality and utility of campaign finance disclosure has not been in doubt. Following the *Citizens United* decision, however, corporations, unions, and other deep-pocketed interests could exploit the existing weaknesses of the federal campaign finance laws to spend anonymously in elections by contributing to mixed-purpose 501(c) groups. Attempts to strengthen the disclosure requirements applicable to mixed-purpose groups at the federal and state level in turn spurred a coordinated litigation effort by opponents of campaign finance to blunt the effects of these new or proposed enhancements of disclosure laws. The result of these developments is that citizens must now simultaneously contend with both an unprecedented lack of transparency in federal elections and a broad assault on the constitutionality of existing laws.

It is thus imperative in the aftermath of *Citizens United* for lawmakers and advocates of political reform to find or develop new models of disclosure that are both effective and constitutionally defensible. The laws presented in this Article provide a variety of such models and many have already survived, at least in large part, constitutional challenges in the lower courts. Without further reform the loopholes in federal disclosure law relating to mixed-purpose groups will become more damaging. *Citizens United* will have initiated not only an epoch of unbridled corporate and union spending in our elections, but also an era of unprecedented public ignorance of such spending and its potentially corruptive effects on our democracy.