




The Victims of "Dark Money" Disclosure:
How Government Reporting
Requirements Suppress Speech and
Limit Charitable Giving

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I N S T I T U T E



“Anonymity is a shield from the tyranny of the majority.”

-*McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995)

EXECUTIVE SUMMARY

Anonymous political speech has been essential to democratic discourse since the founding of our republic. Ratification of the U.S. Constitution was primarily debated through a series of anonymous papers. Yet in recent years, anonymous political speech has been under attack by so-called “dark money” critics, who demand that government expose the identities of individuals, businesses, labor unions, and nonprofits that spend money to participate in political dialogue. Couched as “transparency” measures, “dark money” disclosure mandates are often used as excuses to silence disfavored speech. Troublingly, disclosure mandates are sweeping the country in the form of vague and overbroad regulations reaching the activities of 501(c)(3) nonprofit organizations – groups that operate in nearly every sector and industry in the United States and represent views across the political and philosophical spectrum. These mandates have diluted political dialogue, invited harassment and retaliation against speakers, and chilled speech and association. Although the Constitution protects political and private associations against compelled disclosure, federal courts have often failed to enforce those protections. Therefore, liberty advocates should litigate for greater constitutional protection of free speech and association rights. At the same time, several simple policy reforms can protect nonprofits from efforts to silence opposition and endanger free thought, speech, and association.

I. INTRODUCTION

“Anne,” afraid to give her real name, was alarmed when she heard an early morning pounding on her front door. “It was so hard. I’d never heard anything like it. I thought someone was dying outside.” When she ran to open the door, armed police came pouring into every room of the house, yelling orders, cornering her family, and seizing Anne’s private property. The police reportedly verbally abused Anne and her family, instructing them not to contact her lawyer or tell anyone about the early morning raid. Anne’s neighbors watched from the outside.

What was Anne’s crime? She had supported Wisconsin’s 2011 Act 10 – Governor Scott Walker’s public union reform bill – and other political causes. Anne wondered, “Is this America?”¹

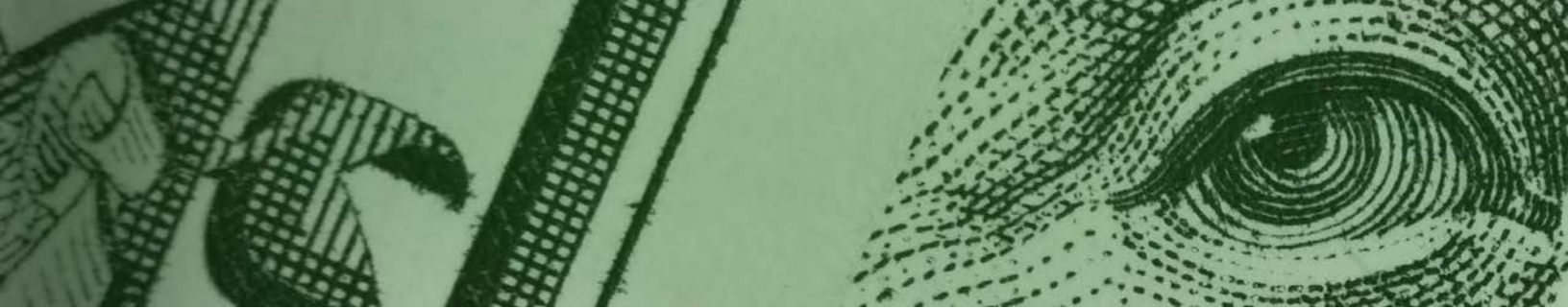
Anne's story is one of several reports of political harassment and intimidation in Wisconsin's "John Doe" investigations, so named because of the extraordinary powers granted to law enforcement to compel disclosure of information and maintain the secrecy of their investigations.² Initially a probe into the activities of Governor Walker and his staff, the investigation expanded to reach nonprofits nationwide that made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association.³

Eric O'Keefe, director of the Wisconsin Club for Growth, which advocates for lower taxes and limited government and was targeted in the raids, sued in federal court to block subpoenas demanding the identity of the Club's donors.⁴ The district court ruled in Mr. O'Keefe's favor, finding that prosecutors exceeded their lawful authority by pursuing Mr. O'Keefe's group "for exercising issue advocacy speech rights that on their face are not subject to the regulations or statutes the defendants seek to enforce."⁵

No criminal charges have yet been filed in the nonprofit John Doe Probe.⁶ But it serves as a chilling example of one state's attempt to criminalize political speech. Indeed, it shows the danger to free speech when regulators use their authority to silence and suppress speech with which they disagree. Even if charges are never brought, Mr. O'Keefe told reporters that the broad reach of the subpoenas in his case, "froze my communications and frightened many allies and vendors of the pro-taxpayer political movement in Wisconsin and across the country." He lamented, "[T]he process is the punishment."⁷

The seemingly politically motivated attempts to suppress speech in Wisconsin led Anne to exclaim that this is not the America she recognizes. Nor is it consistent with this country's long tradition of respecting the right to free association and anonymous speech of all kinds.

Indeed, ratification of the U.S. Constitution was debated through a collection of anonymous papers. The *Federalist Papers*, written under the pen name "Publius," are the seminal writings advocating for state adoption of the U.S. Constitution. Considering the personalities involved, regional rivalries at the time, and the importance of focusing the debate on the message rather than the messenger, it is unlikely that the *Federalist Papers* would have been as effective had their authors, Alexander Hamilton, James Madison, and John Jay, been forced to disclose their identities.⁸ Yet, under some present-day state laws requiring disclosure of individuals and groups speaking on political issues, Publius's foundational expositions would likely be considered publications by a "political committee," which would be forced to disclose its authors or cease its publications.



Thus, the danger is clear: broad disclosure laws empower government to silence dissenting opinions by ensnaring constitutionally protected activity. If the authors of the Federalist Papers would be subject to forcible disclosure under current campaign finance laws,⁹ then so would other issue advocacy groups, including charitable organizations established under § 501(c)(3) of the U.S. tax code.

The proponents of so-called “dark money” disclosure have already swept these organizations into the ambit of laws designed to regulate candidate campaign financing. And until constitutionally protected speech is properly safeguarded by courts and legislatures throughout the country, we might all begin to wonder, like Anne, how these attempts to silence speech can happen in America.

A. What is “Dark Money?”

The proponents of mandatory reporting of private civic activities have won a major marketing victory by the widespread use of the phrase, “dark money.” As one commentator put it, “Dark money. The name itself carries ominous undertones, undertones that critics of this relatively new campaign-finance phenomenon claim reflect a genuine threat to democracy.”¹⁰ But the term is misleading. “Dark money” would be more aptly referred to by what those who find free speech objectionable actually support – mandated government disclosure. The use of such terms is intended to cast suspicion on those who contribute to various civic causes so the debate revolves around *ad hominem* attacks rather than engaging on the issues.

So, what is “dark money”? It conjures images of shady political operatives greasing the palms of politicians in dark, smoked-filled rooms. But does it also apply to traditional political activities, like you and your neighbor contributing your time and money to civic and social activities that you support? And is it really a threat to democracy, or are those who seek to silence the voice of opposition and limit speech the real threats?

“Dark money” generally refers to funds spent for political activities by businesses, unions, nonprofit organizations, and individuals who are not required by law to disclose the identities of their donors. Depending on where supporters of government disclosure draw the inherently arbitrary line, dark money could refer to donations made to the American Civil Liberties Union (“ACLU”) or to your local church or soup kitchen.

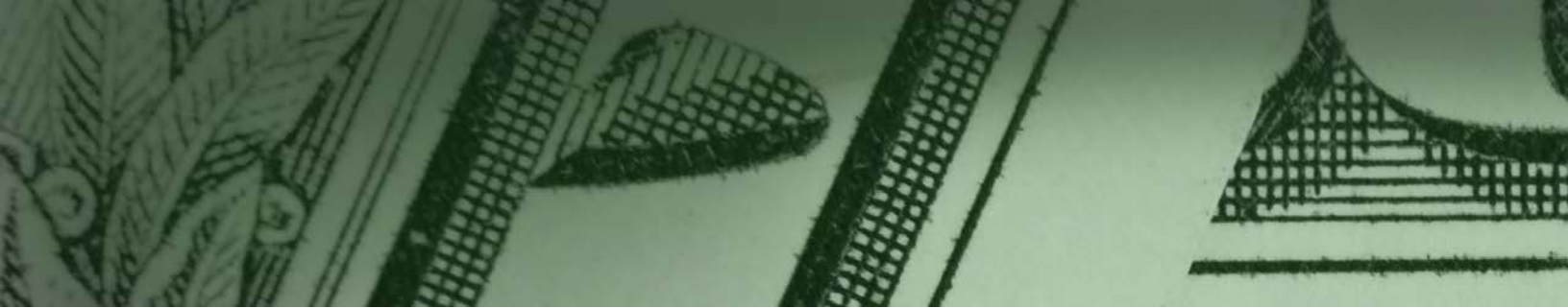


As a general matter, all spending that calls for the election or defeat of a political candidate or constitutes “electioneering communications” involves some level of disclosure to the government. In fact, there are more disclosure obligations on the books today than at any other time in our nation’s history.¹¹ Nevertheless, some supporters of government disclosure claim that current laws do not go far enough. They assert that certain charitable and social welfare organizations, including those organized under § 501(c) of the federal tax code, should be forced to disclose the identities of their individual donors when those organizations engage in political activity, even if that is not their primary function.¹²

Those calling for the elimination of “dark money” are thus attempting to dramatically extend the reach of government-mandated disclosure to a wide variety of organizations, activities, and communications.

Advocates for expanded disclosure call for such dramatic and far-reaching regulations despite the fact that “dark money” is not a pervasive element in American politics. Some government disclosure advocates claim that so-called “dark money” expenditures constitute a significant portion of political spending in the United States.¹³ But the characterization is inaccurate. In the 2014 election cycle, the Federal Elections Commission reported approximately \$5.9 billion in total spending on federal elections.¹⁴ Of that \$5.9 billion, roughly \$173 million came from groups that are not required by law to disclose donors.¹⁵ This represents a mere 2.9 percent of all spending on federal elections – hardly a significant portion. In fact, this figure represents a decline from the 2012 election cycle, where such expenditures amounted to 4.4 percent of spending on federal races.¹⁶ As the Center for Competitive Politics observed from the 2012 election cycle, “Nearly all of the organizations that financed such independent expenditures . . . were well-known entities, including the U.S. Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, Planned Parenthood, the National Association of Realtors, the National Federation of Independent Business, NARAL Pro-Choice America, and the Humane Society.”¹⁷ As a result, there is no secret as to what causes and issues such groups support.

Under existing campaign finance laws, the identities of these groups must be revealed when making direct contributions to candidates or political parties or engaging in other electioneering communications. Additionally, donor identities must be disclosed when they specifically earmark their donations to nonprofit organizations to be used for electioneering communications. Those types of donations can hardly be characterized as “dark money” in need of further regulation when under existing disclosure rules, anyone can see that the NRA contributed to Candidate X and Planned Parenthood contributed to Candidate Y. The positions of those organizations are



well known. Characterizing those expenditures as “dark money” is, therefore, disingenuous. But forcing further disclosure of donor identities is at best unnecessary, as donors may contribute to organizations to support the overall mission rather than any specific political candidate. Their donations are intended to support certain issues, not politicians.

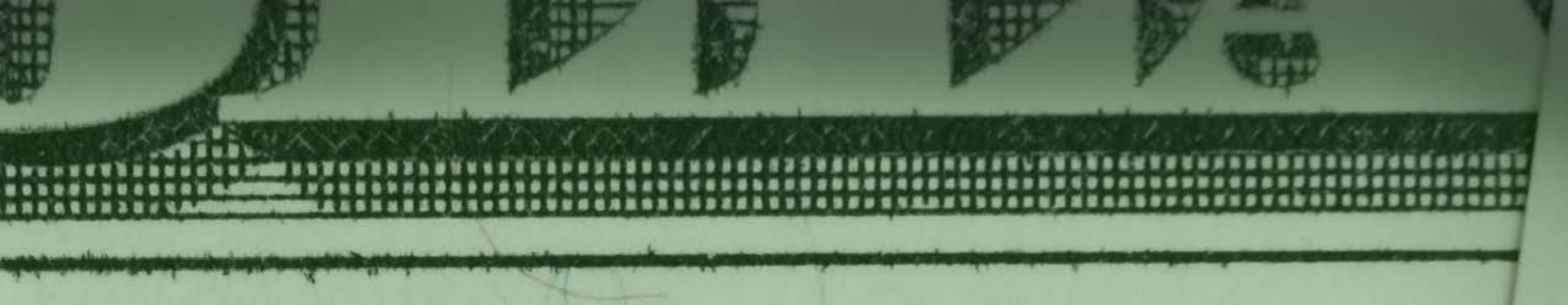
Claims that “dark money” is distorting American politics are even more tenuous when leveled at 501(c)(3)s, considering these nonprofit organizations are prohibited from participating in any partisan political activity.

B. What are 501(c)(3) Nonprofits?

There are nearly one million tax-exempt charities in the United States organized under § 501(c)(3) of the federal tax code.¹⁸ These organizations include schools, churches, hospitals, art centers, public radio stations, research foundations, and other groups dedicated to a range of issues from improving the environment to providing legal services to indigent litigants.¹⁹ Nonprofit 501(c)(3) organizations operate in nearly every industry and sector in the United States and abroad, including education, health care, culture, sports, animal care and zoos, foreign affairs, and the humanities, among many others.²⁰ The Special Equestrians of Vero Beach, Florida, which provides therapeutic horseback training to physically and mentally challenged individuals – is just one example of the one million 501(c)(3) organizations.²¹

The social and economic impact of 501(c)(3)s in the United States is sizeable. According to the Urban Institute, 501(c)(3) public charities reported \$1.65 trillion dollars in revenue in 2012, though the vast majority (66.4 percent) had less than \$500,000 in gross receipts. It is estimated that the nonprofit sector contributed \$887.3 billion dollars to the U.S. economy in 2012,²² and employed millions of Americans – both for compensation and as volunteers.

Some 501(c)(3) organizations are organized as public and social benefit groups, such as community foundations and public interest or civil rights organizations. These groups run the entire political spectrum. The ACLU, the National Rifle Association, Focus on the Family, and the Cato Institute, for example, are all 501(c)(3) public charities. The organization for which I work – the Goldwater Institute – is a 501(c)(3) organization, dedicated to advancing limited government, free market, and liberty-oriented public policy solutions. The Center for American Progress – a research and education organization that advocates for progressive policies and increased government programs – is also a 501(c)(3) organization.



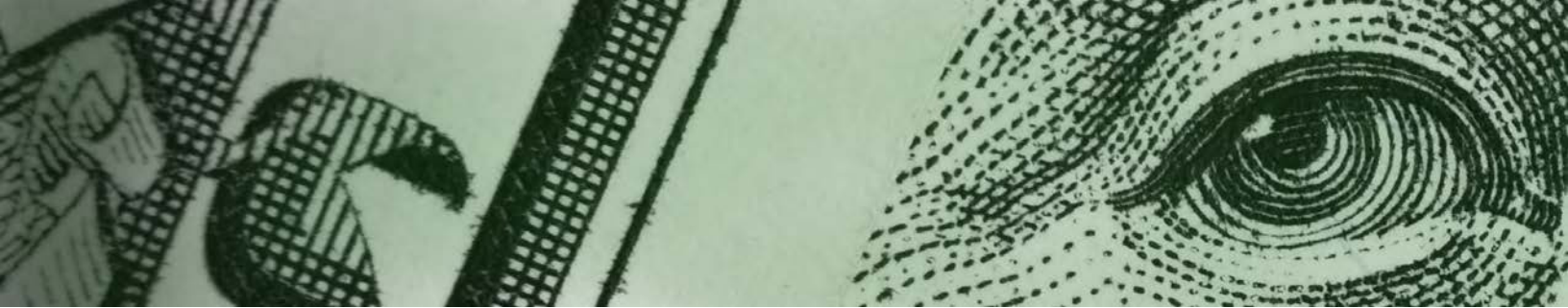
Despite the broad philosophical diversity among 501(c)(3) public charities, an important distinction between them and other 501(c) organizations is that 501(c)(3) groups are prohibited from engaging in any express political activity involving political candidates.²³ Other 501(c) organizations, notably 501(c)(4) groups, can advocate for the election or defeat of political candidates, so long as those activities are not the organization's primary activity. 501(c)(4) organizations can also engage in unlimited lobbying to further the purpose of the organization. By contrast, 501(c)(3) public charities can only engage in a limited amount of lobbying under certain circumstances.²⁴

Of course, the entire point of a public or social benefit organization is to advance an issue or set of issues through public dialogue, including political dialogue. According to government disclosure advocates, however, people should not be able to donate privately to the charities of their choice if those entities engage in any political dialogue. What does this mean in practice? A donation to Planned Parenthood becomes a public record. Member dues to the NRA or Greenpeace would be reported to the government and disclosed to the public. Even donors to a theatre group that engaged in political activity on an issue affecting the arts would be made public. Under these proposals, how many donations would be withheld? How much speech would be silenced?

Yet despite these dangers, trends are developing nationwide to compel the disclosure of private donors to 501(c)(3) groups.

II. GATHERING TRENDS FOR MANDATORY REPORTING AND DONOR DISCLOSURE

Advocates of mandatory government reporting have engaged in a multi-pronged attack on anonymous speech to force more organizations, including 501(c)(3) nonprofits, to reveal their private donors. After a federal disclosure bill failed by a single procedural vote in the U.S. Senate,²⁵ government reporting advocates have largely focused their attention on state legislatures, where several proposals have recently passed or nearly passed that would require a wide range of mandatory government reporting. Additionally, state regulators have begun to demand private donor information under their putative authority to regulate charitable fundraising. Many of these mandates have often been subtle but sweeping; for example, by expanding the definition of an "electioneering communication," or of a "political committee." In many instances, these efforts have resulted in forcible disclosure of both private individuals and nonprofit entities whose purpose is not primarily political.



A. Legislative Efforts to Mandate Donor Disclosure.

In recent legislative sessions, several states have considered or passed statutory measures mandating that private organizations reveal their donors.²⁶ These efforts have generally come in one of two forms: dramatically expanding the definition of what constitutes (1) a “political committee” or (2) an “electioneering communication.” Many of these efforts have direct implications for 501(c)(3) organizations, particularly those that engage in limited lobbying.²⁷ Additionally, the broad sweep of these proposals and statutes have ensnared private citizens engaging in grassroots political activity.

For example, in 2013, Nevada enacted a law that amended the state’s campaign finance laws to expand the definition of a “committee for political action.”²⁸ The amended law defines a “committee for political action” as:

Any business or social organization, corporation, partnership, association, trust, unincorporated organization or labor union...Which does not have as its primary purpose affecting the outcome of any primary election, general election, special election or any question on the ballot, but for the purpose of affecting the outcome of any election or question on the ballot receives contributions in excess of \$5,000 in a calendar year or makes expenditures in excess of \$5,000 in a calendar year.²⁹

In other words, any group that receives or spends more than \$5,000 on an election or ballot question is deemed a political committee, regardless of the overarching nature or purpose of the organization. All so-deemed “committees for political action” must file contribution and expense reports.³⁰

Under this amended law, 501(c)(3) organizations that, for example, support a ballot measure, would almost certainly have to disclose the identities of all their donors. This is true even though that organization would not engage in political activity as its primary purpose. Moreover, this law could easily ensnare small grassroots groups, like a group of neighbors who get together to advocate for or against a ballot question. Even though such a group’s purpose may be political, treating them as if they were a sophisticated political action committee, with all attendant registration and disclosure requirements, deters activities that, as described below, are constitutionally protected and ought to be encouraged.

Such a broad definition of “political committee” even ensnared a concerned *individual* in Arizona. In 2011, Dina Galassini opposed a bond proposal set to appear on the Town of Fountain Hills’ November ballot. Ms. Galassini attended town hall meetings and spoke out against the measure. One month before the election, she also sent a personal e-mail to 23 friends and neighbors asking them to join her in opposing the bond by writing letters and attending a protest where they



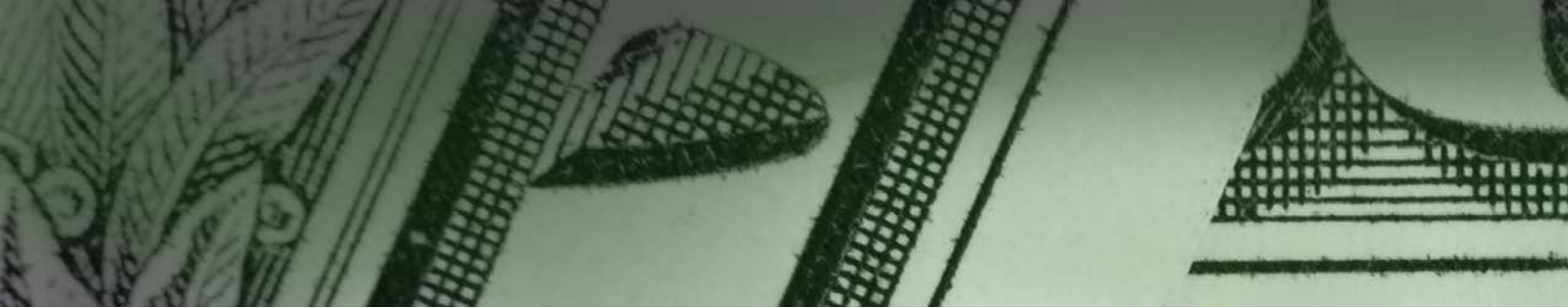
would hold signs on a street corner. Shortly after sending her e-mail, town officials sent Ms. Galassini a “cease and desist letter,” claiming that she must register as a political committee, with attendant registration and disclosure requirements, under Arizona law prior to engaging in such commonplace political activities. As an average citizen concerned about her community, Ms. Galassini was frightened by the letter from town officials, and cancelled her two planned protests.³¹

At the time, Arizona law defined “political committee” in “a 183-word sentence,” as the federal judge observed in the lawsuit that challenged the town’s actions.³² Under that law, any group that spent more than \$250 had to register with the government before distributing literature or making signs pertaining to campaign activities.³³

Fortunately, Ms. Galassini was able to secure pro-bono legal representation from a public interest group, the Institute for Justice, to challenge this broad and burdensome definition of “political committee.” In striking down Arizona’s definition of “political committee,” the court observed, “In this case, it is not clear that even a campaign finance attorney would be able to ascertain how to interpret the definition of ‘political committee.’”³⁴ The court went on to note that the practical effect of Arizona’s campaign finance regulations was to create a “severely demanding task” for small groups wishing to engage in protected political speech.³⁵ Thus, not only did Arizona’s definition of “political committee” burden the speech of small nonprofits organized under 501(c)(3), but its muzzling reach extended to everyday citizens wishing to join together in small groups to address the political issues of the day.

State legislatures have also sought to expand the definition of “electioneering communication” to require 501(c)(3) nonprofits and other small groups to disclose their donors simply for speaking about political issues. For example, the Minnesota legislature recently considered a pair of bills that greatly expanded the definition of “electioneering communication” to include any communication that (1) refers to a candidate, (2) is distributed within 30 days of a primary election or 60 days of a general election, and (3) “can be received by more than 1,500 persons.” Such communications include “printed material” such as billboards and signs. These bills would have required the organization to turn over the “name, address, and amount attributable to each person” who donated more than \$1,000 used for these so-called “electioneering communications.”³⁶ Given the broad scope of this definition of “electioneering communications,” these bills would likely affect 501(c)(3) nonprofits, that, for example, published a voter guide, and require that such groups disclose their donors.

These statewide legislative efforts to compel government reporting of donations to private nonprofits have become more prevalent and widespread. Fortunately, many have been defeated by the voters themselves at the ballot box. Others, however, have survived. Those that do tend to obfuscate the issue and avoid clear First Amendment objections by redefining terms such



as “political committee” or “electioneering communication.” Given the steady drumbeat of government reporting advocates, however, it is likely these legislative efforts will continue in states across the country. At the same time, state regulators are using their powers to compel disclosure even where a state’s statutory scheme does not mandate as much.

B. Regulatory Efforts to Compel Disclosure.

Government reporting advocates – either in tandem with legislative efforts or when legislative efforts have been unsuccessful – have been using the power of regulatory agencies to force nonprofit organizations to reveal their donors. These efforts attack the lifeblood of 501(c)(3) organizations – the ability to fundraise – giving nonprofit organizations the untenable choice between ceasing fundraising activities in a particular state or invading the privacy of the organization’s donors. The most aggressive such efforts are occurring in California and New York.

In order to solicit charitable contributions in California, nonprofits, including 501(c)(3) organizations, must register with the California Registry of Charitable Trusts, which is administered by the Department of Justice. As part of the registration process, 501(c)(3) nonprofits have historically submitted a redacted IRS Form 990 to state regulators. That form did not include the names or other identifying information of donors. In 2014, however, California attorney general Kamala Harris began demanding that 501(c)(3) nonprofits submit an unredacted Form 990 (Schedule B) that includes the names, addresses, and contribution levels of donors.³⁷ Even worse, once this information is turned over to the state government, California law arguably requires government officials to make these records available to the public via public records requests.³⁸ In other words, the chief law enforcement officer in the state of California mandated that private charities disclose their private donors as a precondition to, as we will see in Section IV of this paper, engaging in constitutionally protected speech and association.

New York attorney general Eric Schneiderman has demanded the same information from 501(c)(3) nonprofits under the same auspices.³⁹ Existing statutes and regulations in either state do not support these unilateral regulatory actions.

Unsurprisingly, these unprecedented and alarming power grabs by two state attorneys general have been subject to constitutional challenges in federal court.⁴⁰ Ultimately, the question of whether 501(c)(3) nonprofits must disclose their private donors will need to be resolved by the U.S. Supreme Court.⁴¹ In the meantime, it is clear that government reporting advocates are finding sympathetic backers in regulatory agencies to demand private information – the disclosure of which state law often does not require and the Constitution forbids.

III. THE DANGERS OF DISCLOSURE

Proponents of government-mandated disclosure have set forth several arguments for compelling private charitable organizations to disclose their donors. Those arguments range from the wrong but perhaps well-intentioned to the nefarious. In any event, the strongest arguments for government reporting are easily eclipsed by the dangers of disclosure. On the soft end of the spectrum are those government reporting advocates who claim they are not seeking to prevent speech, but only to inform the public of who is speaking.⁴² On the hard end of the spectrum are partisan political operatives who wish to use disclosure mandates to silence opposing views. As Arshad Hasan, executive director of the anti-privacy group ProgressNow put it, “The next step for us is to take down this network of institutions that are state-based in each and every one of our states.”⁴³ A similar sentiment was echoed by the sponsor of the DISCLOSE Act, the federal bill that would have mandated greater disclosure by nonprofit organizations, when he candidly proclaimed, “the deterrent effect on [political speech] should not be underestimated.”⁴⁴ Regardless of motive, the dangers of disclosure are far outweighed by any putative benefits.

Private association is a fundamental part of our nation’s history and underpins a free society. Mandatory disclosure undermines core values that are essential for free speech and thus representative democracy. Specifically, mandatory disclosure: (1) prevents public discourse from focusing on the message, rather than the messenger; (2) allows for retaliation against speakers by those who disagree, particularly for minority opinions or when speaking truth to power; and (3) muddles regulations so that no one knows what speech is permitted and what is not, thus further chilling speech. Even assuming mandatory disclosure achieves its ostensible goals, an assumption that research does not appear to support,⁴⁵ the costs of disclosure are simply too high.

A. Anonymous Speech Keeps Marketplace of Ideas Focused on the Message.

Anonymous speech is an essential component of free speech, which is an essential component of representative democracy. One of the most important features of anonymous speech is that it focuses the dialogue on the message and issue, rather than the speaker. This is invaluable and irreplaceable in literary, social, and political dialogue. As the U.S. Supreme Court recognized in *Talley v. California*, “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”⁴⁶

Indeed, the ratification debate of our own Constitution was argued primarily under the pseudonym “Publius.” The actual authors, Alexander Hamilton, James Madison, and John Jay, feared that their arguments would be eclipsed by *ad hominem* attacks had the papers not been published anonymously. At the time of ratification, Alexander Hamilton in particular was subject



to personal attacks because of his foreign birth and perceived links to the British Crown.⁴⁷ As one author noted, “Hamilton’s anonymity meant to avoid prejudice and preclude obfuscation of his message, and these interests are still compelling justifications for speaking anonymously.”⁴⁸ Similarly, although a less controversial character, given the regional rivalries of the time, James Madison’s Virginian roots would have made New Yorkers suspicious of his arguments had they been penned in his own name.⁴⁹ Given these realities, an objective assessment of the U.S. Constitution would have been much less likely had it not been for anonymous political speech in the *Federalist Papers*. Put simply, the Constitution may never have been ratified had it not been for anonymous political speech.

The *Federalist Papers* are also instructive for another reason. In *Citizens United v. FCC*, writing for the majority, Justice Kennedy cited to James Madison’s *Federalist 10* in observing that factions will necessarily exist in our republic, “but the remedy of destroying the liberty of some factions is worse than the disease.”⁵⁰ Justice Kennedy went on to observe, “Factions should be checked by permitting them all to speak...and by entrusting the people to judge what is true and what is false.”⁵¹ In our republic, citizens should be trusted to judge the value of the speech, irrespective of the speaker. Competing arguments ought to be weighed on their merits. Indeed, even under the most ideal circumstances, the value of government reporting mandates is negligible when the *content* of the speech, rather than its *source* is the primary consideration in evaluating the strength of competing arguments, particularly in the political context. How many Americans are tired of *ad hominem* attacks on and by political actors, divorced from their positions on political issues? How worn is the country by character assassinations perpetrated by political campaigns? Is there not a yearning for dialogue that is above the caliber of gossip columns? Unfortunately, disclosure mandates drive political dialogue in the opposite direction. The result, as Madison and Justice Kennedy observed, is a “remedy” worse than the “disease” and an affront to the sensibilities of free people who should be entrusted to weigh the value of free speech.

The value of anonymous speech is not limited to purely political dialogue. Authors of literary works as well as editorials and news articles have long published anonymously or under assumed names. Lewis Carroll published anonymously to maintain his privacy. George Orwell wrote under a pen name because he was embarrassed of his early poverty. Both Charlotte and Emily Bronte published their classics under pseudonyms to avoid the significant gender biases of the time. Other authors may do so out of fear of economic or social retaliation. As the U.S. Supreme Court recognized in *McIntyre*, “Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”⁵²



The same is true of the news media. Reporters routinely rely on anonymous sources to reveal major and significant newsworthy events. For example, the identity of Bob Woodward's and Carl Bernstein's primary source, Deep Throat, who provided information on the Nixon Administration's involvement in the Watergate scandal was not revealed until 2005 – over 30 years after President Nixon resigned.⁵³ Indeed, reporters have faced incarceration for refusing to reveal their anonymous sources, even during national security investigations.⁵⁴ These reporters reason, correctly, that anonymous speech often encourages truthful reporting, particularly from those who fear retaliation or retribution for speaking.

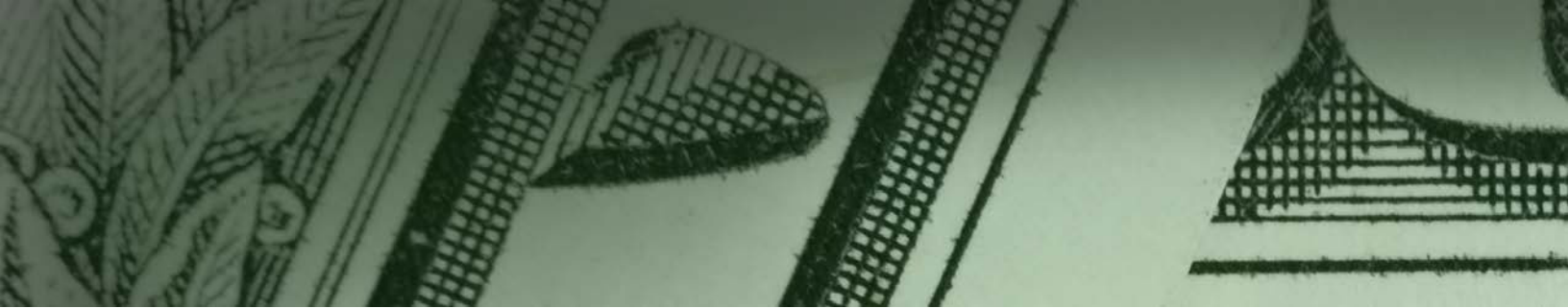
In addition to news reporting, every major newspaper in the country continues to publish anonymous editorials and commentary pieces. It can hardly be argued that media reports and truth in reporting are not tremendously important public values. But imagine a law that compelled the disclosure of news sources who choose to be anonymous or mandated that every newspaper editorial include a byline – and the names of every stockholder in the media corporation that owns the newspaper. The outrage would be swift and justified. The same should be true in the context of donor disclosure to nonprofit organizations – and for the same reasons. The real value of free speech is in the message, not the messenger, and the dangers of disclosure far outweigh any supposed benefits. One of the most significant such dangers is preventing retaliation against speakers who choose to be anonymous by those who disagree, particularly when speaking truth to power.

B. Anonymous Speech Prevents Retaliation, Especially When Speaking Truth to Power.

Writing for the majority in *Talley v. California*, Justice Black wrote, "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."⁵⁵ Political actors have routinely sought the identities of speakers with whom they disagree in order to harass, humiliate, and ultimately silence them.

During the Civil Rights era, for example, the Alabama attorney general sought to compel the National Association for the Advancement of Colored People ("NAACP") to turn over the names and addresses of all of its members to the state. This act of force and intimidation was fortunately rebuffed by the U.S. Supreme Court as a violation of the NAACP's and its members' First Amendment rights.⁵⁶

Even staunch advocates for free speech, such as John Adams, could not help using the power of government to silence critics, when, in 1798, he signed the Sedition Act.⁵⁷ That statute made it a federal crime to "write, print, utter or publish...any false, scandalous and malicious writing or writings against the government of the United States."⁵⁸ Of course, Adams punished such criminal acts only if their "scandalous" writings "pertained to him or his allies."⁵⁹ Unfortunately, judicial review had yet



to be established in 1798. Had it been, perhaps Mr. Adams would have received an admonishment from the Supreme Court, such as the one that echoed over two centuries later in *Citizens United*:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.⁶⁰

Unfortunately, efforts to compel disclosure in order to silence critics continue today. These include threats from government bureaucrats, like we saw when Dina Galassini tried to organize some friends and neighbors to oppose a local bond measure in Fountain Hills, Arizona. They include threats from other citizens, such as when Margie Christoffersen lost her job as a restaurant manager after her \$100 donation to the campaign to ban gay marriage in California became public.⁶¹ And perhaps most ominously, these include threats from those wielding law enforcement authority, like the controversial Arizona sheriff, Joe Arpaio, who has jailed journalists critical of his office as well as political opponents.⁶² As the U.S. Supreme Court has long recognized, public disclosure of donations undoubtedly discourages political participation and exposes contributors to harassment and retaliation.⁶³ Anonymous speech protected by the First Amendment has been the one barrier to prevent these abuses.

C. Regulatory Labyrinths Chill Free Speech.

In order for opportunities for robust and free speech to be open to every speaker – not just the sophisticated or well-connected – the rules of the road must be simple and clear. Citizens and citizens groups must know what is permissible and what is impermissible, so they can steer their conduct accordingly. This is, in fact, a constitutional precept that negates vague and overbroad laws, particularly in the context of the First Amendment.⁶⁴ Unfortunately, in the area of campaign finance law and mandatory donor disclosure, the rules of the road can be anything but simple and clear. Regulations are so often muddled that the average speaker does not know what is permissible and what is not. The unfortunate and inevitable result is less speech.

The U.S. Supreme Court in *Citizens United* recognized the importance of simplicity and clarity in the context of campaign finance speech restrictions:

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must

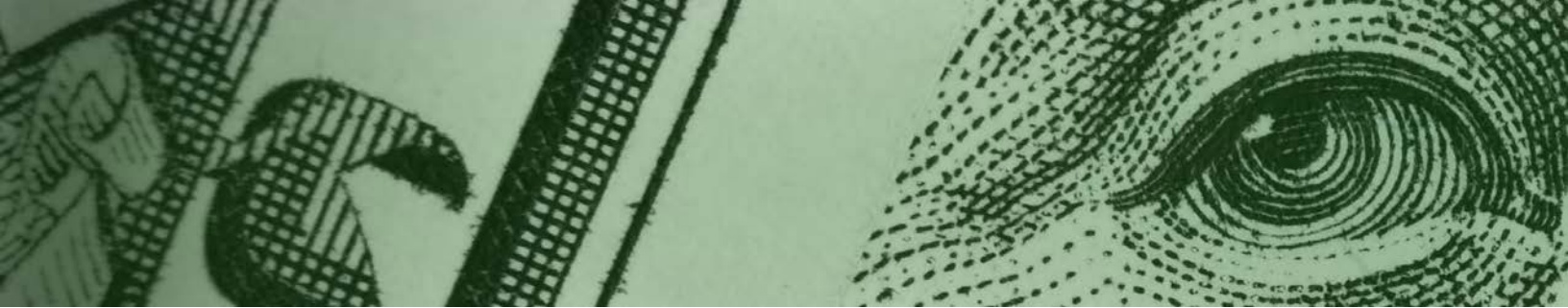
necessarily guess at [the law's] meaning and differ as to its application.⁶⁵

A recent law review article provided one example of a small group of concerned citizens in a rural county who wanted to run a message about an environmental policy to illustrate how average Americans might get caught in the morass of campaign finance restrictions. The authors estimated that in order to form a political action committee to comply with federal election law, an average issue group would likely have to spend \$9,000 in legal fees and ongoing compliance costs of \$2,800.⁶⁶ This expense alone makes political advocacy for most Americans cost-prohibitive.

Even more dangerous is the possibility that citizens who do choose to speak will get ensnared in the complexities of campaign finance restrictions. Dina Galassini had first-hand experience with this when Fountain Hills labeled her efforts to e-mail friends and organize a street protest a “political committee.” The predictable result was that Ms. Galassini was scared her grassroots efforts were illegal, and she ceased her communications.⁶⁷ As the U.S. Supreme Court observed, “As a practical matter...given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak.”⁶⁸ This acts as a prior-restraint on communication, the effect of which is to prevent speech – an outcome that is anathema to the First Amendment. Moreover, as the Court forecast in a FEC enforcement case, “Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports...it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.”⁶⁹

In this sense, mandatory disclosure laws have the precise effect they were intended to have by many government reporting advocates – they silence opposing views. In his concurring opinion in *Citizens United*, Justice Thomas observed that the intimidation tactics by government reporting advocates have spurred a “cottage industry that uses forcibly disclosed donor information to preempt citizens’ exercise of their First Amendment rights.”⁷⁰ Justice Thomas then cited to a *New York Times* article that described a new nonprofit group formed in the run-up to the 2008 elections that “plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions...[by exposing donors to] legal trouble, public exposure and watchdog groups digging through their lives.”⁷¹ This organization’s leader described his donor disclosure efforts simply as “going for the jugular.”⁷²

Cloaked as advocates of greater information and transparency, the enemies of free speech are at the gate. Defenders of the First Amendment must be ready to identify the dangers of donor disclosure and challenge efforts to compel government reporting wherever they occur. The courts should be one such battleground.



IV. DISCLOSURE MANDATES THAT ENCOMPASS 501(C)(3) NONPROFITS ARE UNCONSTITUTIONAL

The Supreme Court has long recognized “the vital relationship between freedom to associate and privacy in one’s associations.”⁷³ In striking down the State of Alabama’s attempt to compel the names and addresses of members to the NAACP, the Supreme Court compared the “[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs” to a “requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.”⁷⁴ Twenty-five years later, in *Brown v. Socialist Workers ’74 Campaign Comm.*, the Court reiterated this concept: “The Constitution protects against the compelled disclosure of political associations and beliefs.”⁷⁵ In no uncertain terms the Supreme Court has ruled that private association is protected by the Constitution. And only in certain narrow circumstances, as discussed below, will this right to association yield to a countervailing and sufficiently significant governmental interest. As the Supreme Court has cautioned, however, “[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”⁷⁶

As the law stands today, donor disclosure mandates applied to 501(c)(3) nonprofits in most forms are unconstitutional. Because 501(c)(3) organizations are expressly prohibited from participating in candidate campaign advocacy by virtue of their 501(c)(3) designation, the government justifications for restricting speech in other campaign finance cases simply do not apply to issue advocacy groups. Thus, attempts to force the disclosure of donors to 501(c)(3) nonprofits offend basic principles of free speech and violate the Constitution.

A. Government Justifications to Restrict Express Advocacy Do Not Apply to Issue Advocacy Organizations.

At the outset, it is important to distinguish between “express advocacy” and “issue advocacy.” The former is speech that expressly advocates for the election or defeat of a political candidate.⁷⁷ The latter is speech that is focused on issues, not candidates. Or, as the Supreme Court put it, “Issue advocacy conveys information and educates.”⁷⁸ Political speech is protected by the broad text of the First Amendment and the cases that have interpreted it. Over time, however, the courts have carved out exceptions under which “express advocacy” is subject to government regulation. These include, for example, federal limits on contributions to candidates or communications that expressly advocate for the election or defeat of a candidate.⁷⁹ Because such restrictions infringe on political speech, the government bears the high burden of showing that they are narrowly tailored to achieve a compelling government interest.⁸⁰ In campaign finance cases, the Supreme Court has accepted very few compelling government interests that met this standard. Chief among them is when political speech, often in the form of candidate contributions or express advocacy, can result in *quid pro*



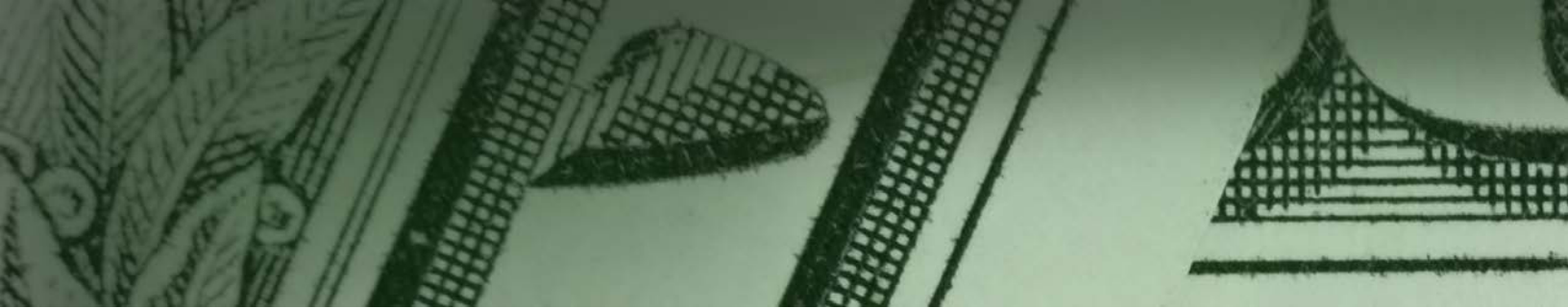
quo corruption.⁸¹ The Supreme Court has ruled that the government has a compelling interest in regulating campaign finance when the regulation is meant to prevent the exchange of money for political favors.

As a result, the Court has held that most campaign finance regulations are only constitutionally justified if they pertain to express advocacy where *quid pro quo* or its appearance are possible. Because 501(c)(3) organizations, however, are prohibited from engaging in any express advocacy,⁸² it is highly improbable for there to be any actual corruption or the appearance of corruption because organizations are not speaking about candidates, they are speaking about issues. To the extent 501(c)(3) nonprofits discuss candidates, it is generally in the context of nonpartisan voter guides.

Granted, the Court has indicated that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”⁸³ After all, “[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.”⁸⁴ However, the Court has repeatedly drawn a line between permissible restrictions on express advocacy and impermissible restrictions on issue advocacy. As the Court wrote in *Federal Election Commission v. Wisconsin Right To Life, Inc.*, “[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”⁸⁵ That case should be conclusive on the question of campaign finance regulation of 501(c)(3) organizations. Although *Wisconsin Right To Life* pertained to electioneering communications rather than donor disclosure, the rationale is the same – campaign finance regulations are unconstitutional if they pertain to pure issue advocacy, rather than express advocacy. Because 501(c)(3) nonprofits do not and cannot engage in campaign-related speech, courts should strike down attempts to regulate their activities as unconstitutional.

B. Disclosure Mandates are Prohibited by the First Amendment.

Even under a less exacting legal test, donor disclosure mandates as applied to 501(c)(3) organizations are unconstitutional. To be sure, the U.S. Supreme Court has set a lower bar for determining whether disclosure mandates are constitutional than it has for outright bans on speech. The Court has reasoned that although “disclosure requirements may burden the ability to speak...[they] do not prevent anyone from speaking.”⁸⁶ Thus, the Court has subjected disclosure requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” government purpose.⁸⁷ Although a less exacting test than strict scrutiny, which requires that the restriction on speech be narrowly tailored to a compelling government purpose, this is still a high bar. And the Court has only identified three such “sufficiently important” interests to justify disclosure requirements. Namely, disclosure mandates may be




constitutionally justified if they: (1) “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;” (2) serve as “an essential means of gathering the data necessary to detect violations of...*contribution limitations*;” or (3) provide information “as to where *political campaign* money comes from and how it is spent by the *candidate* in order to aid the voters in evaluating those who seek...office.”⁸⁸ None of these government purposes justifies forcible disclosure of donor identities by 501(c)(3) organizations.

First, as described above, deterring actual or apparent *quid pro quo* corruption cannot be a permissible government purpose because 501(c)(3) organizations are prohibited from participating in political campaigns for or against candidates. Second, and similarly, the reporting, recordkeeping, and gathering data interest is applicable only in the context of detecting violations of campaign contribution limitations that have been upheld. Since 501(c)(3) organizations are prohibited by law from contributing to candidate campaigns, this government interest cannot apply to them.

The final court-sanctioned interest that allows mandatory disclosure likewise does not apply to 501(c)(3) organizations. The government’s purported “informational interest” in the source of campaign money, like its interest in deterring corruption and gathering data to enforce contribution limits, also cannot apply to 501(c)(3) organizations, because they do not participate in candidate campaigns. Proponents of government reporting often cite *Citizens United* and *John Doe No. 1 v. Reed* to support their claim that disclosure mandates are constitutionally permissible. Both cases are inapposite. *Citizens United* dealt with an “electioneering communication” that specifically referenced then-Senator Hillary Clinton by name shortly before an election.⁸⁹ Although the Court did not limit disclosure mandates to express advocacy, it did appear to sanction disclosure requirements only in the context of campaign-related communications.⁹⁰ In other words, the logic the Court relies on in *Citizens United* only applies to express advocacy, not the types of speech that 501(c)(3) nonprofits engage in. *John Doe* never even addressed the “informational interest” justification. It was, instead, decided on a separate basis pertaining to the integrity of the electoral process for referendum petitions, allowing disclosure of the names of those who sign ballot petitions, rather than groups that advocate for the passage or defeat of them.⁹¹

Thus, the Court has not found a sufficient government interest in mandating disclosure of donor or member lists outside of the context of campaign-related speech. Even in the context of campaign speech, the Supreme Court struck down a federal prohibition on issue advocacy, rather than express advocacy, advertisements: “We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy...”⁹² Additionally, in *McIntyre v. Ohio Elections Commission*, the Court flatly rejected the government’s



purported “informational interest” in requiring the disclosure of an author of anonymous leaflets opposing a school tax: “Ohio’s informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.”⁹³

Based on these precedents, the Court has identified three government interests that may override the strong First Amendment protections afforded to anonymous political speech. None are applicable to 501(c)(3) organizations. The only interest that is arguably applicable – the government’s informational interest – has been expressly rejected by the Supreme Court in the context of both issue advocacy speech and the creation of anonymous political pamphlets. Thus, because there is not a sufficiently important government interest in mandating the disclosure of donor information to 501(c)(3) organizations, such requirements are unconstitutional.

C. Disclosure Mandates are also Susceptible to Constitutional Challenge as Vague and Overbroad.

As a final note, as discussed in Section III, disclosure laws may be unconstitutional on other grounds. These laws are often unconstitutionally vague or overbroad, especially their definitions of “political committees” and “electioneering communications.”

As the Supreme Court has set out, “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”⁹⁴ Because individuals are “free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”⁹⁵ If laws “interfere with the right of free speech or of association, a more stringent vagueness test should apply.”⁹⁶ At the same time, even clear laws may be unconstitutionally overbroad if they reach constitutionally protected activity, such as the right to free speech and association.⁹⁷

States have struggled with defining essential terms in campaign finance laws, such as what constitutes a “political committee” or an “electioneering communication.” Much of the difficulty states have had lies in the fact that they are attempting to unconstitutionally regulate constitutionally protected activities, resulting in clumsy legislation.

This is precisely what happened in the *Galassini* case, where the federal district court struck down Arizona’s 183-word definition of “political committee” as unconstitutional. That statute not only failed to alert individuals of ordinary intelligence what activities were prohibited, but it also swept within its purview clearly constitutionally protected political activity. The district court had no



problem in striking down Arizona’s definition of “political committee” as vague because “people of common intelligence must guess at the law’s meaning and will differ as to its application,”⁹⁸ and overbroad “because it sweeps in a substantial amount of protected speech that the State does not have an important interest in regulating.”⁹⁹

The same fate likely awaits similarly vague and overbroad laws seeking to extend the reach of campaign finance reporting requirements to the constitutionally protected activities of 501(c)(3) organizations.

V. PROTECTING DONOR PRIVACY: THE WAY AHEAD

Donor privacy and free speech are under assault. The millions of men and women who participate in or support nonprofit activities as well as liberty-minded advocates everywhere should resist efforts to mandate government reporting and silence speech in courts and statehouses throughout the country. Action can be taken by both litigants and legislators.

The opening rounds of the legal fight to protect donor privacy against efforts to mandate government reporting have, in fact, already begun. As described above, the *NAACP* case and other Supreme Court precedents have firmly established that private association is protected by the Constitution. However, some government reporting advocates have read the decision in *NAACP* to establish a right to political privacy only on a showing that disclosure would subject groups to threats, harassment, or other forms of coercion. As one commentator described this position, “[I]n order to establish a right of political privacy, one’s views must be so disfavored that others might attack or fire members of the group for espousing such views.”¹⁰⁰ This reading leads to the perverse result that members of an American Nazi political party may have greater rights to political privacy under the First Amendment than members of the National Rifle Association.¹⁰¹ Of course, the proper position is that political privacy should be protected regardless of political views. Moreover, speakers should not have to suffer and prove an injury before their right to private speech and association is protected.

Unfortunately, courts are already split on this issue.¹⁰² In one particularly troubling ruling, the U.S. Court of Appeals for the Ninth Circuit held that donor disclosure itself was not a violation of a 501(c)(3) organization’s First Amendment rights; instead, the nonprofit had to show *actual* harm to their speech rights through evidence of harassment, threats, or other chilling conduct, in order to claim constitutional protection.¹⁰³ In other words, the burden is on the speaker to justify his speech. That is a harm that results in less speech by discouraging public discourse and participation in the



political process.¹⁰⁴ Moreover, such a preventive showing of harassment or threats may be impossible to make until the harm actually occurs, particularly future harms. A political issue that may not be controversial today could well be highly controversial tomorrow. Public disclosure of support or opposition to such an issue may subject speakers to future harm that they would have no way of proving ahead of time.

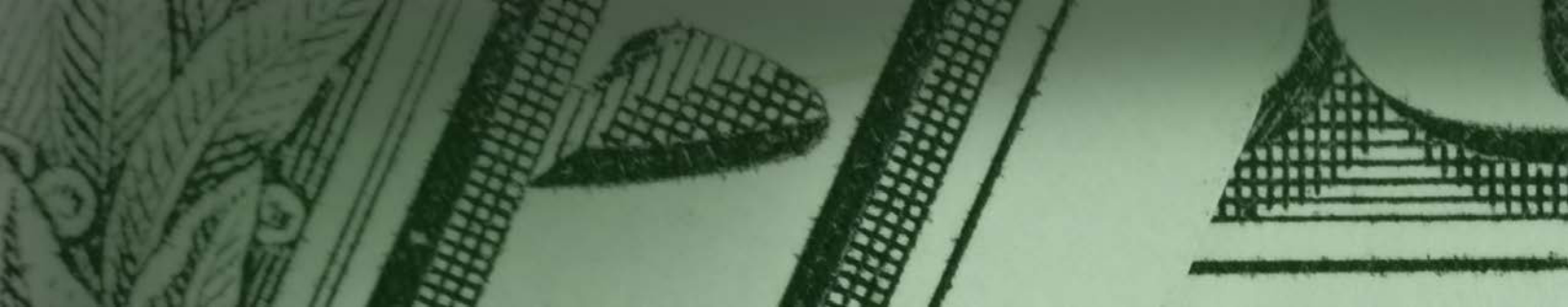
Ultimately, the question of whether nonprofits that engage in issue advocacy must disclose their donors may ultimately reach the U.S. Supreme Court. Although the case most likely to succeed would be one where a nonprofit demonstrated harassment or threats to its donors as a result of disclosure mandates, such a showing should not be necessary. Instead, the Supreme Court (and any lower courts hearing the issue) should provide clarity in this area by holding that citizens should not first need to suffer an injury to receive First Amendment protection. The Court should pronounce that political privacy and association are unequivocally protected under the First Amendment, much as Justice Thomas asserted in *Citizens United*: "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection."¹⁰⁵

The Court should also establish that disclosure laws, if they apply at all, explicitly do not apply to issue advocacy organizations that do not participate in campaign speech. As it has in the past, the Court may draw a clear line between express advocacy and issue advocacy, and hold that disclosure laws are not constitutional when applied to issue advocacy.

These declarations would go a long way to providing simplicity and clarity in an area where simplicity and clarity should be the rule, not the exception.

In addition to federal litigation, free speech advocates should also not hesitate to deploy the "federalism shield"¹⁰⁶ to protect donor privacy. Thus, liberty-minded litigants should seek protection from the 50 state constitutions, which often provide greater protection to free speech and association rights.

Likewise, these same protections for private speech and association can emanate from state capitols. For example, state statutes can simply establish that campaign finance disclosure laws do not apply to organizations that are tax exempt as 501(c) nonprofits. There is existing precedent for this in some states.¹⁰⁷



Additionally, as we have seen, the definition of “electioneering communication” in statute and regulation has ensnared a great deal of constitutionally protected activity, including that of 501(c)(3) nonprofits. Thus, to the extent they already exist and repeal is not practical, disclosure laws that cover 501(c)(3) nonprofits should be amended to clarify that they do not apply to any communications that do not expressly advocate for the election or defeat of a political candidate.

Finally, to the extent state statutes and regulations have broadened the definition of “political committee” to sweep in the activities of 501(c)(3) organizations, those definitions should be clarified to exclude any organization that does not participate in candidate campaign activities as its primary purpose. Since 501(c)(3) nonprofits are specifically prohibited from engaging in candidate campaign activities, these amendments would have the effect of protecting 501(c)(3) nonprofits from disclosure requirements of state law or regulatory action.

VI. CONCLUSION

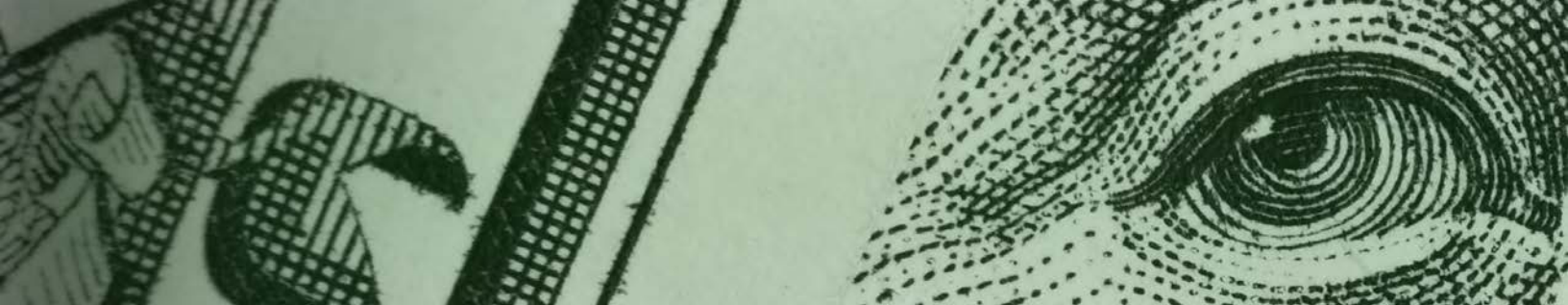
Responding to the steady creep of campaign finance laws to restrict more and more speech, Chief Justice John Roberts lamented in one Supreme Court opinion, “Enough is enough.”¹⁰⁸ The same can be said of government reporting activists who seek to extend the reach of disclosure mandates to nonprofit and charitable activities, like tentacles covering the mouths of a million speakers. Such efforts should not be tolerated – either by the courts or state legislatures. The already inadequate justifications for limiting an organization’s right to engage in express advocacy without disclosing the identities of their donors collapse entirely when applied to issue advocacy organizations, such as 501(c)(3) groups. The nearly one million nonprofits – whose activities range from civil rights advocacy to equestrian therapy – should not fall victim to politically-driven efforts to silence their views and end their activities.

At the same time, the disrespect shown for anonymity in political dialogue and association disregards our nation’s rich history and tradition of protecting these rights and demeans Americans who cherish freedom of thought and speech. As the New York Supreme Court admonished in a First Amendment decision over 40 years ago:

Do not underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.¹⁰⁹

(ENDNOTES)

- 1 David French, "Wisconsin's Shame: 'I Thought It was a Home Invasion,'" *National Review*, April 20, 2015, available at <http://www2.nationalreview.com/article/417155/wisconsin-shame-i-thought-it-was-home-invasion-david-french>.
- 2 See, e.g., "Wisconsin Political Speech Raid," *Wall Street Journal*, Nov. 18, 2013, available at <http://www.wsj.com/articles/SB10001424052702304799404579155953286552832>; Richard Esenberg, "How Wisconsin Prosecutors Became Campaign Partisans," *Wall Street Journal*, Sep. 19, 2014, available at <http://www.wsj.com/articles/richard-m-esenberg-how-wisconsin-prosecutors-became-campaign-partisans-1411167181>; Cary Spivak and Meg Kissinger, "Ruling is Latest Blow to Probe of Scott Walker's Campaign, Allies," *Milwaukee-Wisconsin Journal Sentinel*, Feb. 8, 2015, available at <http://www.jsonline.com/news/statepolitics/ruling-latest-blow-to-probe-of-walkers-campaign-allies-b99440298z1-291199181.html>.
- 3 Jason Stein, et al., "FBI Seizes Items at Home of Former Top Aide to Gov. Walker," *Milwaukee-Wisconsin Journal Sentinel*, Sep. 14, 2011, available at <http://www.jsonline.com/news/statepolitics/129801878.html>; "Wisconsin Political Speech Raid," supra note 2.
- 4 *Id.*
- 5 *O'Keefe v. Schmitz*, 19 F.Supp.3d 861 (E.D. Wisc. 2014). Although not disagreeing with the district court on the merits, the Seventh Circuit Court of Appeals dismissed the case based on federal-state comity grounds. *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014). That decision is now pending a petition for certiorari at the U.S. Supreme Court.
- 6 Spivak, supra note 2.
- 7 "Wisconsin Political Speech Raid," supra note 2.
- 8 Benjamin Barr & Stephen R. Klein, *Publius Was Not A Pac: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 *Wyo. L. Rev.* 253, 256-58 (2014).
- 9 *Id.*
- 10 David R. Berman, "Dark Money in Arizona: The Right to Know, Free Speech and Playing Whack-a-Mole," *Arizona State University Morrison Institute for Public Policy*, Mar. 2014 at 1, available at <https://morrisoninstitute.asu.edu/products/dark-money-arizona-right-know-free-speech-and-playing-whack-mole>.
- 11 See "Campaign Finance Disclosure: The Devil is in the Details," *Center for Competitive Politics*, 2013 at 4, available at www.campaignfreedom.org/.../12/2014-08-19_Policy-Primer_Disclosure.pdf.
- 12 Certain expenditures made by such groups are purportedly "dark" because while particular candidates or political committees must identify the organizations that financially contribute to their cause, the organizations themselves are not forced to disclose the identities of their donors. Because most § 501(c) organizations are well known, or vocal about the causes and issues they support, it is hardly fair to call such contributions "dark."
- 13 See, e.g., Bruce F. Freed and Karl J. Sandstrom, "How Dark Money is Distorting Politics and Undermining Democracy," *The Fiscal Times*, Feb. 24, 2015, available at <http://rebootamerica.thefiscaltimes.com/index.php/how-dark-money-is-distorting-politics-and-undermining-democracy> ("[A] large swath of political spending has gone underground."); Berman, supra note 10 ("Dark money refers to the infusion of large amounts of money into political campaigns...") (emphasis added).



- 14 "FEC Summarizes 24-Month Campaign Activity of the 2013-2014 Election Cycle," U.S. Federal Elections Commission, Apr. 9, 2015, available at <http://www.fec.gov/pages/fecrecord/2015/may/24msummary2014cycle.shtml>.
- 15 "2014 Outside Spending, by Group," The Center for Responsive Politics, available at <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=U>.
- 16 "Campaign Finance Disclosure," supra note 11, at 4. The Center for Competitive Politics performed a similar analysis of overall spending by non-disclosing organizations in this paper.
- 17 Id.
- 18 Brice S. McKeever and Sarah L. Pettijohn, "The Nonprofit Sector in Brief 2014," The Center on Nonprofits and Philanthropy at the Urban Institute, Oct. 2014, at 3, available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413277-The-Nonprofit-Sector-in-Brief--.PDF>.
- 19 The federal tax code defines 501(c)(3) organizations as follows: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals..." 26 U.S.C. § 501(c)(3).
- 20 Lesley Rosenthal, *Good Counsel: Meeting the Legal Needs of Nonprofits*, 5-6 (2012).
- 21 Id. at 6.
- 22 McKeever, supra note 18 at 1.
- 23 26 U.S.C. § 501(c)(3).
- 24 26 U.S.C. § 501(h)
- 25 In 2010, the U.S. House of Representatives passed the Democracy is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE" Act), which would have mandated greater disclosure by nonprofit organizations, including those organized under 501(c)(4). The bill was essentially defeated in the Senate when it failed on a cloture vote. See Library of Congress, Bill Summary & Status 111th Congress (2009-2010), S.3628, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03628>. However, new iterations of the bill have appeared in subsequent Congresses. Additionally, and perhaps more troublingly, fifty-four senators recently supported a constitutional amendment to amend the First Amendment which would provide literally no limits on Congress's authority to regulate free speech in the context of campaign finance reform. See Byron York, "Dems struggle to show anti-Koch amendment is 'reasonable,'" *Washington Examiner*, Jun. 26, 2014, available at <http://www.washingtonexaminer.com/dems-struggle-to-show-anti-koch-amendment-is-reasonable/article/2550250>.
- 26 See e.g., H.F. 43, S.F. 154 89th Leg. (Mn. 2015-16); H.B. 188, 98th Gen. Assembly (Mo. 2015); H. 3722, 121st Sess. (S.C. 2015-16).
- 27 501(c)(3) nonprofits may engage in limited lobbying so long as it does not constitute a "substantial part" of the organization's activities. 26 U.S.C.A. § 501(c); see also 26 U.S.C.A. § 501(h).
- 28 S.B. 246, 77th Leg. (Nv. 2013).
- 29 Nev. Rev. Stat. Ann. § 294A.0055 (emphasis added).



- 30 “State of Nevada Committee for Political Action (PAC) Information Sheet,” Secretary of State Barbara K. Cegavske, available at: <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=3119>.
- 31 Galassini v. Town of Fountain Hills, No. CV-11-02097-PHX-JAT at 2-7 (D. Ariz. Sept. 30, 2013).
- 32 *Id.* at 1.
- 33 Ariz. Rev. Stat. Ann. § 16-901(19) (Ariz. 2012).
- 34 Galassini, *supra* note 31 at 33.
- 35 *Id.* at 41.
- 36 H.F. 43, S.F. 154 89th Leg. (Mn. 2015-16).
- 37 Tim Phillips and David Spady, “A California Assault on Free Speech That Would Shock the Founders,” *Wall Street Journal*, Dec. 19, 2014, available at <http://www.wsj.com/articles/tim-phillips-and-david-spady-a-california-assault-on-free-speech-that-would-shock-the-founders-1419032786>.
- 38 Cal. Gov’t Code §§ 6250, *et seq.*
- 39 *Citizens United, et al. v. Schneiderman*, No. 1:14-cv-3703 (S.D.N.Y. May 22, 2014).
- 40 See Phillips and Spady, *supra* note 37; *Citizens United v. Schneiderman*, *supra* note 39.
- 41 See *Center for Competitive Politics v. Harris*, application for injunction pending petition for cert. filed (U.S. May 15, 2015) (No. 14-15978).
- 42 Berman, *supra* note 10 at 7.
- 43 Jon Gabriel, “Netroots Panel Launches Effort to ‘Take Down’ Conservative ‘Stink Tanks,” *Ricochet* available at <https://ricochet.com/archives/netroots-panel-launches-effort-take-conservative-stink-tanks/>; see also Nick Dranias, “In Defense of Private Civic Engagement: Why the Assault on ‘Dark Money’ Threatens Free Speech – and How to Stop the Assault,” *The Heartland Institute*, April 2015, at 8, available at <http://www.campaignfreedom.org/2015/04/20/in-defense-of-private-civic-engagement-why-the-assault-on-dark-money-threatens-free-speech-and-how-to-stop-the-assault/>.
- 44 CNN, “Floor Statement: Sen. Mitch McConnell on the DISCLOSE Act,” Jul. 17, 2012, available at <http://www.cnn.com/2012/07/17/politics/mcconnell-disclose-act-statement/>.
- 45 David M. Primo, “Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public Debate,” *Institute for Justice*, Oct. 2011, available at <http://www.rochester.edu/College/PSC/primo/FullDisclosurePrimoIJReport.pdf>.
- 46 362 U.S. 60, 64 (1960).
- 47 Barr & Klein, *supra* note 8, at 257.
- 48 *Id.*
- 49 *Id.*
- 50 *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 354-55 (2010) (internal quotations omitted).

51 Id. at 355.

52 *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

53 David Von Drehle, “FBI’s No. 2 Was ‘Deep Throat’: Mark Felt Ends 30-Year Mystery of The Post’s Watergate Source,” *Washington Post*, Jun. 1, 2005, available at http://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwseRIV_story.html.

54 Adam Liptak, “Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Source,” *The New York Times*, Jun. 2, 2014, available at http://www.nytimes.com/2014/06/03/us/james-risen-faces-jail-time-for-refusing-to-identify-a-confidential-source.html?_r=0.

55 362 U.S. 60, 64 (1960).

56 *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958); see also *In re First Nat’l Bank*, 701 F.2d 115, 118 (10th Cir. 1983) (“The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protester group has been said to be ‘readily apparent’”) (quoting *United States v. Grayson Cnty. State Bank*, 656 F.2d 1070, 1074 (5th Cir. 1981)).

57 Barr & Klein, *supra* note 8, at 260.

58 1 Stat. § 596-97 (1798).

59 Barr & Klein, *supra* note 8, at 260.

60 *Citizens United*, 558 U.S. at 356.

61 Steve Lopez, “Prop. 8 Stance Upends Her Life,” *Los Angeles Times*, Dec. 14, 2008.

62 Michelle Ye Hee Lee and Michael Kiefer, “Maricopa County supervisors settle lawsuits filed by ‘New Times’ founders, Stapley” *The Arizona Republic*, Dec. 20, 2013.

63 *Buckley v. Valeo*, 424 U.S. 1, 68 (1976).

64 See *Dranias*, *supra* note 43, at 6.

65 *Citizens United*, 558 U.S. at 324 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (internal quotations omitted)).

66 Barr & Klein, *supra* note 8, at 267-270.

67 Galassini, *supra* note 31 at 2-7.

68 *Citizens United*, 558 U.S. at 335.

69 *Fed. Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).

70 *Citizens United*, 558 U.S. at 482.

71 Id. at 482-483.

72 Id. at 482.

73 NAACP, 357 U.S.at 462.

74 Id.

75 459 U.S. 87, 91 (1982).

76 Fed. Election Comm’n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 457 (2007).

77 The Supreme Court extended the reach of campaign finance regulations to speech that is the “functional equivalent” of express campaign speech that also mentions a candidate for federal office. See *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 204-206 (2003).

78 Wisconsin Right To Life, Inc., 551 U.S. at 470.

79 See, e.g., *Buckley*, 424 U.S. 1.

80 See *McConnell*, 540 U.S. at 205.

81 *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450 (2014).

82 Section 501(c)(3) nonprofits are prohibited from “participat[ing] in, or intervene[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” 26 U.S.C. § 501(c)(3).

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

84 Id.

85 Wisconsin Right to Life, 551 U.S. at 474.

86 *Citizens United*, 558 U.S. at 315 (internal citation omitted).

87 *Buckley*, 424 U.S. at 64-66.

88 Id. at 66-68 (internal citations omitted) (emphasis added).

89 *Citizens United*, 558 U.S. at 368.

90 Id at 369.

91 *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) (finding as sufficient a government interest in “preserving the integrity of the electoral process” in the specific context of disclosing the names of signatories to a referendum petition).

92 See Wisconsin Right to Life, 551 U.S. at 457.

93 *McIntyre*, 514 U.S. at 349.

94 *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

95 Id.

96 *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

97 *Grayned*, 408 U.S. at 114.



- 98 Id. at 33.
- 99 Id. at 41.
- 100 Barr & Klein, *supra* note 8, at 277.
- 101 See, e.g., *id.* at 281.
- 102 Compare *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) with Edvard Pettersson, “Koch Group Gets to Keep Donors Secret in California Lawsuit,” *Bloomberg.com*, Feb. 17, 2015 available at <http://www.bloomberg.com/news/articles/2015-02-17/koch-group-wins-order-blocking-california-donor-data-demand>.
- 103 *Harris*, 784 F.3d at 1314.
- 104 See *Buckley*, 424 U.S. at 68, 83.
- 105 *Citizens United*, 558 U.S. at 485 (Thomas, J., dissenting) (internal citations and quotations omitted).
- 106 See *Dranias*, *supra* note 43 at 22.
- 107 See, e.g., *Ariz. Rev. Stat. § 16-922* (establishing that religious institutions organized under Section 501(c)(3) are not required to register as political committees). This law is narrowly confined to 501(c)(3) religious organizations. Model legislation can and should be expanded to include any 501(c)(3) nonprofit entity.
- 108 *Wisconsin Right to Life*, 551 U.S. 478.
- 109 *People v. Duryea*, 76 Misc. 2d 948, 966, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974) *aff’d*, 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974) (internal quotations omitted).