

By Austin Graham / November 29, 2018

## TRANSPARENCY AND THE FIRST AMENDMENT

### How Disclosure Laws Advance the Constitution's Promise of Self-Government

The disclosure of money spent to influence elections is a cornerstone of campaign finance law.<sup>1</sup> With origins in the Progressive era, political disclosure laws operate as a mechanism to shine light on the sources of funds in our democratic processes. Historically, disclosure has enjoyed bipartisan support as a means of combating corruption and informing voters about the financial interests supporting or opposing candidates and elected officials.

Since 2007, the U.S. Supreme Court has steadily chipped away at the permissible range of campaign finance regulation. In a series of 5-4 decisions, the Court under Chief Justice John Roberts has struck down the federal restriction on corporate-funded political ads during the pre-election period, the longstanding prohibition on corporations and unions making independent expenditures in elections, and aggregate limits on individuals' campaign contributions. But the Court's support for campaign finance disclosure represents an exception to this deregulatory trend, with eight of nine Justices repeatedly recognizing that transparency requirements provide crucial information to voters about candidates and their supporters.

Despite the Roberts Court's sustained approval of disclosure, opponents of campaign finance regulation have continued to attack the constitutionality of reporting and disclaimer requirements. Most of these challenges contend that disclosure infringes on First Amendment rights of political speech and associational privacy—but fail to recognize that disclosure actually promotes interests “rooted in the Constitution and in the First Amendment itself.”<sup>2</sup>

In this report, we take a more holistic view of the relationship between disclosure laws and the First Amendment, viewing political transparency as a means to *advance* First Amendment principles “by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process.”<sup>3</sup> This understanding of disclosure is grounded in the First Amendment's overarching aim of promoting democratic self-governance, and, relatedly, ensuring that elected leaders are responsive

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<sup>1</sup> Throughout this report, “disclosure” refers to three activities: reporting campaign contributions and expenditures to election officials; providing disclosure statements, commonly referred to as “disclaimers,” on political advertising; and publishing data on contributions and expenditures.

<sup>2</sup> *McCutcheon v. FEC*, 572 U.S. 185, 236 (2014) (J. Breyer, dissenting).

<sup>3</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002).

to the American electorate.

This report begins with an overview of the development of federal campaign finance law and U.S. Supreme Court jurisprudence on political transparency. Part II examines how and why existing disclosure laws are increasingly unable to secure meaningful transparency in elections, and discusses “dark money” and foreign interference in recent American elections. Part III argues that First Amendment interests are enhanced, rather than inhibited, by campaign finance disclosure. In support of this argument, the section reviews the Court’s reasoning in support of disclosure laws. The final part provides policy recommendations to strengthen and modernize election-related disclosure laws.

## I. Development of Disclosure Law

### Early Legislation, FECA, & *Buckley*

Concerns over political corruption prompted passage of the first disclosure laws in the U.S. at the close of the 19<sup>th</sup> century, and, by the late 1920s, nearly every state had adopted some form of campaign finance disclosure.<sup>4</sup> Congress enacted the first federal disclosure legislation, the Publicity of Political Contributions Act (“Publicity Act”), in 1910.<sup>5</sup> As amended in 1911, the Publicity Act required political committees active in multiple states’ congressional elections to disclose the name and address of each contributor of \$100 or more, and the name and address of each recipient of expenditures of \$10 or more.<sup>6</sup>

The Federal Election Campaign Act (“FECA”),<sup>7</sup> as amended in 1974 and 1976,<sup>8</sup> sets out much of the statutory framework that governs disclosure in contemporary federal elections. The 1974 amendments to FECA, in particular, were driven by public outrage over the “reprehensible, clandestine political acts connected with Watergate,” as the investigation into Nixon’s 1972 reelection campaign had revealed an extensive record of political corruption enabled by deficiencies in federal election law.<sup>9</sup> The 1974 FECA amendments obligated federal candidates, parties, and political committees (“PACs”) to file quarterly reports of contributions and expenditures; extended application of federal disclosure laws to presidential candidates and to primary elections; and improved the public accessibility of disclosure filings.<sup>10</sup> Another key provision of the amended FECA addressed “independent expenditures,” requiring an individual or group, other than a federal candidate or political committee, making expenditures over \$100 in a calendar year to file a disclosure report with the newly created Federal Election Commission (“FEC”).<sup>11</sup>

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4 Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 400 (2014).

5 *Id.* at 403 & n.106; ch. 392, 36 STAT. 822 (1910) (amended in 1911 and in 1925; repealed in 1972).

6 36 STAT. at 822-24.

7 Pub. L. No. 92-225, 86 STAT. 3 (1972) (codified as amended at 52 U.S.C. § 30101 *et seq.*).

8 Pub. L. No. 93-443, 88 STAT. 1263 (1974).

9 120 CONG. REC. 9270 (1974) (statement of Sen. Williams); see also Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791 (2016).

10 Potter & Morgan, *supra* note 4, at 412-13.

11 Pub. L. No. 93-443, §204(c), 88 STAT. at 1278 (“Every person (other than a political committee or candidate) who makes contributions or expenditures . . . in an aggregate amount in excess of \$100 within a calendar year shall file with the Commission.”).

Not long after enactment of the 1974 amendments, the enhanced federal disclosure system faced its first major legal challenge. In *Buckley v. Valeo*, the U.S. Supreme Court upheld FECA's disclosure regime against challenges to its application to minor political parties and independent candidates, and to its coverage of expenditures made independently of federal candidates and political parties.<sup>12</sup> In assessing the challenges, the Court explained that disclosure, unlike contribution and expenditure limits, "impose[s] no ceiling on campaign-related activities" and does not inhibit political speech.<sup>13</sup> Although the Court accepted that public disclosure could potentially deter some donors from contributing to candidates and political organizations, the Court maintained that transparency requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."<sup>14</sup> Accordingly, FECA's reporting provisions were considered under a less rigorous standard of review than that applied to limits on campaign expenditure and contributions.<sup>15</sup> Under this intermediate standard of review, disclosure laws will be held constitutional if they bear a "substantial relation" to a "sufficiently important" governmental interest.<sup>16</sup>

*Buckley* identified three distinct government interests advanced by disclosure. Primarily, disclosure "provides the electorate with 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 federal office" and "allows 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."<sup>17</sup> Second, the Court recognized that disclosure "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity."<sup>18</sup> Finally, disclosure serves to ensure enforcement of other campaign finance rules, like contribution limits, through the documentation of campaign receipts and disbursements.<sup>19</sup>

Although the Court accepted the critical interests advanced through FECA's disclosure provisions, it conceded that "[t]here could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [disclosure] requirements cannot be constitutionally applied."<sup>20</sup> *Buckley* was not that case: the Court found that the plaintiffs had not presented sufficient evidence of potential harm to support a "blanket exemption" from disclosure for minor parties and independent candidates, and proceeded to uphold the application of FECA to these parties and candidates.<sup>21</sup> But the Court left open the possibility of future as-applied exemptions for groups that could actually show "a

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12 424 U.S. 1 (1976) (per curiam).

13 *Id.* at 64.

14 *Id.* at 68.

15 This tiered framework of review has survived since *Buckley*. Because expenditure limits, in the Court's view, impose a direct restraint on speech, they are subject to strict scrutiny, and must be narrowly drawn to serve a "compelling" governmental interest. *Id.* at 44-45; *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Contribution limits are subject to a lesser standard of scrutiny, and are upheld so long as they are "closely drawn" to further a "sufficiently important" interest. *Buckley*, 424 U.S. at 25. Disclosure laws implicate the least rigorous review, and are valid so long as they bear a "substantial relation" to a "sufficiently important" governmental interest. *Id.* at 64; *Citizens United*, 558 U.S. at 366-37.

16 *Buckley*, 424 U.S. at 64, 66.

17 *Id.* at 66-67 (internal quotations and footnotes omitted).

18 *Id.* at 67.

19 *Id.* at 67-68.

20 *Id.* at 71.

21 *Id.* at 71-72.

reasonable probability” of “threats, harassment, or reprisals” resulting from disclosure.<sup>22</sup>

*Buckley* also upheld FECA’s reporting requirements for “expenditures” made by persons and groups other than federal candidates or political committees, finding that disclosure of independent campaign spending likewise worked “to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible.”<sup>23</sup> Similarly, disclosure of independent spending “helps voters to define more of the candidates’ constituencies.”<sup>24</sup> However, in its holding, the Court narrowly construed the statutory definition of “expenditure” to assuage its misgivings about the potential breadth of the term.

FECA defined an “expenditure” as any “any purchase, payment, distribution . . . or anything of value, made by any person *for the purpose of influencing* any election for Federal office.”<sup>25</sup> But the Court was concerned the phrase “for the purpose of influencing any election” could result in regulation of a substantial amount of “issue” advocacy that was not “unambiguously related to the campaign of a particular federal candidate.”<sup>26</sup> In light of this concern, the Court interpreted the provision to apply only to “communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>27</sup> “Express words of advocacy,” the Court clarified, included language such as “‘vote for,’ ‘elect’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘reject,’ ‘defeat.’”<sup>28</sup>

Thus, even as *Buckley* sustained FECA’s disclosure obligations for groups making independent expenditures, the Court created a loophole that would allow groups to avoid reporting candidate-related advertising that did not include “magic words” of express advocacy. Congress would not act to close this loophole for nearly three decades.

### **From *Buckley* through *McConnell*: 1976-2010**

After *Buckley*, the Court continued to signal support for campaign finance disclosure in several holdings related to ballot measure advocacy. In *First National Bank of Boston v. Bellotti*, the Court endorsed transparency in the direct democracy setting, finding that “[i]dentification of the source of advertising” for ballot measures “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.”<sup>29</sup> Three years later, in *Citizens Against Rent Control v. City of Berkeley*, the Court struck down a municipal ordinance limiting contributions to ballot initiative campaigns, but noted, even in the absence of the contribution limit, “there 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

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<sup>22</sup> *Id.* at 74. In later cases, this “as applied” exemption was granted to the Socialist Party and the Communist Party based on the substantial record of state and private harassment the parties had compiled. See *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982); *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2d Cir. 1982).

<sup>23</sup> *Buckley*, 424 U.S. at 76.

<sup>24</sup> *Id.* at 81.

<sup>25</sup> Pub. L. No. 92-225, § 301(f), 86 STAT. at 9 (emphasis added). Federal election statutes still include this definition of “expenditure.” See 52 U.S.C. § 30101(9)(A)(i).

<sup>26</sup> 424 U.S. at 61, 80.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 44 n.52.

<sup>29</sup> 435 U.S. 765, 792 n.32 (1978).

make their identities known under . . . the ordinance, which requires publication of lists of contributors in advance of the voting.”<sup>30</sup> This line of cases established that the voter information interests supporting candidate-election disclosure also are present in the context of ballot measures.<sup>31</sup>

At the federal level, successive elections following *Buckley* revealed major deficiencies in FECA’s independent expenditure disclosure provision due to the Court’s narrow construction of its terms. Because *Buckley* limited reporting by non-committee organizations to *express advocacy* communications, these organizations recognized that they could fund candidate-related advertisements and avoid disclosure so long as their advertising did not include “express words of advocacy” for or against a federal candidate’s election. Nonprofit organizations—often with anodyne names like Citizens for Reform—eagerly exploited this gap in coverage to spend significant sums on “sham” issue ads clearly intended to influence voters’ views on federal candidates but that did not expressly advocate their election.<sup>32</sup>

In 2002, Congress finally attempted to remedy federal election law’s shortcomings by passing the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>33</sup> To address the problem of sham issue advertising, BCRA introduced disclosure requirements for “electioneering communications,” defined as broadcast, cable, or satellite communications that (1) referenced a specific federal candidate; (2) aired within 30 days of a primary election or 60 days of a general election; and (3) were targeted to the relevant electorate for the office sought by the referenced candidate.<sup>34</sup> Under BCRA, any “person”<sup>35</sup> spending over \$10,000 annually on electioneering communications must file a report disclosing, among other things, the names and addresses of contributors of \$1,000 or more.<sup>36</sup> BCRA also prohibited corporations and labor unions from making electioneering communications with their general treasury funds.<sup>37</sup>

Shortly after Congress approved BCRA, the Supreme Court affirmed the constitutionality of electioneering communication disclosure in *McConnell v. FEC*. *McConnell* made clear that *Buckley*’s narrow construction of FECA’s independent expenditure reporting provision to reach only express advocacy “was the product of statutory interpretation rather than a constitutional command.”<sup>38</sup> The Court also “rejected the notion that the First Amendment requires Congress to treat so-called

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30 454 U.S. 290, 298 (1981).

31 See *id.* (highlighting importance of ballot measure disclosure because “when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source”); *Bellotti*, 435 U.S. at 791-92 (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.”).

32 See *McConnell v. FEC*, 540 U.S. 93, 126-29 (2003). As much as \$500 million reportedly was spent by corporations and unions on sham issue advertising during the 2000 federal election cycle. *Id.* at n.20. *McConnell* highlighted egregious examples of advertising run under the guide of issue advocacy, including an ad sponsored by Citizens for Reform in the 1996 Montana congressional race, which began with the narrator asking “Who is Bill Yellowtail? He preaches family values but took a swing at his wife.” *Id.* at 193 n.78.

33 Pub. L. No. 107-155, 116 STAT. 81 (2002).

34 § 201(a), 116 STAT. at 88. See also *McConnell*, 540 U.S. at 194 (“The term ‘electioneering communication’ applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners.”).

35 “The term ‘person’ includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.” 52 U.S.C. § 30101(11).

36 *Id.* § 30104(f)(2)(E)-(F). BCRA also created a “segregated account” option, permitting groups that funded electioneering communications exclusively through a separate account to disclose only donors of \$1,000 or more who gave to that account. *Id.* § 30104(f)(2)(F).

37 § 203, 116 STAT. at 91.

38 540 U.S. at 191-92.

issue advocacy differently from express advocacy,”<sup>39</sup> finding that the government interests in disclosure identified in *Buckley* also supported disclosure of electioneering communications. In particular, the public’s right to know who was financing candidate-related speech before an election—including speech that did not amount to express advocacy—outweighed any burden stemming from disclosure:

[The plaintiffs] never satisfactorily answer the question of how “uninhibited, robust, and wide-open” speech can occur when organizations hide themselves from the scrutiny of the voting public. ... Plaintiffs’ argument for striking down BCRA’s disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.<sup>40</sup>

Ultimately, *McConnell* upheld BCRA’s electioneering communication disclosure regime by an eight-to-one vote.<sup>41</sup> The effectiveness of BCRA’s disclosure mandates was evident in the election cycles following *McConnell*. During the 2004 federal election cycle, an estimated 96.5% of campaign spending by “outside groups”—*i.e.*, organizations other than federal candidate committees and national political parties—was disclosed; for the 2006 cycle, an estimated 92.9% of outside groups’ spending on federal elections was fully disclosed.<sup>42</sup> Unfortunately, this high mark was short-lived.

### ***Citizens United & SpeechNow.org***

*Citizens United* is mostly known for voiding the longstanding federal prohibition on corporate independent expenditures.<sup>43</sup> In a 5-4 decision, a majority of the Court held that the “absence of prearrangement and coordination of an [independent] expenditure with the candidate” negated anti-corruption rationales for restricting corporate independent expenditures.<sup>44</sup> *Citizens United* thus empowered corporations, whether for-profit or nonprofit,<sup>45</sup> to spend unlimited sums from their general treasuries on campaign-related advertisements and other expenditures to influence elections, so long as they do not coordinate these expenditures with candidates or political parties.

However, *Citizens United* also contained a major ruling in favor of political transparency. Eight of the Court’s nine Justices joined the part of the decision upholding BCRA’s electioneering communication disclosure requirements as applied to *Hillary: The Movie*, which was deemed the functional equivalent of express advocacy, and to commercial advertisements for the film, which were not.<sup>46</sup> As in *Buckley* and *McConnell*, the Court extolled disclosure’s capacity to “insure that the voters are fully informed” about sources of candidate-related speech and to encourage “informed decisions in the

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<sup>39</sup> *Id.* at 194.

<sup>40</sup> *Id.* at 197 (citation omitted) (quoting 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

<sup>41</sup> *Id.* at 196; see also *id.* at 321 (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J.) (voting with majority to uphold electioneering communication disclosure provision).

<sup>42</sup> Potter & Morgan, *supra* note 4, at 442.

<sup>43</sup> 558 U.S. at 348.

<sup>44</sup> *Id.* at 357 (quoting *Buckley*, 424 U.S. at 47).

<sup>45</sup> By extension, *Citizens United* also freed labor unions from the parallel ban on their independent expenditures under federal law. See *id.* at 346-47 (discussing history of federal prohibition on corporate and union independent expenditures).

<sup>46</sup> *Id.* at 371.

political marketplace.”<sup>47</sup> Perhaps more importantly, *Citizens United* specifically rejected the contention that disclosure must be limited to speech amounting to “the functional equivalent” of express advocacy.<sup>48</sup> “Even if the ads only pertain to a commercial transaction,” the Court concluded, BCRA’s transparency provisions had a “substantial relation” to the government’s voter-information interest, because “the public has an interest in knowing who is speaking about a candidate shortly before an election.”<sup>49</sup>

Following on the heels of *Citizens United*, the D.C. Circuit Court of Appeals, in *SpeechNow.org v. FEC*, ruled that FECA’s contribution limits were unconstitutional as applied to a political committee exclusively making independent expenditures.<sup>50</sup> Extending *Citizens United*’s reasoning that independent expenditures do not give rise to corruption concerns as a matter of law, the D.C. Circuit explained “contributions to groups that make only independent expenditures [] cannot corrupt or create the appearance of corruption.”<sup>51</sup> *SpeechNow.org* directly prompted the rise of “super PACs”: independent expenditure-only political committees permitted to accept unlimited contributions—including corporate and union funds—to make unlimited expenditures in federal or state elections, provided they do not coordinate with candidates or political parties. Notably, the D.C. Circuit strongly affirmed the constitutionality of comprehensive federal registration and reporting requirements for super PACs, emphasizing that “the public has an interest in knowing who is speaking about a candidate and who is funding that speech,” and “disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”<sup>52</sup>

Although *Citizens United* and *SpeechNow.org* both affirmed the constitutionality of disclosure, the two decisions collectively unleashed a massive stream of new money into U.S. elections, putting enormous pressure on disclosure laws and precipitating the rise of “dark money”: political spending by organizations that do not have to disclose their underlying sources of funding to the public.

## II. Dark Money: Methods, Madness, & Meddling

### Dark Money Methods

Many disclosure statutes, including FECA and BCRA, were enacted before *Citizens United*, when corporations were legally barred from spending directly in federal campaigns and in many states’ elections. Accordingly, these disclosure laws do not account for corporations making independent expenditures in elections. Further, many statutory definitions of “political committee” only to apply to groups whose “major” purpose is influencing the election or defeat of candidates for public office.<sup>53</sup> Because

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<sup>47</sup> *Id.* at 368, 369 (quoting *Buckley*, 424 U.S. at 76).

<sup>48</sup> *Id.* at 369.

<sup>49</sup> *Id.*

<sup>50</sup> 599 F. 3d 686 (D.C. Cir. 2010).

<sup>51</sup> *Id.* at 694; see also *Citizens United*, 558 U.S. at 357 (“We now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

<sup>52</sup> *SpeechNow.org*, 599 F. 3d at 698.

<sup>53</sup> See, e.g., *Buckley*, 424 U.S. at 79; ARIZ. REV. STAT. ANN. § 16-905(C)(1) (requiring an entity to register as a political action committee if it is “organized for the primary purpose of influencing the result of an election”); MINN. STAT. ANN. § 10A.01, subd. 27 (“Political committee” means an association whose major purpose is to influence the nomination or election of one or more candidates or to promote or defeat a ballot

corporate entities generally are not “major purpose” groups, they do not have to register and report as political committees, which typically must identify their contributors on public filings with election authorities.<sup>54</sup> By invalidating federal and state prohibitions against independent expenditures by corporations, *Citizens United* opened the door for extensive election-related spending by groups outside of the comprehensive disclosure regimes established for political committees.<sup>55</sup>

Beginning in 2010, corporations and other wealthy interests began to shield their political spending from the public by funneling their campaign dollars through nonprofit corporations organized under section 501(c) of the Internal Revenue Code,<sup>56</sup> in recent election cycles, 501(c)(4) “social welfare” organizations and 501(c)(6) trade associations have emerged as the top vehicles for dark money.<sup>57</sup> The Internal Revenue Code, which governs tax-exempt entities, does not require a 501(c)(4) or 501(c)(6) organization to disclose any donors to the public—even if the organization engages in substantial election-related advocacy. The only relevant restriction federal tax law places on these 501(c) groups is that “political campaign intervention” may not be their “primary activity.”<sup>58</sup> As a result, for-profit corporations, special interests, and wealthy individuals have channeled millions of dollars through these nonprofits to finance election-related spending, while avoiding public identification as the original sources of the money.

Federal law does require “event-driven” reporting by non-committee groups making independent expenditures or electioneering communications in federal elections. Under FECA, a non-committee entity making an independent expenditure in excess of \$250 to influence a federal election must submit a report of the expenditure to the FEC. This report must include the name, address, and employment information of (1) any person who made a contribution in excess of \$200 in the calendar year to the non-committee entity,<sup>59</sup> and (2) any person who made a contribution in excess of \$200 to the non-committee entity “for the purpose of furthering an independent expenditure.”<sup>60</sup> Similarly, BCRA added the requirement that any person or entity, other than a political committee, spending over \$10,000 annually on federal electioneering communications must file a report identifying donors of \$1,000 or more, or if the person or entity uses a segregated fund for its election communications, identifying donors to the segregated fund.<sup>61</sup>

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question, other than a principal campaign committee or a political party unit.”); VA. CODE ANN. § 24.2-945.1(A) (“Political action committee” means any organization, person, or group of persons, established or maintained to receive and expend contributions for the primary purpose of expressly advocating the election or defeat of a clearly identified candidate.”).

54 See, e.g., 52 U.S.C. § 30104(a)(4) (describing reporting requirements for federal political committees other than authorized candidate committees); COLO. REV. STAT. ANN. § 1-45-108 (establishing disclosure regime for political committees); CONN. GEN. STAT. ANN. § 9-608 (detailing reporting for state political committees).

55 *Citizens United* indirectly annulled 24 state laws restricting corporate and union expenditures in elections. Ian Urbina, *24 States’ Laws Open to Attack After Campaign Finance Ruling*, N.Y. TIMES (Jan. 22, 2010), <https://www.nytimes.com/2010/01/23/us/politics/23states.html>.

56 For-profit corporations largely have shunned directly making independent expenditures for campaign advertising because public identification of the company’s political preferences can lead to backlash from customers, shareholders, and employees. See, e.g., Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support ‘Antigay’ Candidate*, CBS NEWS (July 28, 2010), <https://cbsn.ws/2B8y5aQ>. Instead, nonprofit corporations have emerged as the primary corporate vehicle for dark money spending. See

Michael Beckel, *Top U.S. Corporations Funneled \$173 Million to Political Nonprofits*, CTR. FOR PUB. INTEGRITY, <https://bit.ly/2uZhrfL> (last updated Jan. 12, 2017).

57 I.R.C. § 501(c)(4)-(6).

58 See Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1991); Rev. Rul. 81-95, 1981-1 C.B. 332.

59 52 U.S.C. § 30104(c)(1) (cross-referencing § 30104(b)(3)(A)).

60 *Id.* § 30104(c)(2)(C).

61 *Id.* § 30104(f).



These statutory disclosure provisions have done little to stem the tide of dark money, because they have been stripped of meaningful donor-disclosure requirements by the FEC. In its regulations and official guidance, the FEC narrowly interpreted FECA's and BCRA's directives to require non-committee groups to disclose only those donors who gave *specifically* to fund a *particular* independent expenditure or electioneering communication.<sup>62</sup> In other words, absent clear evidence that a donor earmarked a contribution to pay for a *specific* advertisement, non-committee organizations actively spending in federal elections do not have to disclose their donors under FEC rules. The FEC's interpretation effectively allows most donors, regardless of their intent or the size of their contribution, to evade public disclosure completely. The FEC's limited reading of federal election law also contravenes the reality of political advertising strategy; even a "good faith" donor who is not trying to avoid public identification is unlikely to earmark their contribution for particular political ads, since advertisements typically are developed only *after* a group has raised sufficient funds.

Consequently, the FEC—rather than enforcing federal statutes as Congress intended—has facilitated the wholesale evasion of disclosure law.<sup>63</sup> Recently, in *Citizens for Responsibility and Ethics in Washington v. FEC*, a federal district court invalidated the FEC's regulation for independent expenditure reporting by non-committee groups, finding the rule to be in conflict with the "unambiguous terms" of FECA's disclosure provisions.<sup>64</sup> The decision is under appeal, though, and it remains to be seen whether the FEC will meaningfully adjust its disclosure regulations in light of the holding.

*Citizens United*, as interpreted by the D.C. Circuit in *SpeechNow.org*, also spawned the proliferation of super PACs in federal and state elections. As political committees, super PACs generally are subject to extensive disclosure obligations, including registration, record-keeping, and reporting requirements.<sup>65</sup> However, super PACs can accept unlimited contributions from labor and corporate sources that have no corresponding obligation to disclose their funding to the public. On campaign finance filings, a federal super PAC must identify only its immediate sources of contributions, which may include nonprofit corporations, LLCs, and labor groups transferring substantial donations given by third parties for election-related spending.<sup>66</sup>

If a 501(c)(4) makes a substantial contribution to a federal super PAC, for instance, the super PAC need only identify the 501(c)(4) as the contribution's source on its subsequent disclosure filing. The donor, or donors, whose funds actually comprise the 501(c)(4)'s contribution would remain anonymous. Accordingly, super PACs have become popular vehicles for dark money from donors who channel their campaign

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62 See 11 C.F.R. § 109.10(e)(1)(vi) (limiting donor identification on independent expenditure reports to "each person who made a contribution in excess of \$200 . . . for the purpose of furthering the reported independent expenditure" (emphasis added)); 11 C.F.R. § 104.20(c)(9) (limiting donor identification on electioneering communication reports to "each person who made a donation aggregating \$1,000 or more . . . for the purpose of furthering electioneering communications" (emphasis added)).

63 See, e.g., Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Commission Votes 1, FEC (June 17, 2014), <https://bit.ly/2KBvN7j>.

64 316 F. Supp. 3d 349 (D.D.C. 2018), appeal docketed (D.C. Cir. Aug. 30, 2018) (No. 18-5261).

65 52 U.S.C. §§ 30102, 30103, 30104(a).

66 See R. Sam Garrett, CONG. RESEARCH SERV., R42042, *Super PACs in Federal Elections: An Overview and Issues for Congress 19-20* (2016) ("[S]uper PACs must identify donors who contributed at least \$200. This requirement sheds light on contributions that go directly to super PACs, but not necessarily those that go indirectly to super PACs. In particular, the original source of contributions to trade associations or other organizations that later fund IEs through super PACs could go unreported.").

contributions through nonprofit entities to obscure the origin of the funds.<sup>67</sup>

Importantly, Congress could fix many of the legal loopholes that enable dark money in federal elections by passing new disclosure laws. Among the legislative possibilities, federal lawmakers could correct the FEC's narrow interpretations of federal reporting statutes, extend disclosure requirements to pass-through entities funneling contributions to super PACs and other spenders in federal races, and broaden federal law to reach a wider range of political advertising, including more digital communications. But Congress, as a whole, has not exhibited the political will to address transparency in federal campaigns.

Shortly after *Citizens United*, there was some initial momentum in Congress to improve federal election disclosure with the DISCLOSE Act.<sup>68</sup> The bill would have instituted disclosure obligations for any organization making substantial transfers to another entity for the purpose of funding election-related expenditures, as defined by broad legislative criteria.<sup>69</sup> In 2010, the House of Representatives passed the bill, but the Senate twice failed to pass the DISCLOSE Act by a single vote.<sup>70</sup> Since the Senate's derailing of the DISCLOSE Act, Congress has made no serious, bipartisan effort to update campaign disclosure requirements, and, for now, meaningful reform at the federal level seems unlikely.

### **Dark Money Madness in Federal and State Elections**

Data from recent election cycles demonstrate that dark money has become a significant factor in elections since *Citizens United*. According to the Center for Responsive Politics and the Wesleyan Media Project, dark money helped to fund more than 240,000 television ads in the 2018 midterm elections, the highest volume of dark money TV ads in the last four election cycles.<sup>71</sup> Meanwhile, partially disclosing groups, such as super PACs, reported a record amount of campaign spending—\$405 million—in the 2018 federal election cycle.<sup>72</sup> Similarly, groups that do not publicly disclose their donors spent over \$311 million and \$183 million in the 2012 and 2016 federal elections, respectively.<sup>73</sup> By contrast, in 2004, non-disclosing organizations made only \$5.88 million in campaign expenditures; in 2006, the last federal election cycle in

<sup>67</sup> The Brennan Center for Justice has termed super PAC expenditures consisting of contributions from non-disclosing groups “gray money.” Chisun Lee *et al.*, *Secret Spending in the States*, BRENNAN CTR. FOR JUSTICE 8 (2016), <https://bit.ly/28XH4d>.

<sup>68</sup> DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

<sup>69</sup> *See id.* § 211(a)(5)(B)(ii)(I) (“The covered organization shall be deemed to have transferred the amounts for the purpose of making a public independent expenditure if . . . (aa) the covered organization designates, requests, or suggests that the amounts be used for public independent expenditures and the person to whom the amounts were transferred agrees to do so; (bb) the person making the public independent expenditure or another person acting on that person’s behalf expressly solicited the covered organization for a donation or payment for making or paying for any public independent expenditures; (cc) the covered organization and the person to whom the amounts were transferred engaged in written or oral discussion regarding the person either making, or paying for, any public independent expenditure, or donating or transferring the amounts to another person for that purpose; (dd) the covered organization which transferred the funds knew or had reason to know that the person to whom the amounts were transferred intended to make public independent expenditures; or (ee) the covered organization which transferred the funds or the person to whom the amounts were transferred made one or more public independent expenditures in an aggregate amount of \$50,000 or more during the 2-year period which ends on the date on which the amounts were transferred.”).

<sup>70</sup> *See* S. 3628, 111th Cong. (2010); 156 CONG. REC. D727 (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>.

<sup>71</sup> *More Dark Money Ads than Any of the Past Four Cycles*, WESLEYAN MEDIA PROJECT (Nov. 1, 2018), <http://mediaproject.wesleyan.edu/releases/110118-tv/> (last visited Nov. 28, 2018).

<sup>72</sup> Anna Massoglia, *Millions in Masked Money Funneled into 2018 Elections*, CTR. FOR RESPONSIVE POLITICS (Nov. 7, 2018), <https://bit.ly/2TPINLX>.

<sup>73</sup> *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POLITICS, <https://bit.ly/2RZ6fnf> (last visited Nov. 28, 2018). Dark money also played a pivotal role during special elections in 2017, with nearly half of the independent expenditures made in these congressional races coming from non-disclosing sources. Kenneth P. Doyle, *Nearly Half of Recent Campaign Money from Undisclosed Sources*, BLOOMBERG BNA (May 18, 2017), <https://www.bna.com/nearly-half-recent-n73014451165>. In Georgia and Montana, the Congressional Leadership Fund (“CLF”), a pro-Republican super PAC, collectively spent around \$8 million on two House races in 2017. On its reports with the FEC, CLF listed \$5 million in receipts from the 501(c)(4) American Action Network, which does not publicly identify donors. *Id.*

which BCRA's disclosure provisions applied in full force, just over \$5 million was spent by groups that did not disclose their donors publicly.<sup>74</sup>

Notably, these monetary estimates provide only a glimpse of the total amount of dark money deployed in federal elections post-*Citizens United*, as the figures are limited to spending actually reported to the FEC. Federal law requires disclosure of broadcast, cable, or satellite advertisements referencing federal candidates that do *not* include express advocacy only if they are aired within 30 days of a primary or 60 days of a general election.<sup>75</sup> Outside of these pre-election windows, non-express advocacy communications referencing federal candidates are not reported to the FEC, and it is virtually impossible to determine total spending for these ads.<sup>76</sup>

Amidst an increasingly divisive climate in Washington, the popularity of dark money transcends partisan lines. Since 2010, the bulk of undisclosed spending in federal elections has come from conservative outfits like Crossroads GPS, a 501(c)(4) with ties to former George W. Bush aide Karl Rove, and the Koch Brothers-affiliated Americans for Prosperity, another 501(c)(4), which have collectively expended hundreds of millions of dollars to boost GOP candidates around the country.<sup>77</sup> But groups on the left have embraced dark money, too.<sup>78</sup> Expenditure estimates for the 2018 federal midterms indicate that, for the first time since 2010, more dark money was spent in support of Democrats running for Congress than for Republicans—adding a darker tint to the Blue Wave.<sup>79</sup>

Dark money reaches state and local elections as well. As detailed by the Brennan Center for Justice, dark money during the 2014 elections in six states was, on average, 38 times greater than in 2006.<sup>80</sup> In some locales, dark money has increased at rates exceeding its growth in federal elections. In Arizona's 2014 elections, there was over \$10.3 million in dark money spending, an amount 295 times greater than the \$35,005 of dark money spent in 2006.<sup>81</sup> Even judicial elections have become a target of dark money in recent years.<sup>82</sup>

In addition to influencing candidate races, dark money has become a force in ballot measure elections. In the context of direct democracy, deep-pocketed corporations

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74 *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POLITICS, <https://bit.ly/2RZ6fnf> (last visited Nov. 28, 2018).

75 52 U.S.C. § 30104(f).

76 For example, One Nation, a 501(c)(4) with conservative ties, spent around \$40 million on advertisements supporting Republican candidates in 2016. Because the bulk of these ads were disseminated outside of the 30/60-day pre-election windows, One Nation only reported spending \$3.4 million in its FEC filings. Robert Maguire, *One Nation Rising: Rove-Linked Group Goes from No Revenue to More than \$10 Million in 2015*, CTR. FOR RESPONSIVE POLITICS (Nov. 17, 2016), <https://bit.ly/2fJebqj>.

77 See Michael Beckel, *Dark Money Illuminated 6*, ISSUE ONE (2018), <https://bit.ly/2NHqKGi> (listing 15 largest dark money groups by total spending in federal elections from January 2010 to December 2016); see also, Peter Olsen-Phillips, *Dark Money Still a Republican Game*, SUNLIGHT FOUND. (Oct. 28, 2014), <https://sunlightfoundation.com/2014/10/28/dark-money-still-a-republican-game/>.

78 Patriot Majority USA, a 501(c)(4) associated with Democratic leaders in Congress, sponsored over 15,000 attack ads against Republican candidates for U.S. Senate in 2014 alone. Michael Beckel, *Secret Donors Fuel Democratic Political Powerhouse*, CTR. FOR PUB. INTEGRITY (Nov. 18, 2015), <https://www.publicintegrity.org/2015/11/18/18875/secret-donors-fuel-democratic-political-powerhouse>.

79 Massoglia, *supra* note 72.

80 Lee *et al.*, *supra* note 67, at 7.

81 By comparison, dark money spending in the 2014 federal elections was about 34 times greater than in 2006. *Id.*

82 In the 2012 race for the Montana Supreme Court, a 501(c)(4) called the Montana Growth Network (MGN) spent nearly \$1 million on attack ads against a judicial candidate. Three years later, an investigation found that \$400,000 of MGN's funds came from billionaires Charles Schwab and James Cox Kennedy, both of whom had vested interests in the state supreme court's rulings on Montana stream access law. Paul Blumenthal, *Two of America's Richest Men Secretly Tried to Sway Montana's Judicial Elections*, HUFFINGTON POST (May 10, 2016), [http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race\\_us\\_572b9f4ce4b016f378951c8f](http://www.huffingtonpost.com/entry/montana-dark-money-judicial-race_us_572b9f4ce4b016f378951c8f). Since 1972, Montana law had allowed open access to waterways while Schwab and Kennedy, both owners of large riverside properties in the state, had opposed public access for years. After losing multiple cases before the Montana Supreme Court, Schwab and Kennedy poured hundreds of thousands of dollars into the judicial election through a 501(c)(4) to achieve their long-sought restrictions on waterway access.

often are vested in the success or defeat of an initiative due to financial interests often at stake.<sup>83</sup> Thus, ballot measure elections attract organizations like the Grocery Manufacturers Association, a D.C.-based trade association whose members include PepsiCo, Nestle, and Kellogg, which secretly spent millions in 2013 to defeat a Washington State initiative, IM 522, to require GMO labeling on packaged food products.<sup>84</sup>

To defeat the Washington initiative, the Grocery Manufacturers Association funneled \$11 million in donations from its corporate members to No on 522, a state political committee opposing IM-522.<sup>85</sup> On its campaign finance reports, No on 522 listed the Grocery Manufacturers Association as the sole source of the \$11 million contribution, and the committee's filings included no information about the food and beverage conglomerates behind the association's multimillion-dollar donation.<sup>86</sup> No on 22 proceeded to set the record for the most money raised in opposition to a ballot initiative in Washington State, and voters narrowly rejected GMO labeling on Election Day.<sup>87</sup>

### **Opening the Door for Foreign Meddling**

Federal law strictly bars "foreign nationals" from making any contribution or expenditure in connection with a federal, state, or local election.<sup>88</sup> In upholding the restriction on foreign national spending, a federal district court explained the prohibition's rationale: "It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-governance."<sup>89</sup> Despite the national prohibition, foreign money continues to infiltrate American elections—facilitated, in part, by inadequate disclosure laws. Multiple episodes around the 2016 and 2018 election cycles, in particular, have renewed attention to this alarming vulnerability.

In January 2017, the CIA, FBI, and National Security Administration concluded, in an unclassified report, that the Russian government had conducted a multifaceted influence campaign to sway the 2016 U.S. presidential election.<sup>90</sup> According to the report, "Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency."<sup>91</sup> U.S. intelligence officials determined Moscow's agents had blended covert cyber operations with "overt efforts by Russian government agencies, state-funded media, third-party intermediaries, and paid social media users or 'trolls'" in a sweeping effort to impact the

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<sup>83</sup> Lee *et al.*, *supra* note 67, at 14-15; *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 at \*9 (Wash. Super. Ct. Nov. 2, 2016).

<sup>84</sup> Lee *et al.*, *supra* note 67, at 15-16.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; Lewis Kamb, *No on 522 Breaks Fundraising Record for Washington Initiative Campaigns*, SEATTLE TIMES (Oct. 28, 2013), <https://bit.ly/2TheXOT>.

<sup>88</sup> 52 U.S.C. § 30121. The term "foreign national" encompasses foreign individuals, governments, corporations, and any "other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b); 52 U.S.C. § 30121(b). The FEC has interpreted the federal ban on campaign activity by foreign nationals to cover only candidate elections, not ballot referenda. *See, e.g.*, Certification, MUR #6678 (Mindgeek *et al.*) (Mar. 18, 2015), <https://www.fec.gov/files/legal/murs/6678/15044372942.pdf>. *See also* FEC Advisory Op. 1984-62, at 1 n.2 (B.A.D. Campaigns, Inc.), <https://www.fec.gov/files/legal/aos/1984-62/1984-62.pdf>.

<sup>89</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *sum. aff'd*, 565 U.S. 1104 (2012).

<sup>90</sup> *Background to "Assessing Russian Activities and Intentions in Recent U.S. Elections": The Analytic Process and Cyber Incident Attribution*, OFFICE OF DIR. OF NAT'L INTELLIGENCE (Jan. 7, 2018), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

<sup>91</sup> *Id.* at 2.

U.S. election.<sup>92</sup> The report cautioned that “Moscow will apply lessons learned from its campaign aimed at the US presidential election to future influence efforts in the United States and worldwide,” and noted the prospect of foreign election interference was the “new normal.”<sup>93</sup>

Investigations by social media companies found that Russian operatives ultimately reached 126 million Facebook users, circulated 131,000 messages on Twitter, and uploaded over 1,000 videos to YouTube as part of their surreptitious operation in 2016.<sup>94</sup> The majority of Russian-generated content focused on divisive social issues, including illegal immigration, gun rights, and African-American political activism.<sup>95</sup> Other social media ads were more explicitly campaign-related, tying these social issues to federal candidates, especially then-Presidential nominees Hillary Clinton and Donald Trump. One Facebook post from Kremlin-linked sources displayed a prominent black X over the face of Hillary Clinton, accompanied by the text “Hillary Clinton is the co-author of Obama’s anti-police and anti-Constitutional propaganda.”<sup>96</sup> Another Facebook ad highlighted a picture of Jesus and Satan arm-wrestling, with Satan declaring, “IF I WIN CLINTON WINS!”<sup>97</sup>

Despite growing public awareness of Russian meddling in 2016, foreign attempts to influence U.S. elections have not abated. In the summer of 2018, both Facebook and Microsoft warned of new foreign-backed attempts to influence the 2018 midterm elections through social media and other digital means. These revelations indicated that foreign entities were adopting more sophisticated tactics to interfere with U.S. elections in 2018, such as using “advanced security techniques” and employing third parties to disseminate social media advertisements.<sup>98</sup> Subsequently, on October 19, 2018, with less than a month remaining before the 2018 midterms, the Justice Department unsealed criminal charges against a Russian accountant named Elena Khusyaynova, alleging she was part of a Kremlin conspiracy “to sow division and discord in the U.S. political system, including by creating social and political polarization, undermining faith in democratic institutions, and influencing U.S. elections, including the upcoming 2018 midterm election.”<sup>99</sup>

According to federal prosecutors, the conspiracy, known as Project Lakhta, was initiated in 2014 and funded by a Russian oligarch with close ties to Vladimir Putin, Russia’s president. Prosecutors contend the conspirators posed as Americans on social media and other internet platforms in order “to address divisive U.S. political and social issues or advocate for the election or electoral defeat of particular candidates.”<sup>100</sup> The complaint against Khusyaynova details a complex and thorough operation, describing

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92 *Id.* at 3.

93 *Id.* at 5.

94 Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://nyti.ms/2h0YQH3>.

95 Craig Timberg *et al.*, *Russian Ads, Now Publicly Released, Show Sophistication of Influence Campaign*, WASH. POST (Nov. 1, 2017), <https://wapo.st/2IEizOj>.

96 Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>.

97 Timberg *et al.*, *supra* note 95.

98 Nicholas Fandos & Kevin Roose, *Facebook Identifies an Active Political Influence Campaign Using Fake Accounts*, N.Y. TIMES (July 31, 2018), <https://nyti.ms/2KellQ7>.

99 Affidavit in Support of Criminal Complaint at \*6, *United States v. Khusyaynova*, No. 1:18-MJ-464 (E.D. Va. Sept. 28, 2018).

100 *Id.*

how the Project Lakhta operatives “wrote on topics from varied and sometimes opposing [ideological] perspectives,”<sup>101</sup> timed activities “to attract the widest possible viewership,”<sup>102</sup> and tailored their messaging to different demographics.<sup>103</sup> Prior to the filing of charges against Khusyaynova, a federal grand jury had separately indicted 13 Russian nationals and three foreign companies, in February 2018, in connection to Russia’s influence campaign during the 2016 election.<sup>104</sup>

While Russian meddling has garnered significant publicity, foreign election activity often occurs against a more mundane backdrop. Following the lead of American dark money groups, foreign actors have tried to wield influence in U.S. elections through loopholes in existing law. In August 2016, the *Intercept* reported that Right to Rise USA, a super PAC supporting Jeb Bush’s presidential candidacy, had accepted contributions totaling \$1.3 million from a California corporation owned by two Chinese citizens.<sup>105</sup> Under FEC guidelines, domestic subsidiaries of foreign corporations are allowed to make political contributions, so long as the contributed funds are wholly derived from U.S. income and an American citizen controls the political decision-making.<sup>106</sup> According to the *Intercept*’s report, though, the corporation’s Chinese owners appear to have directly approved the contributions to Right to Rise USA, which is clearly illegal under federal law.<sup>107</sup>

Examples of illicit foreign involvement in U.S. elections are not confined to the 21<sup>st</sup> century. During the late 1990s, an investigation by the U.S. Senate Committee on Governmental Affairs found that, throughout the 1996 election cycle, the Democratic National Committee (“DNC”) had received a substantial number of illegal donations from Asian sources, including foreign national contributions that were nominally attributed to Buddhist monastics from a temple outside Los Angeles.<sup>108</sup> The 1996 DNC fundraising scandal was a catalyst for congressional enactment of BCRA, which expanded federal law to prohibit foreign nationals from making expenditures, in addition to contributions, in U.S. elections.<sup>109</sup>

Foreign meddling in federal elections is largely enabled by insufficient laws and regulations, especially in relation to online campaign activity. In general, the FEC’s disclosure rules only apply to online communications “placed for a fee on another person’s Web site.”<sup>110</sup> Similarly, the federal definition of “electioneering communication”

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<sup>101</sup> *Id.* at \*13.

<sup>102</sup> *Id.* at \*14.

<sup>103</sup> When posting to “liberal groups” on social media, the conspirators were directed to avoid Breitbart articles; for posts on “conservative” threads, they were told not to share titles from the Washington Post or BuzzFeed. *Id.*

<sup>104</sup> See Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://nyti.ms/2PYosod>. Additionally, in July 2018, a grand jury charged Maria Butina, another Russian national, with conspiracy and failure to register as a foreign government agent in relation to her work advancing Moscow’s objectives through organizations like the National Rifle Association. Spencer S. Hsu & Tom Jackman, *Maria Butina, Russian Gun Rights Advocate Charged in Federal Probe, Moved to Va. Jail*, WASH. POST (Aug. 18, 2018), <https://wapo.st/2EOxt54>.

<sup>105</sup> Jon Schwarz & Lee Fang, *The Citizens United Playbook: How a Top GOP Lawyer Guided a Chinese-Owned Company Into U.S. Presidential Politics*, INTERCEPT (Aug. 3 2016), <https://bit.ly/2auW75p>.

<sup>106</sup> FEC Advisory Op. 2000-17 (Extendicare), <https://www.fec.gov/files/legal/aos/2000-17/2000-17.pdf>.

<sup>107</sup> Schwarz & Fang, *supra* note 105.

<sup>108</sup> S. Rep. No. 105-167, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns: Final Report of the Committee on Governmental Affairs* (1998), “According to prosecutors, the various campaign treasurers had no idea that the money they got through Hsia was coming from prohibited sources. Buddhist nuns, monks and other temple supporters signed checks as individual donors, then were secretly reimbursed by the temple and others.” Bill Miller, *Hsia Is Convicted of Illegal Donations*, WASH. POST (Mar. 3, 2000), <https://wapo.st/2r7tcZV>.

<sup>109</sup> Pub. L. No. 107-155, § 303, 116 STAT. at 96. Prior to BCRA, federal law had only restricted contributions by foreign nationals. *Id.*; see also *Bluman*, 800 F. Supp. 2d at 284.

<sup>110</sup> 11 C.F.R. § 100.26 (“The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.”).

does not include internet or digital advertisements, leaving a large quantity of online advertising about federal candidates outside of disclosure requirements.<sup>111</sup> Although Russian social media posts often referred to federal candidates, the content escaped detection mainly because it was disseminated online.<sup>112</sup>

For its part, the FEC has done little to curtail foreign election spending. In the spring of 2018, the agency announced it was once again seeking public input on potential revisions to its regulations for internet advertising—in continuance of a rulemaking proposal pending before the Commission since 2011.<sup>113</sup> While the FEC received over 165,000 written comments and testimony from 18 witnesses on the proposed changes, the Commission has yet to approve new rules for online advertising.<sup>114</sup> Relatedly, in 2015, the FEC deadlocked on the question of whether foreign entities are permitted to make contributions to ballot initiative campaigns in states and cities.<sup>115</sup> A majority of commissioners could not agree on the scope of federal law’s foreign money prohibition, which expressly prohibits foreign nationals from making “*any contribution . . . in connection with a Federal, State, or local election.*”<sup>116</sup>

The disquieting evidence of Russian meddling in contemporary elections illustrates how foreign actors can disrupt American democracy—out of sight of voters and regulators. Troublingly, many of the legal vulnerabilities recently exploited by Russia remain unaddressed. As technological innovation continues to expand the possibilities for reaching voters through digital channels, it is imperative that lawmakers update disclosure requirements to ensure U.S. elections are transparent and free from foreign interference.

### III. Disclosure Advances First Amendment Principles

Beginning with *Buckley v. Valeo*, campaign finance decisions have predominantly assessed the negative impact of expenditure and contribution limits on First Amendment interests.<sup>117</sup> As a result, courts have tended to view campaign finance laws as burdening First Amendment interests, rather than furthering constitutional values served through regulation of the political process.<sup>118</sup> The disproportionate attention paid to the potential harm arising from campaign finance laws, instead of their benefits, has contributed to doctrinal incoherence, and generated a series of adverse decisions

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111 52 U.S.C. § 30104(f)(3).

112 See Shane, *supra* note 96.

113 Zainab Smith, *Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of “Public Communication,”* FEC (Apr. 5, 2018), <https://bit.ly/2OU3scN> (83 Fed. Reg. 12864 (Mar. 26, 2018)).

114 Zainab Smith, *Public Hearing on Internet Disclaimers*, FEC (July 18, 2018), <https://bit.ly/2SmCX2b>.

115 FEC MUR #6678, *supra* note 88.

116 *Id.*; 52 U.S.C. § 30121(a) (emphasis added).

117 See *Buckley*, 424 U.S. at 13-14 (“[T]he critical constitutional questions presented here go . . . to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S.765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”); *Citizens United*, 558 U.S. at 324 (“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.”); *Ariz. Free Enter. Club’s Freedom PAC v. Bennett*, 564 U.S. 721,754 (2011) (“[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority.”); *McCutcheon*, 572 U.S. at 204-05 (“To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”).

118 See Deborah Hellman, *Resurrecting the Neglected Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 233, 235 (2016) (“*Buckley v. Valeo* and its progeny neglect the positive liberty of self-government. Restrictions on spending money to speak and giving money to candidates in elections do implicate the negative liberty of free speech. But these restrictions are also especially important exercises of the positive liberty of self-government.” (footnote omitted)).

that has rendered a patchwork of laws governing money in politics.

However, disclosure laws have enjoyed a unique status in this otherwise hostile jurisprudence because *Buckley* and its progeny have recognized that the disclosure of campaign finance information “*further[s]* First Amendment values” critical to our democracy.<sup>119</sup> Consequently, the Court has consistently assessed disclosure using a less rigorous standard of review than the scrutiny applied to campaign spending restrictions and contributing limits, reasoning that disclosure requirements do not quantitatively limit political speech.<sup>120</sup> This judicial appreciation of disclosure recognizes the potential impact of disclosure on constitutionally protected activities in conjunction with the countervailing “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.”<sup>121</sup>

A central aim of the U.S. Constitution is to ensure meaningful self-governance by citizens in our representative democracy.<sup>122</sup> The Supreme Court has explained “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies.”<sup>123</sup> This principle underlies the First Amendment, which embodies “[t]he right of citizens to inquire, to hear, to speak, and to use information” as a “precondition to enlightened self-government.”<sup>124</sup>

In its campaign finance decisions, the Court has repeatedly acknowledged the connection between political transparency and democratic self-governance. *Buckley* recognized disclosure “provides the electorate with 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 federal office.”<sup>125</sup> Similarly, *Citizens United* described how disclosure promotes self-governance by supplying information that “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>126</sup> Importantly, the Court has credited the value of disclosure by candidates and by independent sources of political speech, both of which “help[] voters to define more of the candidates’ constituencies” and “promote[] informed choices in the political marketplace.”<sup>127</sup>

In essence, the Court has accepted disclosure serves two heuristic functions augmenting democratic self-governance.<sup>128</sup> First, by publicly identifying financial

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119 *Buckley*, 424 U.S. at 82 (emphasis added); *McConnell*, 540 U.S. at 197 (“Plaintiffs’ argument for striking down BCRA’s disclosure provisions . . . ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.”); *Citizens United*, 558 U.S. at 371 (“The 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.”).

120 *Citizens United*, 558 U.S. at 366-67 (requiring “a substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest”) (quoting *Buckley*, 424 U.S. at 64); see also *Buckley*, 424 U.S. at 64 (“Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities.”).

121 *McConnell*, 540 at 197 (quoting 251 F. Supp. 2d at 237).

122 See Breyer, *supra* note 3, at 247 (“[T]he Constitution, considered as a whole, creates a framework for a certain kind of government. Its general objectives can be described abstractly as including . . . democratic self-government . . .”).

123 *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

124 *Citizens United*, 558 U.S. at 339.

125 *Buckley*, 424 U.S. at 66 (footnote and quotations omitted).

126 *Citizens United*, 558 U.S. at 371.

127 *Id.* at 369; *Buckley*, 424 U.S. at 81.

128 See Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & Pol. 663, 669 (2012) (“Seeing the Club for Growth or a major labor union as a candidate’s major backer, for example, may tell a voter more than numerous campaign policy statements or political party identification could



supporters or opponents of a candidate, disclosure provides the electorate with a more comprehensive understanding of the candidate's ideological orientation, allowing voters to use a particular interest group's, or well-known individual's, monetary support for or against a candidate as a signal of endorsement or rejection.<sup>129</sup> Indeed, *Buckley* noted that identification of a candidate's supporters or opponents can expose the candidate's ideology "more precisely than is often possible solely on the basis of party labels and campaign speeches."<sup>130</sup> Thus, disclosure offers a cognitive shortcut for voters to gauge a candidate's position "in the political spectrum."<sup>131</sup>

Disclosure delivers a second heuristic in revealing the "constituencies" that a candidate, if elected, is likely to favor due to their political patronage.<sup>132</sup> Conversely, knowing sources of electoral spending against a candidate can allow voters to predict the interests toward which a successful candidate likely will feel no gratitude. Voters, in turn, can integrate these prognostics into their assessments of a candidate's suitability for public office.

More generally, disclosure aids voters in assessing the credibility of "who is speaking about a candidate shortly before an election."<sup>133</sup> Various research has found that people are better able to determine the veracity of a communication if they know the identity of its source, especially at the time of the message's receipt.<sup>134</sup> Political advertising disclaimers allow voters to weigh a message's merit with knowledge of its source.<sup>135</sup> Prior to the 2010 midterms, for example, a federal PAC called Latinos for Reform sponsored a Spanish-language television ad on Univision, imploring Hispanics not to vote in the upcoming election to protest congressional inaction on immigration reform.<sup>136</sup> The ads were pulled from Univision after campaign finance filings showed that Latinos for Reform was controlled by a longtime Republican operative, who was subsequently criticized for trying to depress Latino voters' turnout for Democratic Sen. Harry Reid in Nevada's closely contested U.S. Senate race.<sup>137</sup>

The Supreme Court has recognized disclosure provides information necessary for effective self-governance in the direct democracy context, too. Unlike in candidate

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in two different ways. From an ex-ante perspective, a voter could believe that a particular organization would support a candidate only if it strongly believed that the candidate supported its policy agenda. The voter would, in a sense, piggyback on the organization's research and view the contributions much as an endorsement. From an ex-post perspective, a voter could think that a candidate once elected would likely be responsive to those who had contributed to him and vote their way even if the candidate had been inclined to support others' interests before the election.).

129 For some, "knowing a candidate is backed by environmental groups or the gun rights lobby may be all you need to know to cast a ballot consistent with your interests." Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & Pol. 557, 570 (2012).

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

131 *Id.* A study by political scientist Michael Sances offers evidentiary support for this heuristic function of disclosure. Sances found that giving voters information about the backgrounds of campaign donors significantly improves their ability to predict the recipient candidate's ideological leanings. See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1473 (2014); see also Michael W. Sances, *Is Money in Politics Harming Trust in Government? Evidence from Two Survey Experiments*, 12 ELECTION L.J. 53 (2013).

132 Legal scholars have referred to this as an "accountability interest." Heerwig & Shaw, *supra* note 131, at 1465 ("[D]isclosure . . . may 'reveal whose interests a candidate will be inclined to serve once elected—whatever the candidate's own substantive views.' . . . [This] may be broadly conceived of as an accountability interest.").

133 *Citizens United*, 424 U.S. at 369.

134 Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1717-18 (2013) ("Research from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition.").

135 *Citizens United*, 558 U.S. at 371.

136 Hasen, *supra* note 129, at 571-72; Human Khan, *Sharron Angle's Campaign Denounces 'Don't Vote' Ad in Nevada; Backer Linked to the GOP*, ABC News (Oct. 20, 2010), <https://abcnews.ws/2PZIVdp>.

137 *Id.*

elections, ballot initiatives and referenda typically are not tied to an identifiable person or a political party brand; on Election Day, voters often are presented only with a ballot measure's title and a short description of its contents. Moreover, ballot measures often concern arcane subjects, such as the issuance of government bonds, unfamiliar to many voters. Accordingly, the Court has explained transparency around ballot measures allows the public to more fully "evaluate the arguments to which they are being subjected"<sup>138</sup> and "promotes transparency and accountability in the electoral process to an extent other measures cannot."<sup>139</sup> As with independent expenditures in candidate elections, the Court has supported disclosure of ballot measure spending, despite concluding this spending cannot cause corruption.<sup>140</sup>

Knowledge of interest groups for or against a ballot measure affords voters some grasp of the measure's substance by tying it to who wants—or does not want—the measure to succeed.<sup>141</sup> One study of California ballot measures found that informing prospective voters about an interest group's position on a particular measure appeared to serve as a substitute for specific knowledge about the ballot measure's substantive policies with respect to voting behavior.<sup>142</sup> These findings give weight to the Court's observations about the heuristic utility of disclosure in the candidate-election context.

Closely related to, though distinct from, the principle of self-governance is the constitutional interest in ensuring public officials are responsive to the electorate as they govern. To ensure responsiveness in government, the First Amendment guarantees the right to speak, to assemble, and to petition the government, and also provides for a free press.<sup>143</sup> As illuminated by the Court, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."<sup>144</sup>

In other words, the First Amendment assures the unimpeded flow of information, in significant part, to preserve the integrity of our democratic system. The Court has discussed the role of transparency in keeping officeholders' responsive, explaining "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."<sup>145</sup> Even in

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<sup>138</sup> *Bellotti*, 435 U.S. at 792 n. 32.

<sup>139</sup> *Doe v. Reed*, 561 U.S. 186, 199 (2010). Technically, *Doe* is not a campaign finance decision; the case concerned a law permitting public disclosure of the names and addresses of petition signatories in connection to a referendum to repeal Washington State's protections for same-sex couples. *Id.* at 190. Nonetheless, in upholding Washington State's broad disclosure law, the Court again endorsed the merits of transparency in the democratic process. *See id.* at 228 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.")

<sup>140</sup> *See Bellotti*, 435 U.S. at 790 ("[T]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.")

<sup>141</sup> *See Kang, supra* note 134, at 1716 ("Campaign finance disclosure helps to fill some of this informational gap in direct democracy. Voters can reasonably infer that the biggest spenders on campaigning for or against a particular ballot measure are likely to have strong preferences about the policy substance of the ballot measure. By identifying those biggest spenders, voters . . . can position themselves in relation to their feelings about those spenders.")

<sup>142</sup> *Id.* at 1716-17. The study, by political scientist Arthur Lupia, "found that voters who knew only the positions of the interest groups, but were ignorant about the ballot measures' substance, were able to vote identically to voters who actually knew the ballot measures' substance. Voters who knew neither the interest group positions nor the ballot measures' substance, however, voted very differently from the other two groups of voters in Lupia's study, even controlling for other important influences." *Id.*; *see also* Arthur Lupia, *Shortcuts Versus Encyclopedias: Information & Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

<sup>143</sup> U.S. CONST. amend. I.

<sup>144</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931); *see also Citizens United*, 558 U.S. at 339 ("Speech is an essential mechanism of democracy, for it is *the means* to hold officials accountable to the people.") (emphasis added).

<sup>145</sup> *Buckley*, 424 U.S. at 67.

the absence of quid pro quo corruption,<sup>146</sup> information about political contributions and expenditures serves to inform the public's assessment of an elected leader's performance, and to alert voters to instances when an official is unduly prioritizing the wants of campaign supporters above other constituencies.

Further, disclosure obligations may dissuade elected leaders from exploiting their positions to curry favors or solicit large donations in exchange for official action.<sup>147</sup> In the absence of disclosure, politicians could shake down government contractors, lobbyists, and other interest groups with relative impunity.<sup>148</sup> Transparency serves to discourage political "rent extraction," and cultivates integrity in government.<sup>149</sup>

It is worth noting that, in this analysis, the Supreme Court has not discounted the potentially negative implications of disclosure. Contrary to assertions from opponents of campaign finance disclosure,<sup>150</sup> concerns about privacy and associational interests are voiced in the Supreme Court's disclosure jurisprudence. Since *Buckley*, the Court has maintained the availability of as-applied exemptions for plaintiffs who can substantiate a "reasonable probability" of genuine harm resulting from election-related disclosure.<sup>151</sup> The Court has sparingly granted this exemption, though, limiting its availability to plaintiffs in marginalized circumstances for whom public disclosure could result in grave consequences.<sup>152</sup> The judicial reluctance to bestow exemptions from disclosure laws thus does not indicate a disregard for the First Amendment interests of regulated speakers in the electoral context, but, instead, reflects appreciation for the justifications supporting disclosure, which have their own foundation in the First Amendment.

#### IV. Policy Recommendations to Strengthen Disclosure

Jurisdictions can pursue a number of policy measures to ensure that spending in elections is transparent. These options range from broadening the definition of "political committee" to establishing disclaimer requirements for online campaign advertising. These recommendations may work as a package or as standalone reforms, depending on existing laws and campaign practices in a jurisdiction.

Importantly, lawmakers and reformers should consider these policy options in the context of broader realities. Robust campaign disclosure laws *cannot* reverse the corporate spending released by *Citizens United*, nor can they eliminate super PACs. But

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146 The Court has accepted that disclosure directly works to prevent corruption as well as the appearance of corruption. See *Buckley*, 424 U.S. at 67. However, "the amount of work disclosure can do to combat corruption and its appearance depends critically on the Court's theory of corruption." Ortiz, *supra* note 128, at 669-70. Following *Citizens United*, the anticorruption interest supporting campaign finance law is narrow, essentially limited to "the financial quid pro quo: dollars for political favors." *Citizens United*, 558 U.S. at 359. The Court's present understanding of corruption does *not* encompass campaign supporters' "influence over or access to elected officials." *Id.*

147 See Hasen, *supra* note 129, at 565 ("Without public disclosure, politicians would be the only ones to know if they are getting campaign finance support from a government contractor, and could shake down those who do not support the candidate or her party. Public disclosure makes such retaliation by politicians much less likely because the public can more easily see patterns of retribution.");

148 Ortiz, *supra* note 128, at 565.

149 *Id.*

150 See, e.g., Steve Simpson, *Doe v. Reed and the Future of Disclosure Requirements*, CATO SUP. CT. REV. 131, 161 (2010) ("Stating up front that disclosure is 'less burdensome' or does not 'prevent anyone from speaking' simply assumes, at the outset, that disclosure does not violate First Amendment rights. This approach treats anonymous speech and association as second-class rights under the First Amendment.");

151 *Buckley*, 424 U.S. at 74; *Citizens United*, 558 U.S. at 371.

152 See *Brown*, 459 U.S. at 99 (granting as-applied exemption from Ohio's campaign disclosure requirements to Socialist Workers Party in light of "proof of specific incidents of private and government hostility toward the [party] and its members within the four years preceding" the challenge); see also *Doe*, 561 U.S. at 215 (Sotomayor, J., concurring) (explaining "[c]ase specific relief" from disclosure is available in "rare circumstances in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control").

strong disclosure requirements *can* help to educate voters about candidates, policies, and sources of political speech, promoting informed decision-making in the electoral process. Likewise, disclosure can provide the public with information to monitor elected leaders and hold them accountable. By enhancing voters' self-governance, disclosure advances core principles underlying the U.S. Constitution and our democratic system.

### **Defining “Political Committee”**

In campaign finance law, the definition of “political committee” is a critical term that determines the entities subject to comprehensive and ongoing reporting requirements. Due to overbreadth concerns, some jurisdictions restrict the term “political committee” to groups with the major purpose of influencing elections.<sup>153</sup> A common critique of the “major purpose” standard, however, is it allows multipurpose organizations engaging in substantial amounts of election-related activity to avoid meaningful disclosure. Certainly, independent spending in federal election provides evidence to support this apprehension.

Others jurisdictions do not limit the reach of the term “political committee” to organizations with the major purpose of influencing elections. In multiple states, an entity qualifies as a political committee upon raising or spending above a threshold amount to influence state or local elections.<sup>154</sup> While some inclusive definitions of “political committee” have faced legal challenge due to their breadth, most federal circuits have upheld these definitions.<sup>155</sup> In affirming broad definitions of “political committee,” courts have accentuated that the U.S. Supreme Court has never applied the “major purpose” standard to any state or local campaign finance law.

### **Event-driven Reporting for Non-Committee Organizations Making Election-Related Expenditures**

When multipurpose advocacy groups do not meet the definition of “political committee,” jurisdictions still can require these organizations to file “event-driven” disclosure reports upon making independent expenditures or electioneering

<sup>153</sup> See, e.g., ARIZ. REV. STAT. § 16-901 (“Political Committee Includes . . . [a]n association or combination of persons that meets both of the following requirements: (i) Is organized, conducted or combined for the primary purpose of influencing the result of any election in this state or in any county, city, town or other political subdivision in this state, including a judicial retention election. (ii) Knowingly receives contributions or makes expenditures of more than five hundred dollars in connection with any election during a calendar year, including a judicial retention election.”); MD. CODE ANN., ELEC. LAW § 1-101(gg) (“Political committee” means a combination of two or more individuals that has as its major purpose promoting the success or defeat of a candidate, political party, question, or prospective question submitted to a vote at any election.”); N.C. GEN. STAT. ANN. § 163A-1411(74) (“The term ‘political committee’ means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and . . . [h]as the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.”); VA. CODE ANN. § 24.2-945.1 (“Political action committee” means any organization, person, or group of persons, established or maintained to receive contributions for the primary purpose of expressly advocating the election or defeat of a clearly identified candidate.”).

<sup>154</sup> See, e.g., ALA. CODE § 17-5-2 (13) (defining political action committee as “[a]ny committee, club, association, political party, or other group of one or more persons, whether in-state or out-of-state, which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of any Alabama state or local elected official, proposition, candidate, principal campaign committee or other political action committee.”); HAW. REV. STAT. § 11-302 (“Noncandidate committee” means an organization, association, party, or individual that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot . . .”).

<sup>155</sup> See *Yamada v. Snipes*, 786 F.3d 1182, 1201 (9th Cir.), cert. denied, 136 U.S. 569 (2015) (upholding Hawaii’s “noncandidate committee” definition, and accompanying reporting obligations, as substantially related to important government interests in informing electorate, preventing corruption and the appearance thereof, and avoiding the circumvention of state’s campaign finance laws); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (upholding Illinois’s requirement that any group accepting contributions or making expenditures in excess of \$3,000 within 12-month period register as a political committee); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (upholding Maine’s non-major purpose test PAC definition against constitutional overbreadth challenge); *Nat’l Org. for Marriage, Inc. v. Roberts*, 2011 WL 13176734 at \*4 (N.D. Fla. Aug. 08, 2011), *aff’d Nat’l Org. for Marriage, Inc. v. Sec’y*, 477 F. App’x 584 (11th Cir. 2012). *But see Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576 (8th Cir. 2013) (holding that Iowa’s ongoing reporting requirements was unconstitutional as applied to groups whose major purpose was not nominating or electing candidates).

communications above a threshold amount. Under some state laws, event-driven reports of election-related expenditures must include identification of large donors to the group filing the report.<sup>156</sup> This type of law can achieve the disclosure of donors to non-PAC groups, without imposing the administrative duties required of political committees.

### **Covered Transfer Reporting**

Broad definitions of “political committee” and event-driven reporting do not entirely solve the issue of donations being transferred among pass-through entities in an effort to obscure the original sources of funds. However, a third, complementary approach to disclosure, “covered transfer” reporting, is meant to subject these inter-organization transfers to disclosure. While the mechanics vary,<sup>157</sup> these laws generally classify a transaction between organizations as a reportable “covered transfer” if the transferring organization designated or earmarked the funds to be used for independent expenditures by the recipient or a subsequent transferee, made the transfer in response to a solicitation to fund independent expenditures, or otherwise had reason to know that the recipient would make election-related expenditures with the funds.

In general, an organization that makes a covered transfer above a certain threshold must file an event-driven report that identifies its donors. The most widely known example of a covered transfer law is the federal DISCLOSE Act, which Congress has not passed.<sup>158</sup> To date, only a handful of jurisdictions have enacted covered transfer reporting, including Connecticut, Rhode island, and Austin, Texas.<sup>159</sup>

### **Application of Political Advertising Disclaimers**

Disclaimers are the most instantaneous form of disclosure, providing an advertisement’s recipient with immediate information about the ad’s source. Typically, disclaimers must include, at a minimum, the name of the advertising’s sponsor and indicate whether a candidate approved the message.<sup>160</sup> Currently, many states and localities require disclaimers on political advertisements disseminated through print publications, direct mailings, television, and radio. In recent years, digital communications have assumed a more prominent role in campaign advertising, but some jurisdictions’ disclaimer laws either exclude online communications or are silent as to the coverage of internet advisements.<sup>161</sup> To account for the growing importance of digital advertising in campaigns, jurisdictions should update disclaimer

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<sup>156</sup> Event-driven reporting is not continuous, and only mandates the filing of a report if an entity’s total campaign spending exceeds a specific monetary threshold.

<sup>157</sup> Rhode Island requires a person making a covered transfer to file a report, thus tasking the *donor* of the funds with disclosure. R.I. GEN. LAWS ANN. § 17-25-3.1(b). Connecticut, on the other hand, requires the *recipient* of a covered transfer to report it. CONN. GEN. STAT. ANN. § 9-601d(f).

<sup>158</sup> See DISCLOSE Act of 2015, H.R. 430, 114th Cong. § 324(f) (2015), <https://bit.ly/2QkMJo6>.

<sup>159</sup> See CONN. GEN. STAT. ANN. § 9-601d; R.I. GEN. LAWS ANN. § 17-25.3-1; AUSTIN, TEX., CITY CODE § 2-2-34. There have been multiple legislative attempts to require reporting of covered transfers for federal elections, but these efforts have floundered in Congress. See Tarini Parti, *DISCLOSE Act Fails Again in Senate*, POLITICO (July 16, 2012), <https://politi.co/2Rg3LRi>.

<sup>160</sup> Federal election law, for example, requires independent expenditure advertising to include disclaimers with the sponsor’s name, address, telephone number, or website address, and to state the ad is “not authorized by any candidate or candidate’s committee.” 52 U.S.C. § 30120(a)(3).

<sup>161</sup> See, e.g., VA. CODE ANN. § 24.2-955 (limiting the scope of disclaimer requirements to the “sponsor of an advertisement in the print media or on radio or on television.”); IDAHO CODE ANN. § 67-6614A (requiring a disclaimer for political communications “through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing or any other type of general public political advertising”).

requirements to cover online advertisements.<sup>162</sup>

In addition to expanding the media covered by disclaimer laws, jurisdictions can require political advertising to include the largest donors to the sponsor on the face of the ad. This information gives recipients immediate information about the funding sources behind the ad, which in turn helps recipients assess the message. Multiple states now require on-ad disclosure of the top contributors to a political advertisement's sponsor, including California,<sup>163</sup> Connecticut,<sup>164</sup> Massachusetts,<sup>165</sup> and Rhode Island.<sup>166</sup>

### Regulation of Online Election Advertising

As the American public increasingly turns to online sources for news and political information, the use of digital advertising in campaigns has risen dramatically.<sup>167</sup> In the 2016 elections, approximately \$1.4 billion was spent on digital advertisements in federal, state, and local elections, representing nearly an 800% increase over the \$159 million expended for digital ads during the 2012 election cycle.<sup>168</sup> Online election advertising also exceeded the total spent for political ads on cable television for the first time in 2016.<sup>169</sup> By one estimate, digital advertising in the 2018 midterm elections reached almost \$1.8 billion—a 25-fold increase from online spending during the 2014 midterms.<sup>170</sup>

Campaign finance law has failed to keep pace with the rapid growth of online advertising in recent elections. Since the prominence of digital advertising will continue to grow in future elections, jurisdictions should adjust disclosure laws to account for digital media. The federal Honest Ads Act, introduced with bipartisan support in October 2017, would address existing shortcoming around digital advertising in federal elections.<sup>171</sup> The Act would expand the federal definitions of “public communication” and “electioneering communication” to cover digital advertising about federal candidates and social issues.<sup>172</sup> Additionally, the Act would require online platforms to create and maintain political ad files for digital political advertising on the platforms. These political ad files would provide an informational tool for voters, journalists, and enforcement agencies to access more data about digital election advertising and to

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<sup>162</sup> Some states' disclaimer laws do address internet communications. See, e.g., MASS. GEN. LAWS ANN. ch. 55, § 18G (requiring disclaimer on “internet advertising”); MD. CODE ANN., ELEC. LAW § 13-401 (requiring disclaimer on “campaign material,” including a “qualifying paid digital communication”); NEV. REV. STAT. ANN. § 294A.348 (requiring disclaimers for websites and electronic mailings to over 500 people if they expressly advocate a candidate's election or solicit contributions).

<sup>163</sup> CAL. GOV'T CODE § 84503. California requires political advertising paid for by a state committee, other than a candidate committee or political party, to display the names of the committee's three top contributors of \$50,000 or more. *Id.*

<sup>164</sup> CONN. GEN. STAT. ANN. § 9-621(h). Under Connecticut law, an entity making independent expenditures for video or audio advertising within 90 days of an election must include in the ad the five largest sources of covered transfers to the organization within the last 12 months. *Id.*

<sup>165</sup> MASS. GEN. LAWS ANN. ch. 55, § 18G. In Massachusetts, independent expenditures or electioneering communications for television, internet, or print advertising must list the five largest contributors of \$5,000 or more in the previous 12 months to the ad's sponsor. *Id.*

<sup>166</sup> R.I. GEN. LAWS ANN. § 17-25.3-3. In Rhode Island, political advertisements must list the five largest donors of \$1,000 or more in the previous 12 months to the advertisement's sponsor. *Id.*

<sup>167</sup> See Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. (Sept. 7, 2017), <https://pewrsr.ch/2vMCQWO> (“As of August 2017, two-thirds (67%) of Americans report that they get at least some of their news on social media—with two-in-ten doing so often.”).

<sup>168</sup> Borrell Associates, *The Final Analysis: Political Advertising in 2016* (Jan. 3, 2017), <https://www.borrellassociates.com/shop/the-final-analysis-political-advertising-in-2016-detail>; Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, AdAge (Jan. 3, 2017), <https://bit.ly/2RooH2t>.

<sup>169</sup> *Id.*

<sup>170</sup> Todd Shields, Gerry Smith, & Sarah Frier, *Facebook, Google Are Election Ad Winners Despite Meddling Outcry*, BLOOMBERG (Nov. 6, 2018), <https://bloom.bg/2DwgRqC>.

<sup>171</sup> S. 1989, 115th Cong. (2017); see also H.R. 4077, 115th Cong. (2017).

<sup>172</sup> S. 1989, 115th Cong. §§ 5(a), 6(a).

detect foreign election spending on the internet.<sup>173</sup>

In 2018, multiple states enacted new laws requiring online platforms to create publicly accessible databases of digital ads related to state or local elections.<sup>174</sup> Likewise, states have broadened existing definitions to encompass digital advertisements relating to state and local elections.<sup>175</sup> While the Honest Ads Act has not made substantial progress in Congress, California, New York, Maryland, and other states have acted to safeguard their elections from foreign interference and to provide voters with more information about sources of digital advertising in state and local campaigns.<sup>176</sup>

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<sup>173</sup> In 2018, Facebook and Twitter launched publicly searchable archives of political advertisements distributed on the platforms. Like the political ad file requirement under the Honest Ads Act, the social media companies' archives include copies of political advertisements, information about the ad's sponsor, and distribution data. *Ads Transparency Center*, Twitter, <https://ads.twitter.com/transparency>; *Ad Archive*, Facebook, <https://bit.ly/2TRQcB6>. While the Facebook and Twitter archives improve their users' access to important information about online political ads, a comprehensive update of campaign disclosure laws remains the most viable option for strengthening the transparency of digital campaign ads on a systemic scale.

<sup>174</sup> A.B. 2188, 2017-18 Leg., Reg. Sess. (Cal. 2018); Online Electioneering & Transparency Act, H.D. 981, 2018 Leg., 438th Sess. (Md. 2018); Democracy Protection Act, S. 7507-c, 2018 Leg. Sess. (N.Y. 2018).

<sup>175</sup> *Id.*; see also H. 828, 2018 Vt. Act 129 (amending definitions of "electioneering communication" and "mass media activity" to include "electronic or digital communications" and "Internet advertisements," respectively); H. 2938, 65th Leg., Reg. Sess. (Wash. 2018) (amending definitions of "electioneering communication" and "political advertising" to include any "digital communication").

<sup>176</sup> *Id.*