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Legal Challenges to State & Federal Disclosure Laws Post-*Citizens United* Executive Summary

Emboldened by the conservative majority in the U.S. Supreme Court, opponents of campaign finance reform have brought an unprecedented number of cases in the last few years to challenge campaign finance laws at the federal, state and municipal levels, focusing in particular on laws requiring political disclosure. The attached chart catalogues all cases challenging disclosure laws in which decisions were issued following the Supreme Court's 2010 decision in *Citizens United v. FEC*. Contrary to the claims of anti-reform advocates, a review of this litigation reveals that in over 90% of these cases, the courts affirmed the constitutionality of the challenged political disclosure law, in whole or at least in part.

Our review covers legal challenges to laws requiring disclosure in connection to the financing of candidate elections or ballot referenda elections. Only defensive litigation has been included, *i.e.*, cases challenging the facial or as-applied constitutionality of political disclosure laws, or their applicability to certain political communications. The time frame following *Citizens United* was chosen not only because it is the most recent period of litigation, but also because *Citizens United* clarified the standard of judicial review for political disclosure laws, thus rendering obsolete certain cases preceding the decision that applied an incorrect level of scrutiny.

As the chart indicates, both the Supreme Court and the lower courts have rejected the vast majority of challenges to disclosure laws in the post-*Citizens United* period. The chart documents 31 different cases; only three of these 31 cases resulted in a disclosure law being invalidated. Further, two of these three cases (*New Mexico Youth Organized v. Herrera* and *Sampson v. Buescher*) were decided by the Tenth Circuit Court of Appeals, which is an outlier in terms of its jurisprudence on political disclosure. By contrast, the First, Fourth, Seventh, Ninth and Eleventh Circuits have all upheld strong disclosure laws applicable to independent spending following *Citizens United*. In addition, in four of the 31 cases, the court invalidated or narrowed a *portion* of the disclosure law, although frequently these decisions left most of the challenged law standing. Examples of these split decisions include:

- *Center for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2013). The Fourth Circuit Court of Appeals upheld numerous provisions of West Virginia's campaign finance disclosure law, including its definition of "political committee" and "express advocacy," and its requirement that groups making electioneering communications disclose *all* of their donors. The only element of the law the court invalidated was its inclusion of print media in the definition of electioneering communications.
- *Hatchett v. Barland*, 816 F. Supp. 2d 583 (E.D. Wis. 2011). There, a district court considered a law requiring those advocating for or against ballot measures to register and

report, and include disclaimers on their communications. It found the law unconstitutional as applied to the plaintiffs, but rejected a facial challenge to the law.

- *Hispanic Leadership Fund (HLF) v. FEC*, --- F.Supp.2d ----, 2012 WL 4759238 (E.D. Va. Oct. 4, 2012). HLF challenged the application of the federal electioneering communications disclosure requirements to its proposed ads, which would not mention President Obama by name but would use the terms “the White House” and “the Administration” or audio recordings of the President’s voice. A federal district court found that ads using the terms “the White House” and “the Administration” were electioneering communications permissibly subject to disclosure, but that the ads using only recordings of the President’s voice were not.
- *Minnesota Citizens Concerned for Life (MCCL) v. Swanson*, 692 F.3d 864 (8th Cir. 2012). MCCL challenged multiple provisions of Minnesota’s campaign finance law, including the state requirement that associations disclose their independent spending by creating a “political fund,” subject to ongoing registration, record-keeping and reporting requirements. On Sept. 5, 2012, the *en banc* 8th Circuit Court of Appeals struck down the requirement that political funds file disclosure reports even in periods of inactivity, but left the remainder of the law intact.

Finally, it is important to note that the Supreme Court has seemingly endorsed the pro-disclosure stance of the lower courts. It declined to grant *certiorari* to review three recent appellate court decisions upholding disclosure laws, thus allowing these laws to stand, including *Real Truth About Abortion v. FEC*, No. 12-311 (Jan. 7, 2013), *National Organization for Marriage v. McKee*, No. 11-599 (Feb. 27, 2012), and *Human Life of Washington v. Brumsickle*, No. 10-686 (Feb. 22, 2011).