

# SQUARE PEGS: THE CHALLENGES FOR EXISTING FEDERAL CAMPAIGN FINANCE DISCLOSURE LAWS IN THE AGE OF THE SUPER PAC

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## INTRODUCTION

This symposium’s topic “Accountability after *Citizens United*” is an effort to examine one of the most important questions facing our democracy: how do we ensure that individuals who are elected to serve in our government remain accountable to those who cast the votes to elect them? Democracy requires free elections with the full ability to participate in both voting and campaigning.<sup>1</sup> Once elected,

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1. See, e.g., *Minneapolis Star and Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (concluding that “an informed public is the essence of working democracy”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic,

officeholders know that the next election is the ultimate test of accountability for their term in office. To fulfill the democratic promise of our elections, however, it is necessary that the campaigns waged to seek reelection or to unseat an incumbent provide a measure of accountability to the voters who must judge who best will serve their interests and goals.

The Federal Election Campaign Act (the Act or FECA) was enacted to introduce additional accountability into our federal electoral system.<sup>2</sup> The limits and prohibitions in the Act provide important safeguards against corruption or the appearance of corruption. Additional opportunities for accountability exist in the disclosure and disclaimer regime created by the Act. Disclosure provides “shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”<sup>3</sup>

The Federal Election Commission’s (FEC or the Commission) role in this system of accountability is to ensure that existing campaign finance laws and regulations are enforced and, given its authority to issue regulations, to ensure that those regulations are workable and meaningful in the implementation of the statute. Opportunities for accountability can be found in every report filed with the FEC by, for example, a candidate or party committee.<sup>4</sup> In addition, disclaimers attached to communications by political committees and other speakers can be used to ensure accountability.<sup>5</sup> Disclosure and disclaimers provide important transparency within the campaign finance system. However, it is important to consider the limitations of existing regulations both as a result of constitutional interpretation and the practical realities of growing volume. Moreover, the FEC and the Act are not the only actors and laws aimed at ensuring the accountability of those campaigning for office and those attempting to influence voters. The

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are illusory if the right to vote is undermined.”); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 17 (1996) (“Democracy means government subject to conditions—we might call these the ‘democratic’ conditions—of equal status for all citizens.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980) (“Popular control and egalitarianism are surely both ancient American ideals; indeed dictionary definitions of ‘democracy’ tend to incorporate both.”).

2. S. REP. NO. 93-689 (1974); *see also* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (noting the Act’s primary purpose was “to limit the actuality and appearance of corruption resulting from large individual financial contributions”).

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

4. *See* 2 U.S.C. § 434 (2006) (setting forth reporting requirements for political committees).

5. *See* 2 U.S.C. § 441d (2006) (setting out disclaimer requirements for public communications).

Internal Revenue Service (IRS), Securities Exchange Commission (SEC), and congressional ethics and lobbying regimes all play a role in bringing accountability to our systems of campaigns, elections, and officeholder conduct and each reevaluates its approach from time to time.<sup>6</sup>

As the world is broken into smaller, faster-paced bits due to email, text messages, tweets, YouTube videos, and Facebook posts, there is a corresponding increase in the volume of political messages to which each of us is exposed. It is difficult to imagine how recipients are to assess the messages being put forth into the public sphere and effectively assign meaning to them. While there may be no such thing as *too* many ideas, opinions, or pieces of information contributing to the political discourse, there is surely a point of diminishing returns. Much like drinking from a fire hose, it can be extremely difficult to extract anything of value when faced with an enormous quantity of messages. Indeed, as the number of messages grows, we often lack the requisite information to effectively measure, evaluate, or respond.

The essence of accountability is the ability to assess information and determine whether to take action based on that information. The sensory overload phenomenon is true in political debate. How many websites, blogs, and Twitter feeds can one effectively follow and still have any time to digest even a portion of the information coming at such an expanding volume? It is particularly true in the context of campaign finance where additional speakers, including some new types of speakers, are spending more money and engaging in a wider variety of activities, only some of which are subject to regulation and reporting requirements.

This essay will briefly review recent significant changes to campaign finance laws and their potential impact on accountability. Next, we will explore the FEC's role in political accountability including the importance of disclosure as a key aspect, focusing on the legally sound and wise policy underpinnings of disclosure. Finally, the essay will comment on the remaining challenges to achieving meaningful and robust disclosure in the face of significant increases in the types of speakers and spending on communications aimed at voters.

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6. See, e.g., Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 736 (2007); Petition for Rulemaking (Aug. 3, 2011) (submitted by Comm. on Disclosure of Corporate Political Spending to the SEC); Rulemaking Petition on Campaign Activities by Section 501(c)(4) Organizations (July 27, 2011) (submitted by Democracy 21 & The Campaign Legal Ctr. to the IRS).

## I.

## HOW WE GOT HERE:

## THE DAWNING OF THE AGE OF THE SUPER PAC

The long debate over campaign finance regulation has been recently energized. This is in large part due to the well-known and often-cited Supreme Court decision in *Citizens United v. FEC*,<sup>7</sup> as well as *SpeechNow.org v. FEC*,<sup>8</sup> a decision that received far less attention but has a potentially larger impact on our campaign finance system. The Supreme Court's decision in *Citizens United* and the D.C. Circuit's decision in *SpeechNow* together<sup>9</sup> shifted the landscape of campaign finance laws—and led to the creation of what is now known as the “Super PAC.”<sup>10</sup>

7. 130 S. Ct. 876 (2010).

8. 599 F.3d 686 (D.C. Cir. 2010).

9. This is not intended to give short shrift to the District of Columbia Circuit Court of Appeals' decision in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009). There is no doubt that the *EMILY's List* decision is in keeping with the principles of *Citizens United* and *SpeechNow* with respect to the constitutional treatment of independent political expenditures. At issue in *EMILY's List* were several Commission allocation regulations along with a separate regulation setting forth the percentage the Commission will deem contributions when “the corresponding solicitation indicated that donations would be used to support the election or defeat of a federal candidate.” *Id.* at 4–5. A divided panel held that these regulations did “not pass muster under the Supreme Court's First Amendment precedents” because they were “not ‘closely drawn’ to serve a cognizable anticorruption interest.” *Id.* at 18. The case was decided before *Citizens United* and one member of the panel stated that the majority's analysis “results in tension—perhaps irreconcilable tension—with *McConnell*.” *Id.* at 39 (Brown, J. concurring in part). For those reasons, Commissioners Bauerly, Walther, and Weintraub supported the General Counsel's recommendation to file a petition for rehearing en banc. As Commissioners Bauerly and Weintraub stated at the time, “[T]he divided panel's majority opinion reaches constitutional conclusions that were not necessary to its holding and were not briefed by either party at any stage in the litigation.” See Cynthia L. Bauerly, Chair, and Ellen Weintraub, Comm'r, FEC, Statement regarding failure of the Commission to seek rehearing en banc in *EMILY's List v. FEC* (Oct. 22, 2009), available at <http://www.fec.gov/members/bauerly/statements/EmilysList2009-10-22.pdf>. We continue to believe that additional consideration by the full Circuit would have been valuable. It is notable that when the en banc Court of Appeals issued its decision in *SpeechNow*, it made no reference to *EMILY's List*, even though the latter case purports to address the same type of non-profit advocacy groups at issue in *SpeechNow*. That said, the Commission did not appeal *EMILY's List*. The case now adds to the legal milieu governing independent political activity of advocacy groups, another citation for the proposition that “it is ‘implausible’ that contributions to committees making only independent expenditures corrupt or create the appearance of corruption.” *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1075 (S.D. Cal. 2010).

10. Under the Act, a political committee is defined as “any committee, club, association, or other group of persons which receives contributions” of more than \$1000 in a year or makes expenditures of more than \$1000 in a year. 2 U.S.C. § 431(4) (2006). “PAC”—or political action committee—is the “popular term for a political committee

The Court's decision striking down the corporate expenditure ban in *Citizens United* was a landmark decision, but it did not come out of the blue. It followed a series of cases, including *FEC v. Wisconsin Right to Life (WRTL)*<sup>11</sup> and *FEC v. Massachusetts Citizens for Life (MCFL)*<sup>12</sup> that previously chipped away at the statutory prohibition on corporate expenditures. Although *WRTL* and *MCFL* indicated that there were some constitutional problems with uniform application of the corporate expenditure prohibitions in FECA, it was *Citizens United* that finally brought this line of reasoning full circle, holding that the statutory provisions prohibiting corporations from making independent expenditures<sup>13</sup> and electioneering communications<sup>14</sup> vio-

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that is neither a party committee nor an authorized committee of a candidate." FEC, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE, CONGRESSIONAL CANDIDATES AND COMMITTEES 170 (2011). PACs sponsored by a corporation or labor organization are called separate segregated funds. *Id.* PACs without a corporate or labor sponsor are called non-connected committees. *Id.* In general, a Super PAC differs from a typical non-connected PAC in that they "can take in and spend unlimited amounts, including monies from corporate treasury funds." Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics after Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1085 (2011); see also FEC Advisory Op. 2011-12 (June 30, 2011), available at <http://saos.nictusa.com/aodocs/AO%202011-12.pdf> ("Consistent with the *Citizens United* and *SpeechNow* opinions, the Commission concluded that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to IEOPCs, and that these IEOPCs may solicit unlimited contributions from these sources."). Of course, funds raised in unlimited amounts and from previously prohibited sources like corporations and labor organizations may only be spent on independent expenditures. See *SpeechNow*, 599 F.3d at 696 (noting that the decision only applied to "SpeechNow, an independent expenditure-only group" and did not affect "limits on direct contributions to candidates"); see also *Carey v. FEC*, 791 F. Supp. 2d 121, 126 (D.C. Cir. 2011) (noting that "[r]ecent Supreme Court and D.C. Circuit cases have partially invalidated statutory provisions within FECA with respect to the limits placed on contributions for independent expenditures in federal election campaigns").

11. 551 U.S. 449 (2007).

12. 479 U.S. 238 (1986).

13. An "independent expenditure" is statutorily defined as "an expenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2006). Similarly, the Commission's regulations define an "independent expenditure" as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . ." 11 C.F.R. § 100.16(a) (2011).

Express advocacy is defined as:

[A]ny communication that—(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory,"

late the First Amendment.<sup>15</sup> At the same time, the Supreme Court affirmed the validity of the Act's reporting and disclaimer requirements for independent expenditures and electioneering communications at 2 U.S.C. § 434(f), § 441d(a)(3), and § 441d(d)(2).<sup>16</sup>

In striking down the ban on corporate independent expenditures and electioneering communications, *Citizens United* overturned *Austin v. Michigan Chamber of Commerce*,<sup>17</sup> which had previously upheld a similar corporate expenditure ban in Michigan. The Court concluded that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”<sup>18</sup> In short, the *Citizens United* decision held that the statutory prohibition on corporations making independent expenditures and electioneering communications could not withstand strict scrutiny, because “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>19</sup> Because the Supreme Court found no

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“defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc., which say “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush” or “Mondale!”; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

14. The Act and Commission regulations define an “electioneering communication” as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office; is publicly distributed for a fee within 60 days before a general, special, or runoff election for the office sought by the candidate, or within 30 days before a primary or preference election for the office sought by the candidate; and in the case of a candidate for the U.S. Senate or House of Representatives, is targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3) (2006); 11 C.F.R. § 100.29(a) (2011).

15. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

16. *Id.* at 913–16.

17. 494 U.S. 652 (1990).

18. *Citizens United*, 130 S. Ct. at 904 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

19. *Id.* at 884. The Supreme Court also disagreed that corporate independent expenditures can be limited because of an interest in protecting dissenting shareholders from being compelled to fund corporate political speech and held that such disagreements may be corrected by shareholders through the procedures of corporate democracy. *Id.* at 911.

compelling government interest to support the limits on corporations' independent political speech, it invalidated § 441b's restrictions with respect to corporate independent expenditures and electioneering communications.<sup>20</sup>

Citizens United had challenged the Act's disclaimer and reporting provisions as applied to its film and the three advertisements for it.<sup>21</sup> Under the Act, electioneering communications must include a statement identifying the person responsible for payment for the advertisement.<sup>22</sup> Additionally, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a reporting statement with the Commission identifying the person making the electioneering communication, the election to which the communication pertains, and information about certain contributors.<sup>23</sup> The Supreme Court rejected Citizen United's challenge, upholding the reporting provisions because "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>24</sup> The Court found that disclaimer and reporting requirements impose no ceiling on campaign-related spending, do not prevent anyone from speaking, and advance the public's "interest in knowing who is speaking about a candidate shortly before an election."<sup>25</sup>

Ultimately, *Citizens United* has some strikingly clear implications. Corporations and labor unions are no longer prohibited from making independent expenditures or electioneering communications. There is also no longer any need to apply the "no reasonable interpretation" test articulated by Chief Justice Roberts in *WRTL*<sup>26</sup> to determine whether a labor union or corporation may make an electioneering communication from its treasury.<sup>27</sup> However, *Citizens United* also signals a relatively major change to the campaign finance

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20. *Id.* at 913.

21. Citizens United, a non-profit organization, wanted to air a film critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination, and to advertise the film during television broadcasts. *Id.* at 887.

22. 2 U.S.C. § 441d(a) (2006).

23. 2 U.S.C. § 434(f)(1) (2006).

24. *Citizens United*, 130 S. Ct. at 916.

25. *Id.* at 914–15.

26. 551 U.S. 449, 469–70 (2007) ("In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.").

27. *See, e.g.*, 11 C.F.R. § 114.15 (2011) (setting forth the test for determining when a communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate").

landscape, and its ultimate impact is not yet fully known. For the last thirty years, the FEC has developed rules governing the participation of corporations and labor unions in electioneering activities based on the principle that *both* contributions and expenditures were forbidden. It must now attempt to more precisely identify the line between contributions and expenditures. In doing so, the FEC may very well need to reconsider elements that have become part and parcel of campaign finance law, such as the concept of the “separate segregated fund” (SSF).<sup>28</sup>

In the noisy aftermath of the predictions and commentary following *Citizens United*, many overlooked the other significant holding in the case. The Court not only upheld the disclosure and disclaimer requirements for independent expenditures and electioneering communications but it also offered a full-throated defense of their value to the electorate:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called moneyed interests. 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.<sup>29</sup>

The Court’s conclusion was particularly significant because it put to rest the mistaken idea that the Court’s earlier decision in *WRTL*<sup>30</sup> imposed new limits on disclosure.<sup>31</sup>

In response to the decision in *Citizens United*, the FEC declared that it would no longer enforce the statutory provisions or its regula-

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28. See 11 C.F.R. § 114.5 (2011) (setting forth detailed rules respecting the operation of SSFs). Although corporations and labor organizations have historically been prohibited from making contributions and expenditures in connection with federal elections, it has also long been established that these restrictions did not prohibit such activity by a separate “political fund” financed by voluntary contributions. See *generally* *Pipefitters Local Union v. United States*, 407 U.S. 385 (1972) (tracing the legislative history governing the prohibition on political activity by corporations and labor organizations); *FEC v. Nat. Right to Work Comm.*, 459 U.S. 197 (1982) (upholding the Act’s limitations on a corporation’s ability to solicit funds for its SSF).

29. *Citizens United*, 130 S. Ct. at 916.

30. 551 U.S. at 449.

31. See *generally* Torres-Spelliscy, *supra* note 10 (discussing campaign finance disclosure law following *WRTL* through the *Citizens United* decision).

tions prohibiting corporations and labor organizations from making independent expenditures and electioneering communications.<sup>32</sup> As an administrative agency, that is, of course, what the FEC is required to do in response to a Supreme Court decision. What this statement did not do, however, was provide much in the way of useful guidance to those trying to comply with the patchwork of rules that still apply to corporate and labor organizations, including the reporting of electioneering communications and independent expenditures. In order to consider those issues, the FEC would need to engage in a full rulemaking process, the first step of which would be to issue a notice of proposed rulemaking.<sup>33</sup> Although the FEC has been unable to reach a consensus on issuing a notice of proposed rulemaking—primarily because there is disagreement over the appropriate scope of such an endeavor<sup>34</sup>—the Commission has received two separate petitions for rulemaking, focusing on various rules implicated by the decision.<sup>35</sup> As discussed more fully in Part IV, the Commission has taken steps to move forward with a notice of proposed rulemaking addressing one of those petitions.<sup>36</sup>

While *Citizens United* certainly and appropriately got significant attention last year, the D.C. Circuit's en banc decision in *SpeechNow*<sup>37</sup> also shifted the landscape. In that decision, the court held that contribution limits were unconstitutional as applied to individuals who desired to make unlimited contributions to SpeechNow, an organiza-

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32. Press Release, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.

33. A notice of proposed rulemaking is the first step required for notice and comment rulemaking under the Administrative Procedure Act. 5 U.S.C. § 553(c) (2011).

34. See Cynthia L. Bauerly, Chair, and Ellen Weintraub, Comm'r, Fed. Election Comm'n, Statement on the *Citizens United* Rulemaking (Jan. 20, 2011), available at <http://www.fec.gov/members/statements/DEMCommissionersCNPRMStatement1-20-11.pdf>; Caroline Hunter, Vice-Chair, and Donald McGahn II & Matthew Petersen, Comm'rs, FEC, Statement on Notice of Proposed *Citizens United* Rulemaking (June 15, 2011), available at [http://www.fec.gov/members/statements/CitizensUnitedRuleMakingStatement\\_20110615.pdf](http://www.fec.gov/members/statements/CitizensUnitedRuleMakingStatement_20110615.pdf).

35. Petition for Rulemaking Following *Citizens United v. FEC*, (Jan. 26, 2010) (submitted by James Madison Ctr. for Free Speech to the FEC), available at [http://www.fec.gov/pdf/nprm/citizensunited/james\\_madison\\_petition.pdf](http://www.fec.gov/pdf/nprm/citizensunited/james_madison_petition.pdf); Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011) (submitted by Rep. Chris Van Hollen to the FEC), available at [http://www.fec.gov/pdf/nprm/citizensunited/van\\_hollen.pdf](http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf).

36. See *infra* notes 133–142 and accompanying text. Of course, a “Notice of Proposed Rulemaking” is itself only a first step towards developing the rules that will eventually govern the political activity of corporations and unions at the federal level.

37. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

tion that intended to make only independent expenditures.<sup>38</sup> Relying on the majority opinion in *Citizens United*, the court concluded that independent spending does not pose a sufficient risk of corruption to justify limiting contributions to groups that make only independent expenditures.<sup>39</sup> The court explained that “because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.”<sup>40</sup>

And, poof, the Super PAC was born.<sup>41</sup> We now have an entity that seems in most respects like a traditional, federal political committee. It registers with the FEC, it files regular reports showing its receipts and disbursements, it must include appropriate disclaimers on communications, and it must comply with the Act’s recordkeeping requirements. However, with respect to a Super PAC’s expenditures on independent communications, many of the Act’s limitations on contributions have been rendered inapplicable.<sup>42</sup>

As in *Citizens United*, the *SpeechNow* court upheld the requirements related to disclosure, reporting, and organization, essentially concluding that unlike prohibitions on expenditures or limits on contributions, these requirements do not pose substantial impediments to

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38. *Id.* at 689.

39. *Id.* at 695.

40. *Id.* at 696.

41. The FEC has tried to use more technical and less flashy terms when discussing the new breed of political committees capable of raising and spending unlimited funds from previously prohibited sources like corporations and labor organizations. In the wake of *SpeechNow*, the FEC has attempted to refer to these committees as independent expenditure-only committees, or “IEOPCs.” See, e.g., FEC Advisory Op. 2010-11 (July 22, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>; FEC Advisory Op. 2011-12 (June 30, 2011), available at <http://saos.nictusa.com/aodocs/AO%202011-12.pdf>. It was not long, however, before those who write about campaign finance law began using the term “Super PAC” to talk about these groups. See, e.g., Eliza Newlin Carney, *FEC Rulings Open Door For ‘Super’ PACs*, NAT’L J. (Aug. 2, 2010), <http://www.nationaljournal.com/columns/rules-of-the-game/fec-rulings-open-door-for-super-pacs-20100802>; ‘Citizens’ Case Opened Floodgates For PAC Money, NPR Morning Edition (Oct. 1, 2010), <http://www.npr.org/templates/story/story.php?storyId=130272404>; Kim Murphy, *Alaska Senate Race Getting Wilder*, L.A. TIMES, Oct. 20, 2010, at A1. The battle may have been officially lost when Stephen Colbert began using the term on his television program, *The Colbert Report*, and subsequently in his own advisory opinion request. See FEC Advisory Op. 2011-11 (June 30, 2011), available at <http://saos.nictusa.com/aodocs/AO%202011-11.pdf>; Kim Geiger & Melanie Mason, *Comedian’s Day at FEC Highlights a Serious Issue*, L.A. TIMES, July 1, 2011, at A1. Although we may use the term “Super PAC” in this essay, it should be understood as a casual reference rather than an official term of art within the Act, FEC regulations, or the campaign finance lexicon.

42. See generally *supra* sources accompanying note 41.

the exercise of First Amendment rights.<sup>43</sup> Instead, FECA's registration and reporting requirements represent reasonable and important opportunities for members of the public to be informed with respect to their democratic decision-making.<sup>44</sup>

As is frequently the case when the law is developing rapidly, requests for advisory opinions are submitted to the FEC for consideration.<sup>45</sup> The Commission considered a couple of requests in 2010 that dealt directly with the decisions in the *Citizens United* and *Speech-Now* cases (as well as the *EMILY's List*<sup>46</sup> case).

First, the FEC considered an advisory opinion request from Club for Growth.<sup>47</sup> Club for Growth is a nonprofit corporation organized under section 501(c)(4) of the tax code<sup>48</sup> that maintains an SSF to make contributions and expenditures.<sup>49</sup> Club for Growth sought to establish an independent expenditure-only committee (IEOPC) that would, like the SSF, be a component of the Club's overall corporate structure.<sup>50</sup> It also wanted to pay for the establishment, administration, and solicitation expenses of the new IEOPC.<sup>51</sup> In essence, Club for Growth wanted to apply the same approach a corporation takes with respect to an SSF to an IEOPC. The Commission decided that Club

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43. *SpeechNow.org*, 599 F.3d at 697.

44. The Court in *SpeechNow* noted:

Disclosure requirements also burden First Amendment interests because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief." However, in contrast with limiting a person's ability to spend money on political speech, disclosure requirements "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking." Because disclosure requirements inhibit speech less than do contribution and expenditure limits, the Supreme Court has not limited the government's acceptable interests to anti-corruption alone. Instead, the government may point to any "sufficiently important" governmental interest that bears a "substantial relation" to the disclosure requirement. Indeed, the Court has approvingly noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."

*Id.* at 696 (citations omitted).

45. *See generally* 11 C.F.R. pt. 112 (2011) (regarding the availability of, request of, commenting on, issuance of, reliance on, and reconsideration of advisory opinions from the FEC).

46. *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

47. *See* FEC Advisory Op. Request 2010-09 (May 21, 2010), available at <http://saos.nictusa.com/aodocs/1139699.pdf>.

48. *See* Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next "Loophole"?*, 6 FIRST AMEND. L. REV. 41, 48-56 (2007) (discussing the various nonprofit organizational forms available).

49. *See* FEC Advisory Op. 2010-09 (July 22, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-09.pdf>.

50. *See id.*

51. *See id.*

for Growth could establish a connected IEOPC and pay its establishment, administrative, and solicitation expenses.<sup>52</sup> However, because the IEOPC is not an SSF, the establishment, administration, and solicitation expenses are not exempt from the definition of “contribution” and must therefore be reported.<sup>53</sup>

In its Club for Growth Advisory Opinion, the Commission also notes that this arrangement could present concerns about coordination if the contribution committee were to pass along information or requests from candidates to the independent committee.<sup>54</sup> The Advisory Opinion thus observes that, although not required, implementing a firewall consistent with the one outlined in the Commission’s coordination safe harbor would address potential concerns with respect to the conduct standards of the Commission’s coordination rule.<sup>55</sup>

The Commission’s Commonsense Ten Advisory Opinion further addresses the post-*Citizens United* shift by considering whether corporations and labor organizations could give to IEOPCs.<sup>56</sup> In conjunction, these two advisory opinions provide committees with a template letter that they could submit to notify the FEC that they intend to make only independent expenditures and not contributions, thereby permitting them to accept unlimited contributions. The IEOPC designation will help avoid confusion among those reviewing the reports filed and also allow IEOPCs to avoid unnecessary investigations by the Commission. By indicating that a committee is an IEOPC, FEC analysts will not need to ask whether large contributions are excessive or not. Furthermore, the IEOPC designation has value for journalists and others who spend lots of time reviewing reports since it will make it easier to notice contributions to certain committees that are larger than what would have previously been permitted. Each of these advisory opinion requests, akin to the court decisions that prompted them, an-

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52. *See id.*

53. *Id.*

54. *Id.*

55. *Id.* A “coordinated communication” is considered an in-kind contribution to a candidate. *See* 11 C.F.R. § 109.21 (2011). The Commission has established a safe harbor for the establishment and use of a firewall designed to prevent certain agents or employees of an organization or committee from sharing information in a way that a communication paid for by that organization or committee could not be considered “independent” of a candidate. *See* 11 C.F.R. § 109.21(h) (2011); *see also* FEC, MUR 5506, First Gen. Counsel’s Rep. at 5–8 (2005) (concluding that there was no reason to believe that the organization made excessive contributions in the form of coordinated communications, based in large part on the organization’s establishment of “firewall” measures).

56. FEC Advisory Op. 2010-11 (July 22, 2010), *available at* <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>.

ticipate disclosure of spending that would occur within these new committees as well as adherence to FECA disclaimer and reporting obligations.<sup>57</sup>

In 2010, the National Defense PAC submitted an advisory opinion request dealing with the *Citizens United* and *SpeechNow* decisions.<sup>58</sup> National Defense PAC (NDPAC) is a non-connected committee<sup>59</sup> that makes contributions and expenditures. In its advisory opinion request, it sought to create a separate “independent spending” account within the organization rather than create a connected IEOPC for the purpose of accepting unlimited contributions and making independent expenditures.<sup>60</sup> The Commission considered alternative approaches but could not reach a consensus and did not issue an opinion.<sup>61</sup> The Commission disagreed over how to apply *EMILY’s List* and *SpeechNow*, as well as the Supreme Court’s decision in *California Medical Association v. FEC (CalMed)*,<sup>62</sup> to the NDPAC’s proposal and whether a rulemaking was necessary before the Commission could grant the relief requested.<sup>63</sup>

In January 2011, NDPAC filed a lawsuit in the U.S. District Court for the District of Columbia<sup>64</sup> challenging the Commission’s failure to provide an advisory opinion granting NDPAC’s request. The complaint argued that NDPAC was entitled to accept unlimited contributions to an independent spending account while also maintaining a

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57. See *id.* (noting that the committee was “registered with the Commission” and would “file regularly scheduled disclosure reports with the Commission as a non-connected committee”); FEC Advisory Op. 2010-09 (July 22, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-09.pdf> (explaining that the Club intends to register the Committee with the Commission, and the Committee will file regular reports and independent expenditure reports).

58. Nat’l Def. PAC Advisory Op. Request 2010-20 (Aug. 11, 2010), available at <http://saos.nictusa.com/aodocs/1148154.pdf>.

59. PACs without a corporate or labor sponsor are called non-connected committees. See generally *supra* note 41 (discussing the development of terminology used to refer to these entities).

60. See Nat’l Def. PAC Advisory Op. Request, *supra* note 58.

61. See Letter from Rosemary C. Smith, Assoc. Gen. Counsel, FEC, to Dan Backer (Sept. 24, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-20.pdf>.

62. *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981).

63. See FEC Advisory Op. Draft 10-60 (Sept. 17, 2010), available at <http://saos.nictusa.com/aodocs/1148770.pdf> (citing *CalMed* to indicate how the Supreme Court views limitations on contributions to be means to prevent corruption); FEC Advisory Op. Draft 10-60-A (Sept. 21, 2010), available at <http://saos.nictusa.com/aodocs/1148937.pdf> (indicating a view that, under *CalMed*, committees should allocate their fundings in a way that closely corresponds to a ratio of activities to advertisements); FEC Advisory Op. Draft 10-60-B (Sept. 23, 2010), available at <http://saos.nictusa.com/aodocs/1149109.pdf> (linking *CalMed* to the prevention of fraud).

64. Complaint, Carey v. FEC, 791 F. Supp. 2d 121 (D.D.C. 2011) (No. 11-259).

federal “hard money” account.<sup>65</sup> This lawsuit deals primarily with determining the structure organizations, such as NDPAC, are permitted to operate under, thus raising questions of recordkeeping, reporting, and disclosure. In June, the District Court granted plaintiffs’ motion for preliminary injunction, finding the plaintiffs had a “high likelihood of partial success.”<sup>66</sup> The District Court stated that it was bound by the Court of Appeals decision in *EMILY’s List*, and observed that NDPAC’s “proposal conforms with the two basic tenets that govern non-connected non-profits’ election campaign contributions . . . .”<sup>67</sup> The court explained that (1) “non-profit groups may accept unlimited donations to their soft-money accounts [a]nd . . . may spend unlimited amounts out of their soft-money accounts for election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives[;]” and (2) “non-profit entities may be required to use their hard-money accounts for their own contributions to candidates and parties and for an appropriately tailored share of administrative expenses associated with such contributions.”<sup>68</sup>

The court further explained that requiring separate accounts was a “perfectly legitimate and narrowly-tailored means to ensure no cross-over between soft and hard money . . . .”<sup>69</sup> The Commission subsequently entered into a stipulated order and consent judgment with the plaintiffs and agreed that it would not enforce the amount limitations in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) of FECA or any implementing regulations with regard to contributions received for independent expenditures, as long as NDPAC maintains separate bank accounts as described above and allocates its administrative expenses between the accounts in a manner that closely corresponds to the percentage of activity for each account.<sup>70</sup> On October 5, 2011, the Commission issued a statement that provided further guidance for non-connected political committees that intend to conduct their activities consistent with the stipulated order and consent judgment.<sup>71</sup> While this guidance put other non-connected committees on the same footing as NDPAC, the Commission is in the process of developing compre-

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65. *Id.* at 3.

66. *See* Mem. Op. on Mot. for Prelim. Inj. at 8, *Carey*, 791 F. Supp. 2d 121 (No. 11-259); Complaint, *supra* note 64, at 19.

67. Mem. Op. on Mot. for Prelim. Inj., *supra* note 66, at 12.

68. *Id.*

69. *Id.* at 13.

70. Stipulated Order and Consent J., *Carey*, 791 F. Supp. 2d 121 (No. 11-259).

71. Press Release, FEC, Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), available at <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

hensive rules to address the decisions in *SpeechNow*, *EMILY's List*, and *Carey v. FEC* to provide guidance to those seeking to conform to these new norms.

Proving that the Commission is not only criticized for being too lenient but also for being too regulatory, a few months after NDPAC sued the Commission, the Commission was sued by U.S. Representative Chris Van Hollen (D-MD) for being too lax with regard to its electioneering communications reporting regulations.<sup>72</sup> The lawsuit challenged the FEC's existing rules for the reporting of electioneering communications by corporations and labor unions as being inconsistent with the statute and for "allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make 'electioneering communications.'" <sup>73</sup> On March 30, 2012, the U.S. District Court for the District of Columbia granted Rep. Van Hollen's motion for summary judgment, concluding:

Congress spoke plainly, that Congress did not delegate authority to the FEC to narrow the disclosure requirement through agency rulemaking, and that a change in the reach of the statute brought about by a Supreme Court ruling did not render plain language, which is broad enough to cover the new circumstances, to be ambiguous.<sup>74</sup>

*Citizens United*, *SpeechNow*, as well as *EMILY's List*, and more recently *Carey*, concluded that neither FECA's prohibition on corporate and labor union contributions<sup>75</sup> nor its amount limits may consti-

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72. Complaint, Van Hollen v. FEC, No. 11-766 (D.D.C. filed Apr. 21, 2011).

73. *Id.* at 1.

74. Van Hollen v. FEC, No. 11-0766, slip op. at 31 (D.D.C. Mar. 30, 2012) (finding that under step one of the *Chevron* framework, the FCC exceeded its statutory authority because the text of the underlying statute is unambiguous).

75. *Citizens United* did not disturb the other source prohibitions contained in FECA, such as the prohibitions on contributions and expenditures by national banks and nationally chartered corporations, 2 U.S.C. § 441b, the prohibition on contributions by government contractors, 2 U.S.C. § 441c, and the prohibitions on contributions, donations, and expenditures by foreign nationals, 2 U.S.C. § 441e. In *Citizens United*, the Supreme Court did not reach the question of the constitutionality of the prohibitions on foreign nationals. *Citizens United*, 130 S. Ct. at 946. Recently, however, the District Court for the District of Columbia dismissed the Plaintiff's challenge to the constitutionality of the prohibition on foreign nationals making contributions or expenditures in connection with U.S. elections and the Supreme Court summarily affirmed the decision. *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, *Bluman v. FEC*, 2012 WL 33838 (2012). The FEC is also presently defending against a lawsuit challenging the portion of 2 U.S.C. § 441c that bars individuals who have government contracts from making any contribution to any candidate, political committee, or political party in connection with an election for federal office. See Complaint, *Wagner v. FEC*, No. 11-1841 (D.D.C. filed Jan. 31, 2012).

tutionally be applied to contributions made for the purpose of financing independent communications. Importantly, all leave in place disclosure requirements; *Citizens United*, in particular, extols the importance and value of these measures. As the playing field expands, with corporations and labor unions able to make independent political expenditures and Super PACs bolstered with the promise of unlimited funds, effective and meaningful disclosure takes on greater significance. However, it is hardly certain that the status quo will provide the type of disclosure that “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>76</sup> The question remains as to whether our system will provide adequate disclosure in the age of the Super PAC.

## II.

### THE ROLE OF THE FEC: SOME OBSERVATIONS ON DISCLOSURE AFTER *CITIZENS UNITED*

The FEC’s mission is to administer and enforce the Federal Election Campaign Act.<sup>77</sup> This is a rather limited role in the overall scheme of federal campaign finance law. The FEC doesn’t write the laws nor does it decide whether they are constitutional; rather, Congress or the judiciary tell the FEC what its next steps should be. And let’s face it, the FEC regularly loses in court<sup>78</sup>—either because its regulations weren’t regulatory enough or because FECA (and thus the regulations implementing it) has been found to infringe on someone’s First Amendment rights.<sup>79</sup>

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76. *Citizens United*, 130 S. Ct. at 916.

77. See generally 2 U.S.C. § 437c(b) (establishing the Commission’s duties under FECA); *About the FEC*, FEC, <http://www.fec.gov/about.shtml> (last visited Jan. 23, 2012) (describing the responsibilities and duties of the FEC established by FECA).

78. See, e.g., *Van Hollen*, No. 11-0766; *Citizens United*, 130 S. Ct. at 916 (finding § 441b’s restrictions on corporate independent expenditures unconstitutional); *Davis v. FEC*, 554 U.S. 724, 725–27 (2008) (rejecting the FEC’s argument that the Court lacks jurisdiction to hear the matter and ruling § 319(a)–(b) violate the First Amendment); *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 450–51 (2007) (holding that BCRA’s restrictions on issue advertisements are unconstitutional); *EMILY’s List v. FEC*, 581 F.3d 4 (D.C. Cir. 2009) (finding new FEC regulations restricting non-profit expenditures are unconstitutional); *Shays v. FEC*, 528 F.3d 914, 917 (D.C. Cir. 2008) (rejecting several FEC regulations implementing BCRA as “either contrary to the Act or arbitrary and capricious”).

79. That isn’t to say the Commission doesn’t also prevail in its legal challenges. The Commission has won several recent challenges to the Act and its Regulations. See, e.g., *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. Aug. 8, 2011) (challenging the prohibition on foreign nationals making contributions or expenditures in connection with U.S. elections); *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. Mar. 26, 2010), *aff’d*, 130 S. Ct. 3544 (2010) (challenging BCRA’s restric-

That said, the Commission plays an important role administering and enforcing the Act, including its disclosure provisions. Enforcement and disclosure both promote accountability in their own ways. Through the enforcement process, the FEC attempts to ensure compliance with the Act's requirements, including the limits and prohibitions on certain activities. Given the current environment, in which many of the limits and prohibitions on activity—some of which have been around for quite a long time—are now considered constitutionally infirm, disclosure takes on an even more significant role with respect to accountability.

The FEC's website makes an impressive amount of data on candidates for congressional and presidential elections publicly available, often within hours of receiving the reports on which that data is provided.<sup>80</sup> Whether a candidate raises and spends \$80,000 or \$800 million, he or she must register and file reports with the FEC.<sup>81</sup> The filing itself promotes accountability because the books of any registered committee need to be sufficiently organized to file a report. Therefore, the committee must carefully keep track of the money it raises and spends thereby assuring contributors some degree of certainty that their funds are being used appropriately. Any contributor, interest group, reporter, or opponent can easily inspect the reports and review contributions and expenditures.

Awareness that reports will become part of the public record also promotes accountability. Aside from the few who might engage in

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tions on political party fundraising); *Cao v. FEC*, 619 F.3d 410 (5th Cir. 2010) (challenging certain limitations on contributions and coordination with political parties).

80. Senate filing is still done through the secretary of the Senate. Senate committees file with the Secretary of the Senate who then transmits the documents to the FEC electronically. Despite the fact there have been bills to require Senate committees to file electronically with the FEC, in each of the Congresses since mandatory electronic filing was introduced for all other committees that reach a certain threshold of activity—a change that would save money and lead to more timely posting of Senate reports—there is no indication that a change is coming soon. See Lisa Rosenberg, *Senators Take a Pass on Electronic Filing. Again.*, SUNLIGHT FOUND., Feb. 7, 2012, <http://sunlightfoundation.com/blog/2012/02/07/senators-take-a-pass-on-electronic-filing-again/> (noting that the Senate refused to consider an amendment to the Stop Trading on Congressional Knowledge (STOCK) Act that would have required senators and Senate candidates to electronically file their campaign finance reports). Compared to data from paper reports, data from electronically filed reports is received, processed, and disseminated more easily and efficiently, resulting in better use of resources. In fact, the Commission estimates at least \$430,000 per year in costs directly attributable to current Senate filing procedures would be saved by requiring electronic filing. See FEC, LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL ELECTION COMMISSION (2011), available at <http://www.fec.gov/law/legrec2011.pdf>.

81. See 2 U.S.C. §§ 433–434 (2006) (describing mandatory registration of political committees and detailing reporting requirements).

outright fraud, committees who know they will have to report financial information will take care to comply with the law and regulations. Justice Louis Brandeis stated that “sunlight is said to be the best of disinfectants,” but he also suggested that “electric light [is] the most efficient policeman.”<sup>82</sup> When applied to the data available electronically through the FEC’s website, this old adage takes on new meaning.

One of the benefits of the current reporting regime is that it provides a snapshot of different moments, which allows us to use the existing data to get a better understanding of what is actually happening in the aggregate. The 2010 elections were the first elections in the post-*Citizens United* world and there was much speculation about the impact of the decision. Some commentators speculated that the decision would have little impact, surmising that traditional for-profit corporations would not be interested in making their own electioneering communications or independent expenditures.<sup>83</sup> Others opined that it would fundamentally alter communications about elections and result in corporate America determining the outcome of elections.<sup>84</sup> Quite logically, during the 2010 election a number of media reports directly addressed campaign communications, focusing attention on who was paying for them, whether the ultimate donors were being reported, and whether the public knew who was behind them.<sup>85</sup> Many of those advertisements were independent expenditures or electioneering communications as defined by the Act and thus required some level of

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82. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

83. *See, e.g.*, Jan Witold Baran, *Stampede Towards Democracy*, N.Y. TIMES, Jan. 25, 2010, at A23 (arguing that corporate spending in the wake of *Citizens United* will not increase significantly).

84. *See, e.g.*, Press Release, Public Citizen, Public Citizen to Congress: Strong Responses Needed to Offset the Corporate Onslaught Expected from the *Citizens United* Decision (Feb. 3, 2010), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3044> (proposing several responses to address the expected flood of corporate spending).

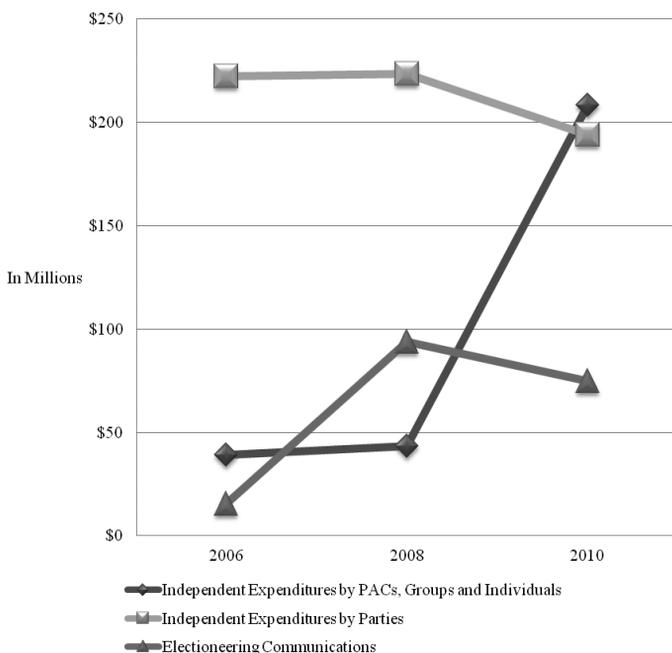
85. *See, e.g.*, Lee Catterall, *Money Talks—but Whose?*, HONOLULU STAR-ADVERTISER, Oct. 31, 2010, available at [http://www.staradvertiser.com/editorials/20101031\\_Money\\_talks\\_-\\_but\\_whose.html](http://www.staradvertiser.com/editorials/20101031_Money_talks_-_but_whose.html) (reporting on the large amounts of money spent during recent congressional election); Jim Rutenberg et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, at A1 (discussing the surge of anonymous money in elections); Joseph J. Schatz, *Anonymity Optional*, CQ WKLY., Oct. 30, 2010, at 2466 (discussing companies making anonymous donations during recent congressional races); Tom Witosky, *Election 2010: Advocacy Groups Can Spend Freely, Keep Donors Secret*, DES MOINES REG., Oct. 24, 2010, <http://www.desmoinesregister.com/article/20101025/NEWS09/10250317/Election-2010-Advocacy-groups-can-spend-freely-keep-donors-secret> (reporting unprecedented amounts of independent expenditures in congressional elections).

reporting to the Commission. From this data, trends in aggregate spending are apparent.

The following graphs depict overall increases in outside spending in congressional races captured in FEC reporting over several cycles, based on information compiled by data analysts at the FEC.<sup>86</sup> It's important to note that this data relies on what committees have reported to the FEC and so does not take into account spending that might appear to some to be election related but is not captured by the scope of the Act.

Figure 1 looks at outside spending in congressional races over the last few cycles and shows some interesting results.<sup>87</sup> Independent expenditures by PACs, groups, and individuals jumped from \$43.4 million in the 2008 cycle to over \$208 million in the 2010 cycle. This reflects nearly five times more spending than in 2008. At the same time, independent expenditures by parties dropped from \$223.6 mil-

FIGURE 1: OUTSIDE SPENDING IN CONGRESSIONAL RACES



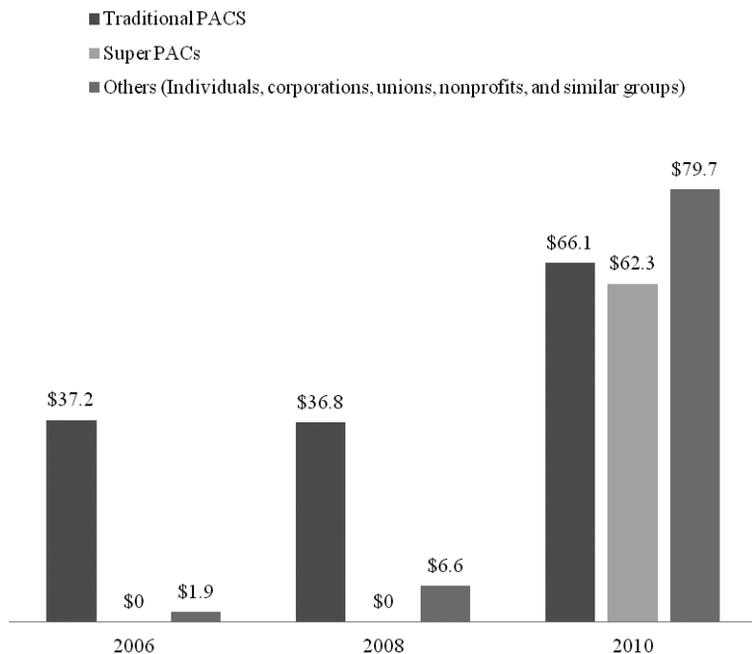
86. In order to more clearly draw comparisons across cycles, we have excluded independent spending in the 2008 presidential election from this analysis.

87. These numbers are based on internal analysis of FEC data. A full summary of 2010 cycle data is available on the FEC's website at [http://www.fec.gov/press/2010\\_Full\\_summary\\_Data.shtml](http://www.fec.gov/press/2010_Full_summary_Data.shtml). Summaries of outside spending in 2006 and 2008 are available at <http://www.fec.gov/finance/disclosure/blogdata/OutsideSpending2006and2008.shtml>.

lion in the 2008 cycle to \$194 million in the 2010 cycle. Electioneering communications also dropped somewhat from \$93.9 million in the 2008 cycle to \$75 million in the 2010 cycle (after a noticeable uptick between the 2006 and 2008 cycles as a result of the Supreme Court's decision in *WRTL*).<sup>88</sup> It is difficult to draw firm conclusions without an opportunity to compare two completed presidential campaigns, but based on the 2010 cycle, and data on activity thus far in the 2012, there has clearly been a shift in independent activity from parties to PACs, groups, and individuals.

Figure 2 looks more closely at the breakdown of spending on independent expenditures. Of the over \$208 million in independent spending by PACs, groups, and others in 2010, just over \$66 million in independent expenditures were made by traditional PACs and \$62.3 million in independent expenditures were made by IEOPCs or Super PACs.<sup>89</sup> Individuals, corporations, unions, nonprofits, and similar

FIGURE 2: BREAKDOWN OF INDEPENDENT EXPENDITURES  
BY SPENDER



88. *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 482 (2007) (holding that the BCRA ban on corporate and labor union electioneering communications was unconstitutional as applied to communications that were not the functional equivalent of express advocacy).

89. FED. ELECTION COMM'N, *2010 Full Election Cycle Summary Data*, available at [http://www.fec.gov/press/2010\\_Full\\_summary\\_Data.shtml](http://www.fec.gov/press/2010_Full_summary_Data.shtml).

groups spent roughly \$79.7 million. These figures represent a substantial increase over past cycles, almost doubling the amount spent on independent expenditures by all PACs and representing a tenfold increase in independent spending by non-PAC entities, such as individuals, corporations, unions, nonprofits, and similar groups, from 2006 to 2010.

It is important to note that these graphs only represent the spending reported to the FEC. Whether that reporting contains the right level of detail about the source of funds and provides useful information to voters is another question. In our experience, on and off the Commission, it is all too clear that the robust disclosure system described by the majority opinion in *Citizens United* does not, in reality, exist.<sup>90</sup> For example, a recent report noted that, of the groups (other than party committees) that reported making electioneering communications or independent expenditures during the 2010 cycle, only a little over half provided any information about the actual sources of their funds.<sup>91</sup> Although there has been a substantial increase in campaign-related spending, the quality of the corresponding disclosure of that spending has not kept pace. As a result, the existing reporting is frequently inadequate to assist the public in determining who is behind advertisements that appear to be political in nature and provides far less disclosure than many would expect after reading the Act or the Court's decision in *Citizens United*. As noted in Part I, above, the Act's scope does not cover all advertisements that many viewers would assume are governed by federal campaign finance law.

In April 2010, the Los Angeles Times issued a detailed report concluding that few of the nation's leading companies disclose their political spending.<sup>92</sup> Despite complying with legal reporting require-

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90. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

91. PUB. CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 10–11 (2011); see also Adam Skaggs, *A Call to Abolish the FEC*, THE ATLANTIC, Dec. 1, 2011, <http://www.theatlantic.com/politics/archive/2011/12/a-call-to-abolish-the-fec/249325/> (criticizing the FEC's disclosure rules as inadequate); Fed. Election Comm'n, MUR 6002, Statement of Reasons at 7 (2010) (attempting to limit the scope of the Commission's regulation requiring reporting of money given “for the purpose of furthering electioneering communications” by imposing a specific intent requirement such that it would apply only to money given for the purpose of furthering a particular electioneering communication).

92. Noam N. Levey & Kim Geiger, *Much Corporate Political Spending Stays Hidden*, L.A. TIMES, Apr. 23, 2011, <http://articles.latimes.com/2011/apr/23/nation/la-na-nation-politics-survey-20110424>.

ments at the state and federal levels regarding their own spending, many of these major companies do not report any of their contributions to politically active third parties who engage in political activity on their behalf.<sup>93</sup>

Raising a related concern, a 2010 report by the public advocate for the city of New York tried to quantify the quality of reporting with respect to the source of funds in the cycle.<sup>94</sup> The report is based on the FEC's data; however, the analysis was performed entirely by the public advocate. The public advocate concluded that outside groups spent \$290 million on independent expenditures in 2010.<sup>95</sup> This number is a little higher than the FEC's \$204 million number for independent expenditures by PACs, groups, and individuals, although it may include electioneering communications, which the FEC treats as a separate category.

The report also concludes that tax-exempt non-profits report spending more than \$130 million on independent expenditures, which is a little less than half of all outside spending by non-party committees.<sup>96</sup> These groups, however, are not reporting the source of the funds being spent on independent expenditures, even when reporting the expenditures themselves.<sup>97</sup>

The report also suggests that there is a tendency for advertisements to be more negative when the donors to the expenditure are not reported—76% as compared to 54% of advertisements in which funding sources are reported.<sup>98</sup> This finding isn't terribly surprising; in the absence of disclosure, which helps to foster accountability, there is little need for a speaker to moderate the quality and tone of discourse we see in the political marketplace.

As we near the 2012 election, there is no doubt that we will see even more money spent on federal elections. While this is of course in part due to the upcoming presidential election, reports also note the expanding role of Super PACs in elections, and, if predictions are accurate, the 2012 cycle will be by far the most expensive in history.<sup>99</sup>

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93. *Id.*

94. PUB. ADVOCATE FOR THE CITY OF N.Y., *CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS* 4 (2010).

95. *Id.*

96. *Id.* at 5.

97. *Id.*

98. *Id.* at 6.

99. David Goldstein, *Super PACs Channel Flood of Money into 2012 Elections*, McCLATCHY NEWSPAPERS, Sept. 30, 2011, available at <http://www.mcclatchydc.com/2011/09/30/125779/super-pacs-channel-flood-of-money.html>. Predictions on overall cost vary based on assumptions and definitions. See, e.g., FEC, PERFORMANCE AND ACCOUNTABILITY REPORT 12 (2011) (contemplating the possibility of \$11 billion in

## III.

## THE PROMISE AND PROPRIETY OF DISCLOSURE

Disclosure, whether through disclaimers or reporting, provides the public with vital information. Unlike other aspects of the Act that are under challenge after *Citizens United*, there is no uncertainty from the Supreme Court about the extent to which effective disclosure is both constitutionally valid and prudent public policy. The modern era of campaign finance jurisprudence begins with *Buckley v. Valeo*,<sup>100</sup> the landmark case involving the constitutionality of FECA, as amended in 1974, and the Presidential Election Campaign Fund Act. The Court's decision in *Buckley* upheld several provisions of the law, including limitations on contributions to candidates for federal office and the public financing of presidential elections.<sup>101</sup> The decision also declared other provisions of FECA to be unconstitutional, in particular the limitations on expenditures by candidates and their committees, the \$1,000 limitation on independent expenditures, and the limitations on expenditures by candidates from their personal funds.<sup>102</sup> Many of the Court's constitutional concerns were based on the notion that "restrictions on both giving and spending money are tantamount to restrictions on speech, and thus can only be sustained in the service of important or compelling governmental interests."<sup>103</sup> *Buckley* has increasingly become the alpha and the omega, the beginning and the end of the analysis for those intent upon undermining campaign finance regulation. Nonetheless, the reasoning in *Buckley* does not articulate an overarching theory of political speech but rather introduces juris-

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election spending for the 2012 cycle); Eliza Newlin Carney, *The Deregulated Campaign*, CQ WKLY., Sept. 17, 2011, at 1922–27, available at <http://library.cqpress.com/cweekly/weeklyreport112000003940582> (well over \$7 billion); Cotton Delo, *Super PACs Could Drive Total 2012 Election Spending to \$9.8B*, ADVERTISING AGE, Mar. 7, 2012, available at <http://adage.com/article/campaign-trail/total-2012-election-spending-hit-9-8b/233155/>; Patricia Zengerle, *U.S. Vote in 2012 Will Be Record, \$6 Billion Election*, REUTERS, Aug. 30, 2011, available at <http://www.reuters.com/assets/print?aid=USTRE77T3ZX20110830> (predicting a total price tag of \$6 billion or more); Paul Blumenthal, *Super PACs and Secret Money: The Unregulated Shadow Campaign*, HUFFINGTON POST, Sept. 26, 2011, [http://www.huffingtonpost.com/2011/09/26/super-pacs-secret-money-campaign-finance\\_n\\_977699.html](http://www.huffingtonpost.com/2011/09/26/super-pacs-secret-money-campaign-finance_n_977699.html) (predicting record spending by non-party groups in the 2012 elections); Michael Scherer, *How Super PACs Could Eclipse Official Campaigns in 2012*, TIME, Sept. 19, 2011, available at <http://swampland.time.com/2011/09/19/how-super-pacs-could-eclipse-official-campaigns-in-2012/> (noting how Super PACs will dramatically change the election landscape in 2012).

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

101. *Id.* at 143.

102. *Id.*

103. Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 953 (2011).

prudential “tensions” that “have reverberated over the decades as the Court has been, by turns, deferential to and skeptical of legislative decisions to limit campaign financing.”<sup>104</sup>

When discussing matters that relate to disclosure, we too rarely refer back to *Buckley*’s robust endorsement of “recordkeeping, reporting, and disclosure requirements.”<sup>105</sup> It’s a useful reminder of the importance of disclosure:

First, 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. It 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. . . .

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. 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. . . .

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests. . . .<sup>106</sup>

Yet challenges to disclosure are raised fairly frequently. Recently, advocates associated with Washington’s same-sex marriage ban proposition argued for anonymous speech rights,<sup>107</sup> stating that disclosure of their contributions to the referendum effort might result in economic harm to their businesses as a result of boycotts by those who disagreed with their political spending.<sup>108</sup> In our country, and

104. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585–86 (2011) (“*Buckley*’s tension is unsurprising given that it was drafted by a committee of Justices who did not agree on the fundamental issue of how to balance First Amendment rights of free speech and association with state interests.”).

105. *Buckley*, 424 U.S. at 67–68.

106. *Id.* at 66–68.

107. James Bopp Jr. & Scott F. Bieniek, *Referendum 71 Case Has Implications for Future Free Speech*, THE SEATTLE TIMES, Apr. 26, 2010, available at [http://seattletimes.nwsourc.com/html/opinion/2011709683\\_guest27bopps.html](http://seattletimes.nwsourc.com/html/opinion/2011709683_guest27bopps.html).

108. See Brief for Petitioner at 10–11, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559); see also Steve Simpson, *Doe v. Reed and the Future of Disclosure Requirements*, 2010 CATO SUP. CT. REV. 139, 162 (noting that the individuals and groups in *Doe* wished to use disclosure laws to intimidate those with certain views). See gener-

around the world, businesses are held accountable for their behavior—whether politically or socially—by consumers through the tried and true method of boycotting. Boycotts have been used to register consumer opposition to everything from apartheid to selling baby formula.

So it goes in our political system as well. Voters, like consumers, make their choices armed with the knowledge of who is speaking and who is paying for the speech. That information helps to eliminate distortions within the marketplace of ideas; without it, the market may be unreliable. The mere fact that voters sometimes decide to use that same information to make economic decisions doesn't change the value of the information or the important interests behind disclosure in terms of making electoral decisions.

Nonetheless, there are still efforts to characterize anonymous speech as necessary to all First Amendment expression. For example, in response to a draft of an executive order that would have required government contractors to report contributions, some commentators<sup>109</sup> argued that such disclosure was harmful to the contributor's rights, citing the protection afforded by the Court in *NAACP v. Alabama ex rel. Patterson*.<sup>110</sup> In that case, the Court found that the state interest—determining whether an organization needed to register as doing business in the state—was insufficient to require the NAACP to disclose the names and addresses of its members.<sup>111</sup> The Court noted, “It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a restraint on freedom of association.”<sup>112</sup> Importantly, the state action at issue was not simply the disclosure of membership information, but “a demand by the State of Alabama that the NAACP reveal the names and addresses of all its Alabama members and agents as part of an effort to prevent the organization from operating in the State. The State's demand was found to

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ally Bradley A. Smith, *In Defense of Political Anonymity*, CITY J., Winter 2010, available at [http://www.city-journal.org/2010/20\\_1\\_political-anonymity.html](http://www.city-journal.org/2010/20_1_political-anonymity.html) (discussing how political activity disclosures may lead to forms of retaliation and discrimination).

109. See Letter from Sean Parnell, President, Ctr. for Competitive Politics, to President Barack Obama, (May 3, 2011); David Marston & John Yoo, *Political Privacy Should Be a Civil Right*, WALL ST. J., Apr. 27, 2011, at A17, [http://www.campaignfreedom.org/docLib/20110504\\_20110503\\_Letter\\_ObamaEO.pdf](http://www.campaignfreedom.org/docLib/20110504_20110503_Letter_ObamaEO.pdf); Zac Morgan, *Colbert Is Funny, Our Disclosure Laws Are Not*, FRUM FORUM (Aug. 30, 2011, 3:28 PM), <http://www.frumforum.com/colbert-is-funny-our-disclosure-laws-are-not>.

110. 357 U.S. 449 (1958).

111. *Id.* at 466.

112. *Id.*

be a denial of due process and a violation of the members' First Amendment right to freedom of association."<sup>113</sup>

Courts have repeatedly held that the government interest in disclosure of political contributions is sufficient to compel disclosure. In 2009, the U.S. Court of Appeals for the D.C. Circuit confronted both *NAACP* and *Buckley* in the context of the Honest Leadership and Open Government Act.<sup>114</sup> That case, *National Association of Manufacturers v. Taylor*, challenged the lobbying disclosure rules in part because "[t]aking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment."<sup>115</sup> The D.C. Circuit rejected that argument, holding that "the risks that [the National Association of Manufacturers] claims its members would suffer if their participation in controversial lobbying were revealed are no different from those suffered by any organization that employs or hires lobbyists itself, and little different from those suffered by any individual who contributes to a candidate or political party."<sup>116</sup> The panel went on to note that this argument is inconsistent with *Buckley's* statement that "certainly in most applications" compelled disclosure laws survive exacting scrutiny.<sup>117</sup>

Less than six months after *National Association of Manufacturers* was decided, the Supreme Court reaffirmed its support for broad disclosure as it applies to independent speech in *Citizens United*.<sup>118</sup> As noted above, in *SpeechNow* the D.C. Circuit held that a committee making only independent expenditures must disclose all its activity, even if that requires reporting its express advocacy communications.<sup>119</sup>

Not long after *Citizens United*, the Supreme Court held, in *Doe v. Reed*, that disclosure of support for referendum petitions, such as the

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113. *United States v. Judicial Watch, Inc.*, 266 F. Supp. 2d 1, 20 n.27 (D.D.C. 2002).

114. Pub. L. No. 110-81, 121 Stat. 735 (2007). The Honest Leadership and Open Government Act made a number of lobbying-related changes to various rules in the wake of the scandals associated with Jack Abramoff. See Charles Fried, *Report: Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, 63 ADMIN. L. REV. 424, 432-33 (2011).

115. 582 F.3d 1, 19 (D.C. Cir. 2009) (citation omitted).

116. *Id.* at 22.

117. *Id.* at 19.

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

119. *SpeechNow.org v. FEC*, 599 F.3d 686, 697-98 (D.C. Cir. 2010). The court went on to state that "requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring SpeechNow to organize and report to the FEC as a political committee." *Id.* at 698.

Washington same-sex marriage ban, does not violate the First Amendment.<sup>120</sup> *Doe v. Reed* continues the long line of cases rejecting the idea that political speech requires blanket protection.<sup>121</sup> The case is notable, however, due to the particularly strong concurrence written by Justice Scalia which ultimately concluded that referendum petitions were more akin to legislating and probably not protected by the First Amendment at all.<sup>122</sup> Even so, Justice Scalia also made it clear that even if referendum petitions were protected, history suggests that protection doesn't include anonymity. Justice Scalia concluded by stating that "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."<sup>123</sup> There is something particularly powerful about the way Justice Scalia ties transparency and disclosure to our tradition of self-governance and civic courage.

After *Doe v. Reed* and *Citizens United*, there can be no question that disclosure is constitutional and that it serves an important governmental interest. Lower courts are following the Supreme Court's lead.<sup>124</sup> The First Circuit, building on *Citizens United*, recently described the informational interest in our modern society as follows:

However, the informational interest is not limited to informing the choice between candidates for political office. As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages. In an age characterized by the rapid multiplication of media outlets and the rise of Internet reporting, the "marketplace of ideas" has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus "enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>125</sup>

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120. *Doe v. Reed*, 130 S. Ct. 2811 (2010).

121. *Id.*

122. *Id.* at 2833 (Scalia, J., concurring).

123. *Id.* at 2837 (Scalia, J., concurring).

124. For a full discussion of district and circuit court decisions after *Doe* and *Citizens United*, see Torres-Spelliscy *supra* note 10, at 1086–89.

125. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011) (internal citations omitted); *see also* *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003) (recognizing that, in the "cacophony of political communications through which . . . voters must pick out meaningful and accurate messages[.] . . . being able to evaluate who is doing the talking is of great importance").

Despite recent repeated declarations by the Supreme Court upholding disclosure and significant discussion of its merits, as pressure for disclosure mounts in a variety of arenas—for example, shareholders voting on corporate spending—we expect to hear more arguments challenging the idea that the public has the right to know who is funding million-dollar advertisements or contributions to such efforts.

#### IV.

##### CHALLENGES TO MEANINGFUL DISCLOSURE: THE REALITY OF OUR CURRENT DISCLOSURE CAPACITY

As previously noted, the FEC's role extends to the reach of FECA.<sup>126</sup> As it stands, some organizations, particularly those that are not political committees, may be doing little that falls within the FEC's jurisdiction to require disclosure. While these organizations may engage in political activities, they might not report much, if any, of their contributions or donations and spending.<sup>127</sup> The FEC's records are only as good as the data it receives from filing entities and are limited to the information required by the Act and FEC regulations. There are areas of imperfections. First, committees choose how to identify expenditures. While the FEC provides a list of acceptable descriptions, they are not mandated.<sup>128</sup> This means that two different committees may choose to describe the same type of expenditure in two different ways. Readers of these two reports may not be able to fully understand the expenditures or be able to compare them in a meaningful way. Perfection is not required but it is also too optimistic to say that all of the data filed by entities is fully accessible and understandable to all readers.<sup>129</sup>

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126. 2 U.S.C. § 437c (establishing the FEC to administer, enforce, and formulate policy with respect to FECA, the Presidential Campaign Fund Act, and the Presidential Primary Matching Payment Account Act).

127. As the Supreme Court has long acknowledged, "the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.'" *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 456–57 (2007) (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)). When applying this actuality to the Act's limits and prohibitions, the Court has explained that we must tread lightly, because the "tie goes to the speaker, not the censor." *Id.* at 474. When talking about disclosure, however, we need not tread so lightly. The governmental interest in strong and the burden is minimal. If we err on the side of disclosing spending that is only loosely related to a federal election, to borrow a different sports metaphor, no harm, no foul.

128. See FEC Statement of Policy, "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887 (Jan. 9, 2007).

129. See Letter from Steven Walther, Chairman, FEC, to Appropriations Committees (Dec. 17, 2009) (explaining the limitations in our ability to "make public data regard-

Another more important area of imperfection is the incongruity of required disclosures and disclaimers that may not be apparent to voters. While there is a significant amount of disclosure required of political committees, for other entities there is much less. Non-committees who make independent expenditures and fund electioneering communications are subject to different disclosure rules than political committees. The Court's decision in *Citizens United* means that corporate and union treasury funds may now be spent on these expenditures. But the rules governing disclosure for independent expenditure and electioneering communications were written while the ban on corporate and labor union expenditures was in place. With many new speakers—and new types of speakers—engaging in the process in new ways, the public increasingly must rely on disclosure to effectively respond to and participate in the political debate.

Unfortunately, society is a long way from the assumptions the Court's majority made in *Citizens United* about the state of the disclosure and disclaimer system. The Court's statement that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way" and that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages" assumes that the public has full access to information about who is paying for these messages.<sup>130</sup> As explained in Part III above, that is simply not always the case. And, more troubling, the voters may not realize that their access to the information the Supreme Court says they are entitled to varies drastically depending on the type of speaker they are hearing. Voters don't watch television commercials praising or criticizing candidates with the legal constructs of independent expenditures and electioneering communications in mind. Voters don't first consider whether the speaker is a candidate committee or IEOPC when viewing a message.

Instead, most voters view what they believe to be "campaign ads" from organizations with ambiguous names and assume that they are subject to the restrictions and requirements of the Act. Those voters

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ing the media expenditures of federal campaigns"). Chairman Walther's letter explained:

[P]olitical committees are not restricted to choose from a standardized list of purposes for expenditures specified by FECA or the Commission. Instead, political committees are accorded some flexibility in deciding how to report the purpose of an expenditure. As long as the reported purpose is "sufficiently specific" to make the expenditure's purpose "clear," the political committee has met the reporting requirement in FECA.

*Id.*

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

are wrong in many instances. Such advertisements and organizations raise questions that the Commission will not be able to answer because of the limits of FECA and the subsequent case law further narrowing it. There is a disconnect between what voters often assume are regulated communications and those that are actually subject to the Act. To the extent that some voters may assume the idea of “truth in advertising” applies to campaign advertisements or that there is a government regulator ensuring that these advertisements comply with certain requirements, this disconnect is concerning. It seems essential to revisit these rules and consider how they should be revised to fit the new legal regime ensuring that voters are able to “make informed decisions and give proper weight to different speakers and messages.”<sup>131</sup>

For organizations that do register with the FEC, or that make independent expenditures and electioneering communications, the Commission’s failure to issue a notice of proposed rulemaking to seek comment or take other steps in the rulemaking process on changes or modifications to these disclosure regulations after *Citizens United* and *SpeechNow* means that they have little direction when filing their reports. At a minimum, the Commission should take steps to shed some light on the disclosure rules that currently cross-reference sections of the regulations rendered meaningless by *Citizens United*. More generally, the Commission should seriously consider whether past interpretations of our reporting rules are adequate in a post-*Citizens United* world, particularly in light of the Court’s holding on the statute’s disclosure and reporting requirements.

The Commission need not embark upon fundamental and broad reform that has been proposed in legislation like the Democracy Is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act.<sup>132</sup> Certainly there is not much appetite at the current Commission for that. The Commission could do far less and still provide clarity and guidance to those who need to comply with our regulations. For example, simply updating our reporting rules and forms to reflect that corporations may make electioneering communications without restriction would be a beneficial change and provide useful guidance to entities that are trying to comply with the new landscape.

In January 2011, the Commission was unable to issue a notice of proposed rulemaking with respect to *Citizens United* because the Commission was deadlocked on the scope of the proposed rulemaking. At that point in time the Commission did not have enough votes

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131. *Id.*

132. H.R. 5175, 111th Cong. (2010). The DISCLOSE Act of 2012 was recently introduced in the current Congress. H.R. 4010, 112th Cong. (2012).

to even ask the public whether it should update its reporting rules to reflect the new reality or to ask whether it should address questions regarding the role of foreign nationals' control over those groups that could now make independent expenditures or electioneering communications.<sup>133</sup> Another effort in June 2011, which contained more limited options and a narrower discussion of disclosure requirements and foreign national participation, also failed to win majority support from the Commission.<sup>134</sup>

In light of its inability to act in a more comprehensive fashion, the Commission issued notices of availability on two petitions that had been filed seeking FEC action after *Citizens United*.<sup>135</sup> The first petition, filed by the James Madison Center for Free Speech, proposed repeal of several regulations limiting, and in some cases prohibiting, the political activity of corporations and labor organizations.<sup>136</sup> The Commission received three comments addressing this petition.<sup>137</sup> U.S. Representative Christopher Van Hollen filed the second petition proposing that the Commission revise its rules governing the extent of required disclosure when a person or organization makes independent expenditures.<sup>138</sup> Four comments were submitted in response to this

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133. Press Release, FEC Votes on Two Drafts of an NPRM on Independent Expenditures and Electioneering Communications, Approves Final Audit Report (Jan. 20, 2011), *available at* <http://www.fec.gov/press/20110120OpenMeeting.shtml>. A Notice of Proposed Rulemaking (sometimes abbreviated as "NPRM") informs the public as to what potential changes may be made to the Commission's regulations and seeks comment on those proposed changes. If the Commission cannot agree on the scope of a notice of proposed rulemaking, the public is not given the opportunity to comment on possible amendments to the existing regulations.

134. Press Release, FEC Approves Notices of Availability, Advisory Opinions and Audit Memorandum (June 15, 2011), *available at* <http://www.fec.gov/press/press2011/20110615openmeeting.shtml>.

135. While this step is generally required under the Administrative Procedures Act and our own regulations, 11 C.F.R. pt. 200, issuing a comprehensive Notice of Proposed Rulemaking covering the subjects raised by the petitions would have rendered this step unnecessary.

136. Petition for Rulemaking Following *Citizens United v. FEC* (Jan. 26, 2010) (submitted by James Madison Ctr. for Free Speech to the FEC), *available at* [http://www.fec.gov/pdf/nprm/citizensunited/james\\_madison\\_petition.pdf](http://www.fec.gov/pdf/nprm/citizensunited/james_madison_petition.pdf).

137. Comments Received Regarding James Madison Ctr. for Free Speech Petition, FEC ONLINE RULEMAKING SYSTEM, <http://sers.nictusa.com/fosers/>, (search the "Completed and Ongoing Rulemakings" database for "REG Number" 2010-01; then see items listed as "Notice of Availability (NOA) Comment").

138. Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011) (submitted by Rep. Chris Van Hollen to the FEC), *available at* [http://www.fec.gov/pdf/nprm/citizensunited/van\\_hollen.pdf](http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf).

petition.<sup>139</sup> The Commission considered the petitions at its final meeting of 2011; however, it deadlocked and was unable to issue notices of proposed rulemakings to seek public comment on the specific changes relating to the disclosure of independent expenditures.<sup>140</sup> By contrast, the Commission had five votes to issue a notice of proposed rulemaking geared towards deleting regulations that the Commission had announced it would not enforce nearly two years ago.<sup>141</sup> This highlights the challenges of this Commission. Several efforts to seek comment on some of the most basic issues have been blocked because of a dedicated resistance to anything remotely related to regulation—even when the Supreme Court has said that type of regulation not only passes constitutional muster, but also serves an important interest. The electorate is not being well served by this type of intransigence.<sup>142</sup> Where the Commission has thus far failed to undertake a robust and comprehensive notice of proposed rulemaking to address the issues raised by *Citizens United* for the Commission’s regulations, the bare minimum responsible next step is to allow petitions to move forward. Although certainly not an ideal way to resolve the issues, refusing to act on the Van Hollen petition at this point sidesteps the Commission’s responsibility to respond to court decisions and public requests to seriously consider even a few of the many issues raised by *Citizens United*.

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139. FEC ONLINE RULEMAKING SYSTEM, <http://sers.nictusa.com/fosers/>, (search the “Completed and Ongoing Rulemakings” database for “REG Number” 2011-01; then see items listed as “Notice of Availability (NOA) Comment”).

140. Press Release, FEC Approves Advisory Opinion and Notice of Proposed Rulemaking, Elects 2012 Officers (Dec. 15, 2011), *available at* <http://www.fec.gov/press/press2011/20111215openmeeting.shtml>.

141. *Id.* See also Press Release, FEC Statement on the Supreme Court’s Decision in *Citizens United v. FEC* (Feb. 5, 2010), *available at* <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml> (announcing, almost two years earlier, that the Commission would “no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications”).

142. For instance, there have been numerous news reports following the end-of-year reporting by many Super PACs highlighting significant gaps in the information disclosed and noting that by changing their filing frequency, committees can avoid reporting significant contributions or expenditures until after important elections, such as the Republican presidential primary elections in New Hampshire, South Carolina, and Florida. See Dave Levinthal, *What Super PAC Filings Left Out*, POLITICO, Feb. 3, 2012, *available at* <http://www.politico.com/news/stories/0212/72420.html>. The concerns about filing frequency are not unique to Super PACs. The issue arises with traditional PACs as well, but with Super PACs, the stakes are higher. Evaluating and improving the rules governing disclosure of independent expenditures would lessen the significance of when the periodic reports are due.

Until the Commission is able to find a way to ask questions, gather public comment, and consider updates to its regulations and its forms in a comprehensive way, it is unlikely the FEC will lead the way on increased accountability. In reality, many corporations and labor organizations will struggle to comply with rules that are out of date, while doing the best they can to live up to the basic reporting expectations. Voters will have access to limited information often without a clear understanding of the ways in which it is limited.

Although the FEC is not doing as much as it could or should do to carry out its mission, it does promote accountability through its existing efforts to provide the public with a clear, accurate record of who is spending what in federal elections. The Commission and its dedicated staff are making sure that data is available swiftly and is easily accessible on its website. For most committees, the data is available within hours of it being filed. Analysts review all of those reports and where there appears to be a problem or a lack of required information, they will contact committees to request further information and clarification to ensure that the public record is accurate.

#### CONCLUSION

As a result of *Citizens United*, and several subsequent cases, Congress, the Commission, and the public have been presented with an opportunity to examine how best to satisfy the informational needs of the electorate. Some commentators have questioned the efficacy of existing disclosure and disclaimer requirements in achieving their purpose.<sup>143</sup> Ideally, a serious effort to recalibrate our disclosure system would address the reality that it currently provides too little information concerning what is really important for voters—i.e., the source of millions of dollars spent on independent expenditures and electioneering communications—and too much of what is of less significance. For example, while most contribution limits are adjusted for inflation, the \$200 itemization threshold has held steady since the 1979 amendments to FECA raised the threshold from \$100.<sup>144</sup> Similarly, questions about the usefulness of contributors' addresses beyond zip codes are also worth considering.

In addition, some have raised concerns about the privacy of contributors as a result of the FEC providing raw data to others, particu-

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143. See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L. J. 273 (2010); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 263–69 (2010).

144. S. REP. NO. 96-319, at 3, 10 (1979).

larly those who then display that information on their websites.<sup>145</sup> Concerns about an individual's address available on some websites are certainly understandable. It's an understatement to say that the Internet has forever changed our notions of privacy. Internet disclosure was one of the virtues of the existing disclosure system highlighted by the Court in *Citizens United*. Although not as robust as the Court imagined, there is a more fundamental question: once the government has such information, on what grounds would it not disclose it to the public?

There are certainly a number of improvements that would provide a better quality of information to voters while assisting with the challenges of quantity. Despite the Supreme Court's view of the value of disclosure in our system, it is difficult to see the day when a robust and purposeful discussion about meaningful disclosure for the benefit of voters will take place, given continued challenges to disclosure based on anonymity and recent, failed efforts to consider legislative, and regulatory modifications. In the meantime, we think efforts to enhance the existing disclosure and disclaimer provisions are necessary.

Accountability is served by providing voters with knowledge about where messages and contributions are coming from, and in the absence of meaningful disclosure, there is little to check the types and quality of discourse we see in the political marketplace. Whether we are talking about corporate accountability to shareholders, a political committee's accountability to its contributors, or voters' ability to make informed voting decisions, in our view, access to meaningful information about the source and types of spending is the very foundation of empowered citizen decision-making. Federal campaign finance disclosure provides several opportunities for enhanced accountability, but there is no question that more needs to be done if the Supreme Court's vision for the benefits of disclosure is to be realized for voters.

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145. *E.g.*, Briffault, *supra* note 143, at 290–95; Deborah G. Johnson, Priscilla M. Regan & Kent Wayland, *Campaign Disclosure, Privacy, and Transparency*, 19 WM. & MARY BILL RTS. J. 959, 959–60, 982 (2011).