Wyoming Liberty Group

Founding Principles Guiding Innovative Solutions

August 28, 2017

To: Joint Corporations Committee

From: Steve Klein

Cc: Legislative Service Office;
Kai Shon, State Election Director, Wyoming Secretary of State's Office

Re: Campaign Finance – Disclosure and Coordination Regulation

Following the first 2017-18 interim meeting of the committee in May, this memorandum provides further information about two campaign finance issues that were of concern to certain members of the committee and members of the public: disclosure and coordination. I also discuss the Wyoming Campaign Finance Information System (WYCFIS) and caution that expansions of campaign finance disclosure absent more information will prove costly and of dubious benefit.

I. CAMPAIGN FINANCE DISCLOSURE

A. The Constitutional Implications of Disclosure

Testimony to the committee during the May meeting indicated that according to the *Citizens United* case, campaign finance law may require any organization engaged in electoral advocacy to register with the government and disclose all of its donors—that is, to become political committees, or "PACs." This was incorrect; *Citizens United* addressed disclosure and disclaimer requirements of a special type of advertisement called "electioneering communications," which are specifically defined in federal law and do not require the disclosure of all of an organization's donors. *See* 52 U.S.C. § 30104(f)(3); 11 CFR 100.29. The case did not overturn or upset the extensive case law that specifically addresses PAC-style disclosure, and this committee should not attempt to circumvent this precedent.

One need look no further than a case decided by the Tenth Circuit Court of Appeals after *Citizens United*. In *New Mexico Youth Organized v. Herrera*, the court re-affirmed various Supreme Court precedents and held that the law may still only require disclosure of all of an organization's donors if that organization has the "major purpose" of engaging in elections. *See* 611 F.3d 669 (10th Cir. 2010). As the court discussed, this requirement dates to *Buckley v. Valeo* (424 U.S. 1 (1976)) and was not altered by *Citizens United*. The "major purpose" test has never been defined in federal law, is

seldom featured in state laws, and this often proves to be problematic. Nevertheless, it is an important safeguard from placing PAC-style disclosure requirements on any and all groups that occasionally engage in electoral advocacy.[1]

Disclosure is a heated topic in campaign finance law. A copy of an article I recently published in the *Washburn Law Journal* is included as **Attachment A**, focusing on disclosure's present and future. It opens with a personal discussion of my efforts to comply with Wyoming campaign finance law as a campaign's treasurer in the 2014 election. It then discusses the divergent outcomes of some recent campaign finance cases—one of them another recent case decided by the Tenth Circuit Court of Appeals—and argues that academics and proponents of regulation have failed to account for the burdens of complying with the law for average citizens and novice politicos.

By recognizing the problem of placing too much red tape on political activity, this committee would go above and beyond the callous attitude too often expressed by proponents of campaign finance "reform." At the very least, the committee should be wary of expanding disclosure beyond constitutional precedent.

B. The Wyoming Campaign Finance Information System

WYCFIS is a no-frills website that discloses campaign finances in Wyoming state elections. *See* http://www.wycampaignfinance.gov. Reports are filed mostly by campaigns and political committees. As briefly discussed in my recent law review article (**Attachment A**) and as likely experienced by members of this committee, it is a functional site but is not particularly user-friendly for filers or average citizens. When considering any potential amendments to Wyoming campaign finance law, this committee should keep in mind the following: modifying WYCFIS is expensive, and we are currently unaware of how (or even how many) Wyomingites actually use it.

WYCFIS was constructed with an appropriation of $2.5 million. *See* House Enrolled Act (House Bill 3) (2008). Because of the complexity of interactive software, upgrading WYCFIS is also expensive. For example, in 2015 a simple (and welcome) change to filing requirements was accomplished with an appropriation of $56,000. *See* House Enrolled Act 57 (House Bill 126) (2015). Without modifications to the website, WYCFIS becomes haphazard, as exhibited with the current disclosure of independent expenditures pursuant to WYO. STAT. § 22-25-1069(b)(i). This requirement was added to the law in

[1] On its face, Wyoming law does not reflect the "major purpose" doctrine, and arguably turns any organization that makes a single expenditure into a PAC. *See* WYO. STAT. § 22-25-106(b)(i). However, since the law has not been enforced this way, it is not of immediate concern. *See* footnote 2 and accompanying text.

2011, via floor amendments to a bill sponsored by this committee. *See* Senate Enrolled Act 48 (Senate File 3) (2011). Because WYCFIS was not modified to account for this (that is, no appropriation was made to update the website), "First Amendment Independent Expenditures" are instead disclosed on the Secretary of State's website in scanned portable document format (PDF). *See* http://soswy.state.wy.us/Elections/FirstAmendmentExpenditures.aspx.[2]

Disclosure is ostensibly about informing the electorate. As I discussed in my May testimony, I believe disclosure is too often just a way for political opponents to try and punish one another for accounting errors, missed deadlines or other honest mistakes. In any event, whether the loftier interest is being served by WYCFIS is an open question. Following the meeting in May, I submitted an open records request to the Secretary of State asking for web traffic information relating to WYCFIS. The response from the Wyoming Secretary of State is included as **Attachment B**. In short, the Secretary of State has not tracked any of this information. (Importantly, the office is not required to do so.) I suspect very few Wyomingites actually utilize WYCFIS outside of candidate campaigns and PACs. Occasionally it is used by journalists, who publish limited pieces of reports when discussing other topics, but citizens who read such articles fall far short of receiving full disclosure. Before expending any more money on WYCFIS, this committee should discover who uses it and determine whether it is worth the cost.

This committee should allow the Secretary of State to gather web traffic data relating to WYCFIS for at least one election cycle and review this information before expending more funds to modify WYCFIS, which will likely be required to accommodate expanded campaign finance disclosure.

II. CAMPAIGN FINANCE COORDINATION[3]

Unlike disclosure, which has filled thousands of pages of judicial opinions, campaign coordination has a sparse history. Prior to *Citizens United*, it was moribund. Like disclosure, however, advocates seized upon it following the ruling and have attempted to use it to shore up campaign finance regulation. Current Wyoming law does not directly address coordination, but includes it as part of the definition of "independent expenditure":

[2] It is likely that this is the method by which the organizations subject to the Wyoming GOP's various complaints in the 2016 election cycle were required to disclose.

[3] Portions of this section are adapted from comments I provided to the Federal Election Commission in October, 2015. *See Pillar of Law Comments on Proposed FEC Coordination Rulemaking (REG 2015-04)*, Oct. 26, 2015, https://pillaroflaw.org/2015/10/26/pillar-of-law-comments-on-fec-coordination-rulemaking-reg-2014-04/.

> For purposes of this subsection, "independent expenditure" means an expenditure that is made without consultation or coordination with a candidate or an agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes[.]

WYO. STAT. § 22-25-102 (emphasis added). In the May meeting, this committee heard testimony that interpreted this provision very broadly, such that candidates may "not associate" with organizations that make expenditures supporting their election or in opposition to their opponents. This is also inaccurate, and is contrary to cases that have addressed coordination.

The idea behind coordination regulation is to prevent shadow campaigns. If a person or organization follows detailed instruction from a campaign on its messaging, then it effectively functions as part of the campaign, but its spending may not be disclosed or will be disclosed as independent of the campaign. More importantly, and of interest to regulation proponents, coordinated expenditures count as contributions to a campaign, and may still be limited while, pursuant to *Citizens United*, independent expenditures may not. In order to undermine *Citizens United*, there is now an active campaign to claim there is simply no such thing as an "independent" expenditure. Precedent, however, shows the dangers of applying even coordination regulations that are narrower than current Wyoming law. Even if a person or organization can pass coordination scrutiny, the breadth and cost of coordination investigations are punishment in and of themselves and threaten free speech. The remainder of this section will discuss two of the cases that exemplify these concerns.

A. *Two Unnamed Petitioners v. Peterson*

Better known as Wisconsin's John Doe Cases, the *Peterson* decision from the state's supreme court halted a prolonged, extensive and secret investigation into the actions of several politically active organizations, campaigns for Wisconsin state office and politically engaged citizens. *See* 866 N.W.2d 165 (Wisc. 2015). The prosecutors based their investigation on a coordination theory that encompassed restrictions and prohibitions on coordinated issue advocacy. The case received national attention due to tactics employed in the investigation, including broad searches and seizures of documents and computers as well as gag orders prohibiting those under investigation from discussing the case.

The court ruled that "[t]he special prosecutor's theories, if adopted as law, would require an individual to surrender his political rights to the government and retain campaign finance attorneys before discussing salient political issues." This was because under the prosecution's theory any organization could become a subcommittee of a campaign committee through coordinated issue advocacy or—alternatively or simultaneously—coordinated issue advocacy could count as an in-kind

contribution to committees, requiring adherence to contribution limits. Moreover, to determine subcommittee status or in-kind contributions, broad investigations would become the norm.

The prosecutorial power wielded under Wisconsin's John Doe law in the case is thankfully uncommon and Wyoming law provides no such power to keep investigations secret. However, the case shows that although regulation proponents often chastise states for not embarking on coordination witch hunts, courts will offer stern rebuke when investigations and prosecutions are undertaken with anything less than exacting constitutional specificity.

B. *Federal Election Commission v. Christian Coalition*

FEC v. Christian Coalition was a comprehensive case in which a D.C. federal judge paved the way for the current FEC coordination regulations, which are very precise. (These are included as **Attachment C**.) This ruling, requiring either specific conduct (a request or suggestion from the campaign for a certain communication) or *very* specific conduct (substantial discussion) over content and strategy—foreshadows what is now 11 CFR § 109.21 (attached). The current regulations are more specific than the decision, and serve to merge the court's reasoning by requiring certain conduct *and* content in a communication in order for it to be coordinated. Standards reaching conduct beyond the current regulations or the *Christian Coalition* court's reasoning would encounter the same constitutional difficulties.

The *Christian Coalition* court's application of its narrow reading of coordination led to the dismissal of most of the FEC's claims against the organization. The court ruled that having access to private opinion polls conducted by a campaign and using that information for targeted speech does not translate to coordination absent a request from the campaign or material discussion. Working for a campaign at the same time one works for an organization like Christian Coalition would not satisfy coordination, either, absent conduct and content. Most tellingly, a candidate may raise money for an outside organization, even when he or she knows that the money raised will be used for a purpose benefiting his or her campaign. Clearly, coordination cannot foreclose all association and cooperation between candidates or campaigns and independent groups.

Coordination regulation must be particularly precise. If this committee supports more vigorous enforcement of Wyoming campaign finance law, the state's legal definition will require more precision.

I appreciate the committee's consideration of this memorandum and invite questions or concerns about the Election Code at stephen.klein.esq@gmail.com or my mobile number (734) 233-1705.

"'The Centre Cannot Hold'": Campaign Finance Disclosure Beyond 2016

Stephen R. Klein*

I. INTRODUCTION

Less than a week before the 2014 general election, a candidate for state legislature called me excited that he had emailed a last-minute mailer to the local printer, just in time for the final product to reach mailboxes a day or two before election day. I did not share his excitement because I had not had the chance to review the mailer. Sure enough, when he sent it over to me I spotted an omission, glaring only to campaign finance attorneys, political opponents, and snobs. While the mailer had the name of the candidate's campaign committee and its address, it did not clearly state "paid for by," a requirement under campaign finance laws in many states and under federal law.[1]

What penalties awaited my candidate? Fortunately, the state was Wyoming, and the law in question did not actually require language as specific as "paid for by." Rather, only identification of the committee that paid for the mailer is necessary—a requirement that the mailer satisfied with the committee's name and address.[2] But this had not prevented a local journalist from reporting that the lack of a specific disclaimer on a mailer in another legislative race might constitute a violation, portraying the Secretary of State's campaign guidebook as a conclusive interpretation of the law.[3] Though this would provide little basis for a fine or prosecution (Wyoming, rare among the states, only penalizes knowing and

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1. *See, e.g.*, Communications; advertising; disclaimers, 11 C.F.R. § 110.11 (2014).

2. WYO. STAT. ANN. § 22-25-110(a) (2011) ("The communications media in using the campaign advertising shall print or announce the name of the candidate, organization or committee paying for the advertising.").

3. Trevor Brown, *Campaign Mailer May Violate Law*, WYO. TRIB. EAGLE (Aug. 13, 2014), http://www.wyomingnews.com/news/campaign-mailer-may-violate-law/article_489ee5f2-cb04-5a7c-bb60-69ddd1bf8e9c.html [http://perma.cc/9ZRG-RJEK] ("The letter lists a post office box belonging to Hutchings as its return address, but it does not include information about who paid for the advertisement."); *see Wyoming Campaign Guide 2014*, WYO. SECRETARY OF STATE 9 (2014), http://soswy.state.wy.us/Elections/Docs/2014/CampaignGuide_14.pdf [http://perma.cc/7GMH-P45S].

willful violations of the law),[4] I did not want to see my candidate subject to the front-page headline "Campaign Mailer May Violate Law" on or just before election day.[5] Thankfully, the nonerroneous error went unnoticed, and my candidate lost for reasons far more fair than a bogus campaign finance story.[6]

Volunteering as treasurer on the candidate's campaign, one might think this candidate had an added bonus, as I am a fairly experienced campaign finance lawyer. But like so many candidates, particularly *bona fide* grassroots candidates who are entering politics with little to no previous political experience, this candidate found many campaign finance regulations surprising and bewildering. What if Wyoming law actually did require "paid for by" language along with the candidate committee's name on a mailer? Would there otherwise be any real doubt that he was not responsible for its content given his logo, his address, and family photographs? Do we really impose *fines* upon people for this stuff?[7] Moreover, why could he not accept free yard signs from a local business whose owner was a big supporter?[8] What is the problem with that, so long as it is disclosed? And speaking of disclosure, months after the election can the campaign reimburse all the office supplies he bought on his credit card along with many items for personal use but for which he did not retain an itemized receipt?[9] Far from being a bonus, having a campaign finance attorney on the campaign was like having an overbearing nanny who kept finding ways to prevent the campaign from campaigning.

Despite my expertise, my own efforts were not easy, either. A candidate's committee in Wyoming requires a treasurer and a chairman,[10] both of whom must sign each campaign finance report.[11] For each report it was a marathon to gather outstanding contributions and receipts for expenditures, balance the checkbook, navigate the state's not-so-user-friendly electronic filing system,[12] and then have the campaign chair sign

4. WYO. STAT. ANN. § 22-26-112(a)(ix) (2015).

5. Brown, *supra* note 3.

6. "Bogus campaign finance story" is often redundant. *See, e.g.*, Alex Seitz-Wald, *David Brock Group Hits Bernie Sanders with Ethics Complaints*, MSNBC (Mar. 30, 2016), https://web.archive.org/web/20160801065333/http://www.msnbc.com/msnbc/david-brock-group-hits-bernie-sanders-ethics-complaints [http://perma.cc/5LKX-LXE7] ("One complaint from the American Democracy Legal Fund alleges Sanders' campaign accepted more money from individual donors than allowed under federal law. *Another accuses the campaign of failing to include proper disclosure on a Facebook ad it ran after the New Hampshire primary.*") (emphasis added).

7. *See* § 22-26-112(a)(ix).

8. WYO. STAT. ANN. § 22-25-102 (2015).

9. *See generally* § 22-25-106.

10. § 22-25-101(b).

11. § 22-25-106(c).

12. *See generally Wyoming's Campaign Finance Information System*, WYO. SEC'Y OF STATE, https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_Authentication/Default.aspx [http://perma.cc/LY33-QP76]. These systems are not cheap to establish or maintain. *See, e.g.*, Candidate Filing Requirements, H.B. 0126, 63d Leg, Gen. Sess. (Wyo. 2015) (allocating $56,000 to revise the

off on everything. This final step was particularly troublesome after the first campaign chair suddenly quit. All of this to bring transparency to a $7000 campaign in a race to represent less than 10,000 people in the Wyoming House. All of this is in a state with relatively simple campaign finance regulations and reporting, which for campaign finance reformers is cause for consternation.[13]

This experience alone—complying with arguably one of the simplest campaign finance regimes—reveals the sharp contrast between the way things are and the way proponents of campaign finance disclosure expect (or perhaps pretend) them to be. The loftiest pronouncements of pundits, professors, and policymakers about campaign finance "reform"—particularly ones about making politics accessible to more citizens—fail to account, often even acknowledge, that campaign finance disclosure is a costly and difficult process for average Americans who want to get involved in politics.[14] Moreover, to remedy this requires the assistance of professionals, often attorneys, accountants, or other compliance services, none of whom come cheap.[15] Thoughtful reformers do not succumb to silly platitudes about "getting big money out of politics and restoring democracy,"[16] but there is at least a strange unaddressed irony that disclosure makes politicking more costly and exclusive.

This Article is a call to introduce compliance difficulties to the field of campaign finance study; that is, to look at its costs—money, time, and

system for a simple change to filing requirements). At the state level, arcane campaign finance databases seem more a feature than a bug of reporting regimes. *See, e.g.*, Susan Montoya Bryan, *Questions Raised About New Mexico's Campaign Finance System*, ISLAND PACKET (Aug. 10, 2016), https://web-beta.archive.org/web/20160812174759/http://www.islandpacket.com/news/business/technology/article94910457.html [http://perma.cc/KFM4-4Z7L] ("[Bernalillo County clerk] Maggie Toulouse Oliver . . . told reporters during a news conference that a spot check of dozens of campaign spending records dating back more than a decade showed discrepancies between the information available in the online searchable database and the printable and downloadable reports. For example, the purpose of some expenditures was omitted online while printed records provided more detail.").

13. *See* Brielle Schaeffer, *Wyoming Gets F Grade in 2015 State Integrity Investigation: Cowboy Spirit Pervades State Government*, THE CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), https://www.publicintegrity.org/2015/11/09/18567/wyoming-gets-f-grade-2015-state-integrity-investigation [http://perma.cc/6CB3-HQKE].

14. *See, e.g.*, *Who We Are*, CAMPAIGN LEGAL CENTER, https://web.archive.org/web/20161213155612/http://www.campaignlegalcenter.org/about/who-we-are [http://perma.cc/NTF6-3CXY] ("We are the lawyers for our democracy, fighting for your fundamental right to participate in the political process." Later: "Laws need teeth, and everyone should be held accountable for breaking the rules.").

15. *Cf. Trevor Potter*, CAPLIN & DRYSDALE, https://web.archive.org/web/20161203170117/http://www.capdale.com/tpotter [http://perma.cc/T5T2-WT47]. When not presiding over the nonprofit Campaign Legal Center, which advocates for expansive campaign finance regulation over politically active individuals and organizations, Trevor Potter's for-profit legal services include "[h]elping politically active individuals and organizations, including political action committees, with establishing and maintaining their status and avoiding civil and criminal penalties." *Id.*

16. *Getting Big Money Out of Politics and Restoring Democracy*, BERNIESANDERS.COM, https://web.archive.org/web/20161109180416/https://berniesanders.com/issues/money-in-politics/ [http://perma.cc/5WUD-ZXVG].

the frustrations that come with both of these—in addition to its results.[17] Perhaps this is a fool's errand, for the difficulty of complying with campaign finance disclosure has already been ably established in social science.[18] Alas, these studies are seldom discussed, much less cited, in academic literature.[19] Recent papers calling for future study of disclosure do not even mention the compliance burden.[20] That silence, however, is not universal, especially in courts. Recent disclosure cases, and the 2016 election of Donald Trump, show that the disclosure debate is far from over.

The first case this article will discuss, *Citizens for Responsibility & Ethics in Washington* ("*CREW*") *v. Federal Election Commission*,[21] rejected any distinction between disclosure burdens as a matter of law. The second case that will be discussed, *Coalition for Secular Government v. Williams*,[22] which featured an ample factual record, concluded to the contrary. The case shows not only how small political operations can be choked in red tape under burdensome campaign finance reporting, but that in the as-applied context, judges may see through the platitudes of disclosure and provide appropriate remedies. The final case that will be discussed, *Van Hollen v. Federal Election Commission*,[23] synthesizes the current disclosure tension as a matter of law and fact. This case provides a sharp contrast to the D.C. District Court's ruling in *CREW* and concludes with a quote from William Butler Yeats illustrating that when it comes to current Supreme Court guidance on campaign disclosure, " 'the

17. The constitutional arguments against campaign finance disclosure are otherwise fairly entrenched, with some more successful than others. The most popular is concerns with preventing the use of disclosed information, the names and information of donors to candidates or causes, to facilitate retaliation. Though this theme that has grown more popular in the last decade, particularly on the right (and not without justification), such concerns have fallen upon deaf ears in courts. I have previously written on the broader virtues of recognizing anonymity within the First Amendment even in the realm of campaign finance, arguing that preventing prejudice and keeping a message central are speech interests that cannot be brushed aside simply because said speech is backed with money. *See generally* Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253 (2014). This is important as a cultural and legislative discussion, but in constitutional terms is all but a dead letter in court. The 2016 election may make this a more bipartisan concern. *See infra* Part V.

18. *See generally* Dick Carpenter & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 FORDHAM URB. L.J. 603 (2012); Dick Carpenter, Jeffrey Milyo & John Ross, *Politics for Professions Only: Ballot Measures, Campaign Finance "Reform," and the First Amendment*, 10 ENGAGE 80 (2009); Dick M. Carpenter, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567 (2009); Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, INST. FOR JUSTICE (Oct. 2007), http://ij.org/wp-content/uploads/2015/03/CampaignFinanceRedTape.pdf [http://perma.cc/7FEG-ZHUZ].

19. A simple Westlaw search reveals almost wholesale disengagement with Carpenter's and Milyo's work.

20. *See, e.g.*, Katherine Shaw, *Taking Disclosure Seriously*, 34 YALE L. & POL'Y REV. INTER ALIA 18 (2016); Brent Ferbuson & Chisun Lee, *Developing Empirical Evidence for Campaign Finance Cases*, BRENNAN CENTER FOR JUSTICE (2016), https://web.archive.org/web/20161213161206/https://www.brennancenter.org/publication/developing-empirical-evidence-campaign-finance-cases [http://perma.cc/9RU8-5WYS].

21. No. 1:14-CV-01419, 2016 WL 5107018 (D.D.C. Sept. 19, 2016).

22. 815 F.3d 1267 (10th Cir. 2016), *cert. denied*, No. 16-28, 2016 WL 3598151 (2016).

23. 811 F.3d 486 (D.C. Cir. 2016).

centre cannot hold.' "[24] This Article concludes with a brief discussion of the implications of the 2016 election on campaign finance disclosure, which echoes the *Van Hollen* decision and Yeats, with the caveat that after 2016 it is quite likely the centre will indeed fold, and quite soon.

II. *CREW V. FEDERAL ELECTION COMMISSION*

The organization Citizens for Responsibility & Ethics in Washington, or CREW, sues the FEC a lot.[25] It is one of many dozens of interest groups interested in all-encompassing campaign finance disclosure, and thus works to knock down the regulatory distinctions between different types of disclosure. This is done ostensibly to "create an appetite for change and make the case for the urgent need for policies and laws that restrict the flow of money into politics and restore power to regular Americans."[26] Some have questioned its credibility, particularly given its leadership under David Brock, who has close ties to Hillary Clinton and left-leaning political organizations.[27] But whatever its motives, it is CREW's philosophy that deserves the most scrutiny: all-encompassing disclosure and heightening the political power of regular Americans, who must also comply with said disclosure, are not necessarily simpatico.

Since *Buckley v. Valeo*,[28] courts have usually ensured that regulation does not reach all political speech—an acknowledgement that disclosure raises constitutional concern.[29] However, in the wake of *Citizens United v. Federal Election Commission*,[30] the "exacting scrutiny"—or interme-

24. *Id.* at 501 (quoting WILLIAM BUTLER YEATS, THE SECOND COMING (1919)).

25. *See Lawsuits*, CREW, https://web.archive.org/web/20161115140753/http://www.citizensforethics.org/legal/lawsuits/ [http://perma.cc/YT4U-ZTGU].

26. *About Us*, CREW, https://web.archive.org/web/20161115070259/http://www.citizensforethics.org/who-we-are/ [http://perma.cc/2Q7G-XUGA].

27. Bill Allison, *CREW's Watchdog Status Fades After Arrival of Democrat David Brock*, BLOOMBERG POLITICS (Apr. 11, 2016), https://web.archive.org/web/20161109215348/http://www.bloomberg.com/politics/articles/2016-04-11/washington-watchdog-adjusts-to-life-with-partisan-roommates [http://perma.cc/VD72-BU8J] ("Now, CREW shares office space, a board member and fundraising executive with the groups under Brock's purview, and as a result is intertwined with the kinds of organizations it investigates."). *But see* Darren Samuelsohn, *Trump's Top Conflict Critics Take Over Watchdog Group*, POLITICO (Dec. 7, 2016), https://web.archive.org/web/20161208134701/http://www.politico.com/story/2016/12/trump-conflict-critics-crew-232293 [http://perma.cc/R8SN-WCLY] ("Brock, one of the main outside attack dogs for Clinton during the 2016 presidential campaign [has stepped down from the board, but] still plans to raise funds for CREW and will serve as an adviser to the group.").

28. 424 U.S. 1 (1986).

29. *Id.* at 76–82. ("The lower courts have construed the words 'political committee' more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.").

30. 558 U.S. 310 (2010).

diate scrutiny—applied to disclosure regimes has largely served as a rational basis test.[31] This usually plays out in the following fashion: a grassroots organization sues a campaign finance agency over registration and reporting requirements, the agency responds "disclosure," the court notes exacting scrutiny and harps on the informational interest to justify disclosure, the case is dismissed, and appeals fail.[32] The *CREW* decision is a logical extension of this paradigm: disclosure is essentially limitless.

Unlike cases where organizations subjected to disclosure bring suit, the *CREW* case is an organization suing the FEC for not applying CREW's preferred disclosure standard to another organization. The case is a challenge under the Administrative Procedure Act ("APA") to the FEC's application of the "major purpose" test.[33] This test was formulated in the wake of *Buckley* and other Supreme Court cases to distinguish between political committees, or PACs, and other organizations—again, due to constitutional concerns with disclosure.[34] The distinction is important because while every person or organization must file reports with the FEC when they spend $250 or more on political advertisements known as independent expenditures, these reports do not require disclosing all of an organization's contributors or anything beyond a single report.[35] PACs, however, must (in addition to certain event-driven reports) regularly disclose all contributions that aggregate over $200 and all spending over that same threshold, comprehensive reporting.[36] For various reasons,[37] including the expense, time, and effort to regularly file, organizations seek to avoid PAC status. Under federal law, a PAC is any organization that spends more than $1000 in independent expenditures or solicits more than $1000 in contributions to pay for independent expenditures.[38] However, the organization must also have the major purpose of influencing elections.[39] Generally, the FEC considered major

31. *See* Indep. Inst. v. Fed. Election Comm'n, No. 14-CV-1500, 2016 WL 6560396, at *11 (D.D.C. Nov. 3, 2016); CREW v. Fed. Election Comm'n, No. 1:14-CV-01419, 2016 WL 5107018, at *8 (D.D.C. Sept. 19, 2016) *appeal docketed*, No. 16-5343 (D.C. Cir. Nov. 21, 2016) (collecting cases) (citing *Citizens United*, 558 U.S. at 366–71).

32. *See, e.g.*, Free Speech v. Fed. Election Comm'n, 720 F.3d 788 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014). The author was co-counsel in this case.

33. *CREW*, 2016 WL 5107018, at *4.

34. Fed. Election Comm'n v. Mass. Citizens for Life Inc., 479 U.S. 238, 252–53, 262 (1986); *Buckley*, 424 U.S. at 79; *see also Mass. Citizens*, 479 U.S. at 254 ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.").

35. Reporting Requirements, 52 U.S.C. § 30104(c) (2012); *see* Reporting Electioneering Communications, 11 C.F.R. § 104.20 (2015) (reports of electioneering communications); *see also FEC Form 5*, FEC, http://www.fec.gov/pdf/forms/fecfrm5.pdf [http://perma.cc/9SP3-CG69].

36. § 30104(b)(3); *see FEC Form 3X*, *supra* note 35.

37. *See* WYCFIS, *supra* note 12.

38. § 30101(4)(A).

39. CREW v. Fed. Election Comm'n, No. 1:14-CV-01419, 2016 WL 5107018, at *2 (D.D.C. Sept. 19, 2016)., *appeal docketed*, No. 16-5343 (D.C. Cir. Nov. 21, 2016).

purpose to be mathematic: if more than 50% of an organization's spending is for independent expenditures, then this threshold is crossed.[40] CREW challenged the reasoning of three commissioners in applying this and other factors of the major purpose test.[41]

For purposes of this article, the pertinent part of the *CREW* ruling is Judge Christopher Cooper's refusal to recognize different burdens between simple, event-driven disclosure and all-encompassing PAC-style disclosure. In other words, where courts once distinguished between the burdens of filing individual reports for specific activities, such as an independent expenditure or electioneering communication, which are fairly simple, and PAC reporting, which is more complex and details the entire income and expenses of an organization,[42] few recognize any distinction today. Collecting cases, Judge Cooper joins the majority of appellate courts in this opinion. "Courts, including the D.C. Circuit sitting en banc, have repeatedly classed periodic reporting and registration requirements with other disclosure regimes, applying to them the very same, less-stringent level of constitutional scrutiny."[43] Moreover, Judge Cooper signals that *any kind* of political speech may be subjected to either form of campaign finance disclosure. "In the wake of *Citizens United*, federal appellate courts have resoundingly concluded that [the] constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context."[44] Generally speaking, these two categories constitute all political speech, potentially leaving disclosure limited to the FEC's enforcement funding and whim. This is not to say any form of disclosure would pass Judge Cooper's scrutiny, but that it is likely everything under the current federal regime does, imposed upon just about any organization.

Importantly, Judge Cooper's reasoning here focuses on two factors of the major purpose analysis: (1) whether electioneering communications—advertisements that merely mention a candidate within 60 days of a general election[45]—may be considered for the major purpose analysis if they do not constitute express advocacy for the election or defeat of a candidate (according to Judge Cooper, they can); and (2) whether the major purpose analysis may look to the lifetime of an organization when considering its major purpose spending (according to Judge Cooper, it cannot).[46] The FEC's authority here has not been commandeered by the court, but considering the major purpose test was born of Supreme Court

40. *Id.* at *4.
41. *Id.* at *8.
42. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 254 (1986).
43. *CREW*, 2016 WL 5107018, at *9.
44. *Id.* at *8.
45. 52 U.S.C. § 30104(f)(3)(A) (2012).
46. *CREW*, 2016 WL 5107018, at *7–12.

precedent with very little detail, it is curious that a court could find any kind of application of major purpose "contrary to law" under the APA.[47] For attorneys who have previously brought challenges to the major purpose doctrine, Judge Cooper's ruling only brings more bewilderment rather than clarity as to how the doctrine avoids the well-established stringency of First Amendment vagueness and overbreadth.[48]

The FEC declined to appeal the *CREW* case, but the intervenors—the organization onto which CREW wants to impose PAC status—is appealing to the D.C. Circuit. It is thus not over, and may provide more prompting for a disclosure case to be considered by the Supreme Court. Particularly in light of the *Van Hollen* ruling and forthcoming judicial appointments after the 2016 election, *CREW* is as good a vehicle as any to address disclosure's burdens and the contours necessary to avoid arbitrary and discriminatory application of those burdens.[49]

III. *COALITION FOR SECULAR GOVERNMENT V. WILLIAMS*

In the fall of 2016, the Supreme Court denied *certiorari* in an appeal from a Tenth Circuit ruling earlier in the year, upholding an important precedent that recognizes the burdens of campaign finance reporting. The Coalition for Secular Government ("CSG") originally brought suit against Scott Gessler, Colorado Secretary of State, in 2012.[50] The case continued through appeals into 2016 against Secretary of State Wayne Williams, who replaced Gessler in 2015.[51] As a grassroots organization, CSG's political activity was fairly limited and inexpensive and related to ballot measure advocacy in Colorado:

> In accordance with its mission, the Coalition publishes a policy paper each year in which a proposed "personhood" amendment appears on Colorado ballots. The policy paper advocates against the personhood amendment, explains the Coalition's view of the deleterious effects of passing such an amendment, and urges "no" votes on the ballot initiative. In 2008, 2010, and 2014, the Coalition used contributed funds to publish its personhood policy paper. [CSG president] Dr. Hsieh and a colleague co-authored each paper and distributed the papers publicly, first by printing and mailing copies and later by making the paper available online.[52]

The total budget for this activity was around $3500.[53] At only $200 of

47. *Id.* at *10.
48. *See* Free Speech v. Fed. Election Comm'n, 720 F.3d 788 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2288 (2014); *see generally* Grayned v. City of Rockford, 408 U.S. 104 (1972).
49. *See infra* Part IV.
50. Coalition for Secular Gov't v. Gessler, 71 F. Supp. 3d 1176 (D. Colo. 2014).
51. Coalition for Secular Gov't v. Williams, 815 F.3d 1267 (10th Cir. 2016).
52. *Id.* at 1269.
53. *Id.* at 1274.

spending, it triggered a litany of requirements under the Colorado Constitution, state statutes, and regulations for CSG to register and report as an "issue committee."[54] The Tenth Circuit ruled that, as applied to CSG, issue committee status could not survive constitutional scrutiny.[55]

As far as establishing an evidentiary record, the *CSG* case is instructive, and it is not supportive of campaign finance disclosure. Utilizing the exacting scrutiny standard with the factual findings of the district court, the standard looks a lot more like its name.[56] Having CSG's burdens established at trial gave the Tenth Circuit panel a lot to consider:

> [M]eeting the [disclosure] requirements is no small chore. Implementing TRACER [Colorado's online compliance system] alleviated some technical burdens, but even with TRACER, a person registering an issue committee still faces over 35 online training modules on how to use TRACER. And although TRACER enables Dr. Hsieh to more easily transfer the Coalition's financial information to the Secretary's disclosures database, she still must provide detailed information about the Coalition's most mundane, obvious, and unimportant expenditures (e.g., the address of the post office at which she purchased stamps).[57]

Suddenly, the government's "informational interest"—the end of disclosure that has justified upholding facial challenges to any number of campaign finance regimes—pales in comparison.[58] "The minimal informational interest here cannot support Colorado's filing schedule that requires *twelve disclosures in seven months regardless of whether an issue committee has received or spent any money*."[59]

The *CREW* case did not remove all barriers to imposing all-encompassing disclosure, nor did *CSG* recognize extensive constitutional protections against disclosure. In fact, as noted by the Tenth Circuit, *CSG* is the second successful as-applied challenge to Colorado's issue advocacy disclosure regime.[60] *Sampson v. Buescher*,[61] a 2010 case, differed only slightly from *CSG*, involving a grassroots organization spending just over half the money in question in the latter case.[62] After *Sampson*, the Colorado Supreme Court declined to allow the Colorado Secretary of State to raise the disclosure threshold above $200, ruling that "[t]he Tenth Circuit's narrow as-applied remedy, which was carefully tailored to the facts

54. *Id.* at 1270–72.
55. *Id.* at 1281.
56. *Id.* at 1276–81.
57. *Id.* at 1279. Notably, the panel also gave credence to concerns of retaliation expressed by CSG donors when they were informed that their names would be disclosed as contributors, but unfortunately qualified this concern with CSG's small size. *Id.*
58. *See* CREW v. Fed. Election Comm'n, No. 1:14-CV-01419, 2016 WL 5107018, at *8 (D.D.C. Sept. 19, 2016), *appeal docketed*, No. 16-5343 (D.C. Cir. Nov. 21, 2016).
59. Coalition for Secular Gov't v. Williams, 815 F.3d 1267, 1279 (10th Cir. 2016) (emphasis added).
60. *Id.* at 1276–77.
61. 625 F.3d 1247 (10th Cir. 2010).
62. *Id.*

before the court, did not render [the state constitution and the law] completely inoperable."[63] *CSG*, like *Sampson*, seems literally an as-applied challenge, allowing no Colorado groups to take protection without bringing a lawsuit of its own or risking prosecution.

Some reform-minded scholars acknowledge the importance of courts in protecting from campaign finance overreach: "[c]ourts have a crucial role to play in assuring that any set of campaign finance rules does not infringe too much on robust campaigns, speech, and associational freedom."[64] But *CSG* illustrates that in practice, particularly the as-applied context, this is unworkable. Four years of litigation, with appeals all the way to the Supreme Court and over $200,000 in attorney fees for CSG,[65] just to vindicate $3500 in spending for the publication of a policy paper. And, again, given its as-applied nature, this case was just for that policy paper and, perhaps, CSG's future efforts in this arena. One of the few things in campaign finance law that makes disclosure inexpensive is when it is compared to litigation costs.

This is not to say *CSG* is an unimportant case; quite the contrary. In illustrating the absurdity of all-encompassing disclosure regimes, it hopefully foreshadows a broader ruling. Historically, such building blocks are often the foundation of important free speech rulings.[66] And, indeed, such a showdown is all but inevitable. Although many reformers distinguish between placing disclosure requirements upon well-funded groups[67]—the effort in the *CREW* case—and small groups like CSG, this distinction, like relying upon as-applied challenges, fails in practice. Interest groups like CREW will not stand for raising disclosure thresholds, because enterprising big-money organizations that want to avoid disclosure can simply split up, form dozens of small organizations, and spend below these thresholds. Grassroots groups like CSG are the eggs reformers must break to make their omelet.[68]

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63. Gessler v. Colorado Common Cause, 327 P.3d 232, 236 (Colo. 2014).

64. RICHARD HASEN, PLUTOCRATS UNITED 122 (2015). *But see id.* at 185–86 ("[D]isclosure thresholds should be raised so those spending small amounts on politics do not face onerous bureaucratic requirements.").

65. Application for Attorney's Fees at 2, Coalition for Secular Gov't v. Gessler, 71 F. Supp. 3d 1176 (D. Colo. 2014) (No. 12-cv-01708-JLK-KLM) (requesting $177,330 in fees before any appeals).

66. *See infra* Part IV.

67. *See* HASEN, *supra* note 64.

68. *See, e.g.*, *CREW Files Amicus Brief in* Van Hollen v. FEC, CITIZENS FOR RESPONSIBILITY & ETHICS IN WASH. (Dec. 13, 2016), https://web.archive.org/web/20161213175828/http://www.citizensforethics.org/legal-filling/crew-files-amicus-brief-in-van-hollen-v-fec/ [http://perma.cc/39EQ-W5CV]; CLC Staff, *Watchdogs File in Defense of Disclosure Laws in 10th Circuit in Free Speech v. FEC*, THE CAMPAIGN LEGAL CENTER (Feb. 11, 2013), https://web.archive.org/web/20161213175945/http://www.campaignlegalcenter.org/news/press-releases/watchdogs-file-defense-disclosure-laws-10th-circuit-free-speech-v-fec [http://perma.cc/CNK2-UB3R]; *Delaware Strong Families v. Biden (Amicus Brief)*, BRENNAN CTR. FOR JUSTICE (June 10, 2014), https://web.archive.org/web/20151104055649/http://www.brennancenter.org/legal-work/delaware-

IV. *VAN HOLLEN V. FEDERAL ELECTION COMMISSION*

Returning to the D.C. Circuit, questions of law, and APA challenges by nonparties, *Van Hollen v. Federal Election Commission* is perhaps the most thoughtful disclosure ruling in recent years. United States Representative Christopher Van Hollen, Jr., challenged a rulemaking by the FEC that limited disclosure of electioneering communications to donations made "for the purpose of furthering electioneering communications" rather than all donations made to an organization paying for such advertisements.[69] Van Hollen previously lost at the D.C. Circuit at *Chevron* Step 1 in 2012,[70] and the court ruled that the FEC's regulation did not violate the plain meaning of its originating statute.[71] This latest appeal overturned Van Hollen's victory at *Chevron* Step 2, ruling that the rulemaking was a permissible construction of federal law and not an arbitrary and capricious regulation.[72]

Writing for the panel, Judge Janice Rogers Brown opened by opining that "the Supreme Court's track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course."[73] Indeed, unlike the *CREW* decision from the D.C. District Court later in 2016, Judge Brown plainly stated that "[d]isclosure chills speech."[74] When evaluating the FEC's rationale for limiting disclosure of electioneering communications to contributors specifically donating for that purpose, the court recognized the "burden rationale"[75] as distinct from the "privacy rationale."[76] Unlike in *CREW*, the court recognized that, as a matter of law, it was burdensome to require an organization to "curate an exhaustive list of every individual who provided more than $1,000" and disclose it to the FEC simply for taking out a single advertisement—moreover, one that only need mention a candidate's name.[77]

Van Hollen features a factual record, one compiled by the FEC in its rulemaking process. This showed the lengths to which the statute would go without the rulemaking: "reporting requirements would far exceed all other reporting requirements that currently apply to nonprofit organizations, such as reporting to the Internal Revenue Service."[78] A

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strong-families-v-biden-amicus-brief [http://perma.cc/G4R8-K447].

69. *Id.*; *compare* 52 U.S.C. § 30104(f)(2)(E), (F), *with* 11 C.F.R. § 104.20(c)(9).

70. *See generally* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C. Cir. 2012); Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

71. *Ctr. for Individual Freedom*, 694 F.3d at 110–11.

72. Van Hollen v. Fed. Election Comm'n, 811 F.3d 486, 492 (D.C. Cir. 2016).

73. *Id.* at 488.

74. *Id.*; *see supra* Part II.

75. *Van Hollen*, 811 F.3d at 498–99.

76. *Id.* at 499–501.

77. *Id.* at 498.

78. *Id.*

narrower rulemaking, such as exempting sources of revenue from business, could not protect nonprofits, which are predominantly donor-supported.[79] At its closing of this analysis, the court noted the FEC could have done a better job justifying the regulation, but nevertheless complied with APA scrutiny.[80] In addition to the privacy rationale, the court also considered that Van Hollen's support for full disclosure would not actually serve that purpose—in all likelihood disclosing donors to organizations for a single advertisement does not necessarily relate to the reasons the donor contributed.[81]

Despite concerns over the makeup of the panel that decided *Van Hollen*,[82] the D.C. Circuit denied *en banc* review,[83] and Van Hollen did not seek *certiorari* from the Supreme Court.[84] Counsel for Van Hollen included attorneys from the Campaign Legal Center, which denounced the panel's ruling as "sanction[ing] the wholesale evasion of federal disclosure laws."[85] But the court's reasoning made a careful analysis of Supreme Court precedent, concluding that "disclosure" is not something the government can impose *carte blanche*.[86] The court leaves the broader collision course between free speech and disclosure for another day, but recent events show that day may be sooner than we all thought.

V. THE COLLISION COURSE AFTER THE 2016 ELECTION

Around the time of this article's completion, the 2016 presidential election occurred and its result surprised many people. Forthcoming changes in campaign finance law and policy are far from certain, other than certainty that changes are afoot. Some of these may be welcome changes of heart in the reform community, such as addressing retaliation—or "dog whistling"—and other downsides of disclosure that have been scoffed at since 2008.[87] The cases discussed herein show something

79. *Id.* at 498–99.
80. *Id.* at 499.
81. *Id.* at 497–98.
82. Rich Hasen, *Appeals Court Panel Overturns Van Hollen v. FEC, Reopening Massive Disclosure Loophole for 2016 Cycle*, ELECTION LAW BLOG (Jan. 21, 2016, 8:26 PM), https://web.archive.org/web/20161213170830/http://electionlawblog.org/?p=79199 [http://perma.cc/2KY9-LSCV].
83. Van Hollen v. Fed. Election Comm'n, 811 F.3d 486 (D.C. Cir. 2016).
84. No. 15-5017 (D.C. Cir.) (No docket entries beyond the 90-day window following the denial of *en banc* rehearing).
85. CLC Staff, *Appeals Court Panel Overturns Van Hollen v. FEC, Reopening Massive Disclosure Loophole for 2016 Cycle*, THE CAMPAIGN LEGAL CENTER (Jan. 21, 2016), https://web.archive.org/web/20160428110018/http://www.campaignlegalcenter.org/news/press-releases/appeals-court-panel-overturns-van-hollen-v-fec-reopening-massive-disclosure [http://perma.cc/FX9W-F2FT].
86. *Van Hollen*, 811 F.3d at 501 ("As our discussion of the FEC's rule has shown, the Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents.").
87. *See* Danielle Paquette, *Donald Trump Insulted a Union Leader on Twitter. Then the Phone Started to Ring.*, WASH. POST (Dec. 7, 2016),

must give in campaign finance disclosure, if only for re-invigorating the protection afforded to grassroots groups, but the timetable for realistically accomplishing this is likely to accelerate.

Even setting aside *Van Hollen* and the other appellate disclosure rulings discussed in this article, disclosure's collision course with free speech is apparent. In the summer of 2016, the Supreme Court denied *certiorari* in another disclosure case that closely resembled *CSG— Delaware Strong Families v. Denn*.[88] Unlike the *certiorari* denials in numerous other challenges,[89] Justice Alito noted his desire to grant the petition and Justice Thomas provided a written dissent to the denial.[90] This dissent was more biting than the D.C. Circuit in *Van Hollen*: "[b]y refusing to review the constitutionality of the Delaware law, the Court sends a strong message that 'exacting scrutiny' means no scrutiny at all."[91] Such feistiness may turn to action by the Court under President Trump's appointment to replace the late Justice Antonin Scalia.

Scalia's replacement may upset the disclosure debate and other facets of campaign finance law. Prominent campaign finance advocates placed their faith on the election producing a president who would appoint a Supreme Court justice disposed to reversing the *Citizens United* decision and blessing all sorts of new campaign finance experiments.[92] Instead, Scalia's replacement may end up being not only one sympathetic to the free speech reasoning of *Citizens United*, but far less sympathetic to disclosure. Scalia, after all, notably dissented in one of the Court's few anonymous speech cases and later wrote an oft-quoted quip about "civic courage" in a concurring opinion to justify disclosure against fears of retaliation.[93] At the time of this writing, Trump's appointment to replace

https://www.washingtonpost.com/news/wonk/wp/2016/12/07/donald-trump-retaliated-against-a-union-leader-on-twitter-then-his-phone-started-to-ring/ [http://perma.cc/VXR7-GXHV] ("Half an hour after Trump tweeted about Jones on Wednesday, the union leader's phone began to ring and kept ringing, he said. One voice asked: What kind of car do you drive? Another said: We're coming for you."); Vera Eidelman, *ACLU Wins Case Protecting Identity of Anonymous Online Critics*, ACLU (Dec. 13, 2016), https://www.aclu.org/blog/free-future/aclu-wins-case-protecting-identity-anonymous-online-critics [http://perma.cc/BS9J-WGF2] (opening a discussion of a court decision protecting anonymity: "With President-elect Donald Trump denigrating public protests and threatening to jail flag burners, we must never forget that the Constitution protects dissent."); *see generally* KIM STRASSEL, THE INTIMIDATION GAME: HOW THE LEFT IS SILENCING FREE SPEECH (2016).

88. 793 F.3d 304 (3d Cir. 2015).

89. *See, e.g.*, Utter v. Bldg. Indus. Ass'n of Washington, 341 P.3d 953 (Wash. 2015), *cert. denied*, 136 S. Ct. 79 (2015); Worley v. Fla. Sec'y of State, 717 F.3d 1238 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 529 (2015); Real Truth About Abortion, Inc. v. Fed. Election Comm'n, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013).

90. Del. Strong Families v. Denn, 136 S. Ct. 2376, 2376 (2016).

91. *Id.* at 2378.

92. *See, e.g.*, HASEN, *supra* note 64, at 178 ("[I]t likely will take a Democratic president nominating progressives who can be confirmed by the Senate. And that will take hard political work on the part of the progressive community and hard jurisprudential work by sympathetic scholars."). Hasen's book was published before Scalia's passing, but notes the new president would likely replace Scalia and/or Kennedy.

93. Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

Scalia has not been confirmed, but there is reason to believe it will not be reformers' "Last Great Hope."[94]

Citizens United itself serves as an example of how campaign finance issues reach their boiling point. The electioneering communication ban upheld in *McConnell v. Federal Election Commission*[95] gave way to a carve-out in the *Wisconsin Right to Life* cases which gave way to the broad ruling in *Citizens United* against bans of any political speech funded with corporate or union money.[96] Ironically, *Citizens United* gave a short-shrift blessing to disclosure of electioneering communications,[97] which reached the broad anything-goes-for-disclosure standard affirmed recently in *CREW*. Depending on Trump's first Supreme Court appointment, the body of failed disclosure challenges between *Citizens United* and now may be quickly reset. If Trump is also able to appoint as good a replacement for a justice who dissented in *Citizens United*, such as Justice Ginsburg, this reset is all but guaranteed.

As much as free speech advocates overplayed their hand with the disclosure cases immediately following *Citizens United*, reformers did no less. Whether on the litigation side, as CREW is in its own case or Campaign Legal Center in the *Van Hollen* case, or on the policy side, as Brennan Center is with one of its latest papers,[98] or on the academic side, which is overwhelmingly "sympathetic scholars,"[99] disclosure was driven to extremes that left it in a precarious state even before the presidential election. With the election settled, the odds have shifted such that free speech proponents can whisper, knowing full well of the wince it will induce, "Trump card."

VI. CONCLUSION

This article opens with a personal anecdote, and then turns into a legal discussion that, at the very least, proves that campaign finance law is not much fun.[100] Stepping away again from academia or legalistic reasoning, it is simply absurd to suggest that campaign finance disclosure is not burdensome on average Americans—it was burdensome on me, and I do this lawyer thing for a living. And yet here we are, forcing people to fill out copious forms just to run for office or to take out a simple political

94. HASEN, *supra* note 64, at 176; *see Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks*, DONALD J. TRUMP (Sept. 23, 2016), https://web.archive.org/web/20161213064541/https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks [http://perma.cc/2CQS-7E9Q].

95. 540 U.S. 93 (2003).

96. *Id.* at 189–94; Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 476–82 (2007); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348–66 (2010).

97. *Citizens United*, 558 U.S. at 366–71.

98. *See supra* note 20 and accompanying text.

99. *See* HASEN, *supra* note 64, at 178.

100. *See supra* Parts II–V.

advertisement. This absurdity is, perhaps, the reason the burdens are ignored and campaign regulation proponents instead focus their efforts on platitudes about cleaning up politics.[101] These platitudes are wholeheartedly accepted by the vast majority of Americans, most of whom have never so much as volunteered on a campaign and who will spend about as much time reviewing the campaign finance reports that result from disclosure as they do the terms of service on their next software update.[102] But no matter how well it polls, so long as reality is so far removed from reformers' rhetoric, it will not really constitute reform.

Donald Trump's election was based upon, or in spite of, a lot of rhetoric that did not sit well within the election law community.[103] But, any campaign finance practitioner looking inward knows the system cannot be anything *but* "rigged" with established interest groups, academics and even judges idly approving PAC status absent lawsuits and appeals that cost nearly 100 times more than the proposed political spending.[104] Campaign finance disclosure does not get big money out of politics; it ensures big money is the only game in town. Surely politics will be cleaner if no one's participating in it, but again, that is wholly contrary to the stated objectives of the reform community.

The year of 2016 was busy for campaign finance disclosure cases, which foreshadow a disclosure showdown. Capped with the presidential election, it is nearly certain that not only will the centre not hold, but that so-called campaign finance "reform" may suffer yet another rude awakening that affirms free speech as powerfully over disclosure as *Citizens United* did for direct speech bans.

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101. *See, e.g.*, *The Plan*, LESSIG, https://web.archive.org/web/20161201033030/https://lessig2016.us/the-plan/ [http://perma.cc/4PXV-STZG].

102. "[A] study tracking the visits of 45,091 households to the Web sites of sixty-six software companies found that 'only about one or two in one thousand shoppers accesses a product's EULA for at least one second.' " OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 67 (2014) (citing Yannis Bakos, Forencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDIES 1, 3 (2014), http://www.law.uchicago.edu/files/file/bakos_fineprint.pdf [http://perma.cc/VHA3-9QS5].

103. This was largely limited to Trump's rhetoric relating to the integrity of the voting process. *See, e.g.*, Greg Sargent, *A Group of Political Scientists Says Trump's Attacks on Our Democracy are Unprecedented and Dangerous*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/11/07/a-group-of-political-scientists-says-trumps-attacks-on-our-democracy-are-unprecedented-and-dangerous/ [http://perma.cc/M4YZ-CNU7].

104. *Compare supra* Part II, *with supra* Part III.

RE: Open Records Request re WYCFIS

Kai Schon <kai.schon@wyo.gov> Mon, Jun 26, 2017 at 6:38 PM
To: Steve Klein <stephen.klein.esq@gmail.com>
Cc: SOS Elections <elections@wyo.gov>

Wyoming Secretary of State

Ed Murray
Secretary of State

Karen L. Wheeler
Deputy Secretary of State

June 26, 2017

Dear Mr. Klein:

Wyoming Liberty Group

1902 Thomes Ave, Ste. 201

Cheyenne, WY 82001

In your public records request dated June 9, 2017, you requested the following:

1. Any documents aggregating the IP addresses of computers requesting the "Search" pages, including the general landing page, found at: https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_SystemConfiguration//PublicSearch.aspx; the "Search Contributions" page, found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_SystemConfiguration/SearchContributions.aspx; the "Search Expenditures" Page, found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_SystemConfiguration/SearchExpenditures.aspx; and the "Search Filed Reports" Page, found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_SystemConfiguration/SearchFilingPublic.aspx.
2. Any documents recording information gathered by "session" and/or "persistent" tracking scripts for computers requesting the pages identified in paragraph 1.
3. Any documents recording the top-level domain name used by the requestor for computers requesting the pages identified in paragraph 1.
4. Any summary documents, reports, indexes, memoranda, notes, statistical analyses, and any communications of any kind concerning information on web traffic, unique visits, and "hits" to the pages identified in paragraph 1.
5. Any documents aggregating the IP address of computers requesting the "Charts & Graphs" pages, including the general landing page, found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_MapsCharts/ChartsGraphs.aspx; "Bar Graphs," found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_MapsCharts/BarChart.aspx; "Charts for Contributions," found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_MapsCharts/ContributionCharts.aspx; and "Charts for Expenditures," found at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_MapsCharts/ExpenditurePieChart.aspx.

Attachment B

6. Any documents recording information gathered by “session” and/or “persistent” tracking scripts for computers requesting the pages identified in paragraph 5.
7. Any documents recording the top-level domain name used by the requestor for computers requesting the pages identified in paragraph 5.
8. Any summary documents, reports, indexes, memoranda, notes, statistical analyses, and any communications of any kind concerning information on web traffic, unique visits, and “hits” to the pages identified in paragraph 5.
9. Any documents aggregating the IP address of computers using the “Research Tools & Reports” page, found at https://www.wycampaignfinance.gov/WYCFWebApplication/Reports/ResearchToolsAndLists.aspx.
10. Any documents recording information gathered by “session” and/or “persistent” tracking scripts for computers using the page identified in paragraph 9.
11. Any documents recording the top-level domain name used by the requestor for computers using the page identified in paragraph 9.
12. Any summary documents, reports, indexes, memoranda, notes, statistical analyses, and any communications of any kind concerning information on web traffic, unique visits, and “hits” to the page identified in paragraph 9.

In response to your request, I offer the following:

- The Wyoming Campaign Finance and Information System (WYCFIS) does not utilize tracking scripts. Therefore, there is no information available in regards to items 1-3, 5-7, or 9-11.
- While tracking cookies are utilized by default, those cookies expire in 20 minutes as per the standard for ASP.Net. There are no logs containing this information. Therefore, there is no information available in regards to items 1-3, 5-7, or 9-11.
- Analytical software, such as Google Analytics, is not utilized on the WYCFIS website. Therefore, there is no information available in regards to items 4, 8, or 12.

I really appreciate your inquiry in this regard. Your records request sparked our own interest in this information, and after discussion with my team, we will plan to implement Google Analytics during our next WYCFIS maintenance period.

Best regards,

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Attachment B

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (52 U.S.C. 30101(17), 30116(a) AND (d), AND PUB. L. 107–155 SEC. 214(C))

Sec.

AUTHORITY: 52 U.S.C. 30101(17), 30104(c), 30111(a)(8), 30116, 30120; Sec. 214(c), Pub. L. 107–155, 116 Stat. 81.

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SOURCE: 68 FR 451, Jan. 3, 2003, unless otherwise noted.

Subpart A—Scope and Definitions

§ 109.1 When will this part apply?

This part applies to expenditures that are made independently from a candidate, an authorized committee, a political party committee, or their agents, and to those payments that are made in coordination with a candidate, an authorized committee, a political party committee, or their agents. The rules in this part explain how these types of payments must be reported and how they must be treated by candidates, authorized committees, and political party committees. In addition, subpart D of part 109 describes procedures and limits that apply only to payments, transfers, and assignments made by political party committees.

§ 109.2 [Reserved]

§ 109.3 Definitions.

For the purposes of 11 CFR part 109 only, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(a) In the case of a national, State, district, or local committee of a political party, any one or more of the activities listed in paragraphs (a)(1) through (a)(5) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To create, produce, or distribute any communication at the request or suggestion of a candidate.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or,

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a candidate.

(b) In the case of an individual who is a Federal candidate or an individual holding Federal office, any one or more of the activities listed in paragraphs (b)(1) through (b)(6) of this section:

(1) To request or suggest that a communication be created, produced, or distributed.

(2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).

(3) To request or suggest that any other person create, produce, or distribute any communication.

(4) To be materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or,

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(5) To provide material or information to assist another person in the creation, production, or distribution of any communication.

(6) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a different candidate.

Subpart B—Independent Expenditures

§ 109.10 How do political committees and other persons report independent expenditures?

(a) Political committees, including political party committees, must report independent expenditures under 11 CFR 104.4.

(b) Every person that is not a political committee and that makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report on FEC Form 5 in accordance with 11 CFR 104.4(e) containing the information required by paragraph (e) of this section. Every person filing a report or statement under this section shall do so in accordance with the quarterly reporting schedule specified in 11 CFR 104.5(a)(1)(i) and (ii) and shall file a report or statement for any quarterly period during which any such independent expenditures that aggregate in excess of $250 are made and in any quarterly reporting period thereafter in which additional independent expenditures are made.

(c) For each election in which a person who is not a political committee makes independent expenditures, the person shall aggregate its independent expenditures made in each calendar year to determine its reporting obligation. When such a person makes independent expenditures aggregating $10,000 or more for an election in any calendar year, up to and including the 20th day before an election, the person must report the independent expenditures on FEC Form 5, or by signed statement if the person is not otherwise required to file electronically under 11 CFR 104.18. (See 11 CFR 104.4(f) for aggregation.) The person making the independent expenditures aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate an additional $10,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 48-hour report of the subsequent independent expenditures. Each 48-hour report must contain the information required by paragraph (e)(1) of this section.

(d) Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent independent expenditures relating to the same election aggregate $1,000 or more, the person making the independent expenditures must ensure that the Commission receives a new 24-hour report of the subsequent independent expenditures. (See 11 CFR 104.4(f) for aggregation.) Such report or statement shall contain the information required by paragraph (e) of this section.

(e) Content of verified reports and statements and verification of reports and statements.

(1) *Contents of verified reports and statement.* If a signed report or statement is submitted, the report or statement shall include:

(i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date, and purpose of each expenditure;

(iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) *Verification of independent expenditure statements and reports.* Every person shall verify reports and statements of independent expenditures filed pursuant to the requirements of this section by one of the methods stated in paragraph (e)(2)(i) or (ii) of this section. Any report or statement verified under either of these methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(i) For reports or statements filed on paper (e.g., by hand-delivery, U.S. Mail, or facsimile machine), the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by handwritten signature immediately following the certification required by paragraph (e)(1)(v) of this section.

(ii) For reports or statements filed by electronic mail, the person who made the independent expenditure shall certify, under penalty of perjury, the independence of the expenditure by typing the treasurer's name immediately following the certification required by paragraph (e)(1)(v) of this section.

[68 FR 451, Jan. 3, 2003, as amended at 81 FR 34863, June 1, 2016]

§ 109.11 When is a "non-authorization notice" (disclaimer) required?

Whenever any person makes an independent expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such person shall comply with the requirements of 11 CFR 110.11.

Subpart C—Coordination

§ 109.20 What does "coordinated" mean?

(a) *Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee. For purposes of this subpart C, any reference to a candidate, or a candidate's authorized committee, or a political party committee includes an agent thereof.

(b) Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted under 11 CFR part 100, subparts C or E.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33208, June 8, 2006]

§ 109.21 What is a "coordinated communication"?

(a) *Definition.* A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication:

(1) Is paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee;

(2) Satisfies at least one of the content standards in paragraph (c) of this section; and

(3) Satisfies at least one of the conduct standards in paragraph (d) of this section.

(b) *Treatment as an in-kind contribution and expenditure; Reporting*—(1) *General rule.* A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate, authorized committee, or political party committee with whom or which it is coordinated, unless excepted under 11 CFR part 100, subpart C, and must be reported as an expenditure made by that candidate, authorized committee, or political party committee under 11 CFR 104.13, unless excepted under 11 CFR part 100, subpart E.

(2) *In-kind contributions resulting from conduct described in paragraphs (d)(4) or (d)(5) of this section.* Notwithstanding paragraph (b)(1) of this section, the candidate, authorized committee, or

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political party committee with whom or which a communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure, that results from conduct described in paragraphs (d)(4) or (d)(5) of this section, unless the candidate, authorized committee, or political party committee engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.

(3) *Reporting of coordinated communications.* A political committee, other than a political party committee, that makes a coordinated communication must report the payment for the communication as a contribution made to the candidate or political party committee with whom or which it was coordinated and as an expenditure in accordance with 11 CFR 104.3(b)(1)(v). A candidate, authorized committee, or political party committee with whom or which a communication paid for by another person is coordinated must report the usual and normal value of the communication as an in-kind contribution in accordance with 11 CFR 104.13, meaning that it must report the amount of the payment as a receipt under 11 CFR 104.3(a) and as an expenditure under 11 CFR 104.3(b).

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

(1) A communication that is an electioneering communication under 11 CFR 100.29.

(2) A public communication, as defined in 11 CFR 100.26, that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

(4) A public communication, as defined in 11 CFR 100.26, that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv) of this section:

(i) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(ii) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(iii) *References to political parties.* The public communication refers to a political party, does not refer to a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election cycle ending on the date of a regularly scheduled non-Presidential general election, the time period in paragraph (c)(4)(i) of this section applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated during the two-year election

cycle ending on the date of a Presidential general election, the time period in paragraph (c)(4)(ii) of this section applies.

(iv) *References to both political parties and clearly identified Federal candidates.* The public communication refers to a political party and a clearly identified Federal candidate, and is publicly distributed or otherwise publicly disseminated in a jurisdiction in which one or more candidates of that political party will appear on the ballot.

(A) When the public communication is coordinated with a candidate and it is publicly distributed or otherwise publicly disseminated in that candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing a reference to that candidate applies;

(B) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(i) or (ii) of this section that would apply to a communication containing only a reference to that candidate applies;

(C) When the public communication is coordinated with a political party committee and it is publicly distributed or otherwise publicly disseminated outside the clearly identified candidate's jurisdiction, the time period in paragraph (c)(4)(iii)(B) or (C) of this section that would apply to a communication containing only a reference to a political party applies.

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section:

(1) *Request or suggestion.* (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or

(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

(i) The content of the communication;

(ii) The intended audience for the communication;

(iii) The means or mode of the communication;

(iv) The specific media outlet used for the communication;

(v) The timing or frequency of the communication; or

(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

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(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors; or

(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor.* Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(6) *Dissemination, distribution, or republication of campaign material.* A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original

preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

(e) *Agreement or formal collaboration.* Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or systematically organized, work on the communication.

(f) *Safe harbor for responses to inquiries about legislative or policy issues.* A candidate's or a political party committee's response to an inquiry about that candidate's or political party committee's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

(g) *Safe harbor for endorsements and solicitations by Federal candidates.* (1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate.

(2) A public communication in which a candidate for Federal office solicits funds for another candidate for Federal or non-Federal office, a political committee, or organizations as permitted by 11 CFR 300.65, is not a coordinated communication with respect to the soliciting Federal candidate unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate.

(h) *Safe harbor for establishment and use of a firewall.* The conduct standards in paragraph (d) of this section are not met if the commercial vendor, former employee, or political committee has established and implemented a firewall that meets the requirements of paragraphs (h)(1) and (h)(2) of this section. This safe harbor provision does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.

(1) The firewall must be designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and

(2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.

(i) *Safe harbor for commercial transactions.* A public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if:

(1) The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and

(2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33208, June 8, 2006; 75 FR 55961, Sept. 15, 2010]

§ 109.22 Who is prohibited from making coordinated communications?

Any person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.

§ 109.23 Dissemination, distribution, or republication of candidate campaign materials.

(a) *General rule.* The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) *Exceptions.* The following uses of campaign materials do not constitute a contribution to the candidate who originally prepared the materials:

(1) The campaign material is disseminated, distributed, or republished by the candidate or the candidate's authorized committee who prepared that material;

(2) The campaign material is incorporated into a communication that advocates the defeat of the candidate or party that prepared the material;

(3) The campaign material is disseminated, distributed, or republished in a news story, commentary, or editorial exempted under 11 CFR 100.73 or 11 CFR 100.132;

(4) The campaign material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views; or

(5) A national political party committee or a State or subordinate political party committee pays for such dissemination, distribution, or republication of campaign materials using coordinated party expenditure authority under 11 CFR 109.32.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33210, June 8, 2006]

Subpart D—Special Provisions for Political Party Committees

§ 109.30 How are political party committees treated for purposes of coordinated and independent expenditures?

Political party committees may make independent expenditures subject to the provisions in this subpart. *See* 11 CFR 109.36. Political party committees may also make coordinated party expenditures in connection with the general election campaign of a candidate, subject to the limits and other provisions in this subpart. *See* 11 CFR 109.32 through 11 CFR 109.34.

[69 FR 63920, Nov. 3, 2004]

§ 109.31 [Reserved]

§ 109.32 What are the coordinated party expenditure limits?

(a) *Coordinated party expenditures in Presidential elections.* (1) The national committee of a political party may make coordinated party expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The coordinated party expenditures shall not exceed an amount equal to two cents multiplied by the voting age population of the United States. See 11 CFR 110.18. This limitation shall be increased in accordance with 11 CFR 110.17.

(3) Any coordinated party expenditure under paragraph (a) of this section shall be in addition to—

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.

(4) Any coordinated party expenditures made by the national committee

of a political party pursuant to paragraph (a) of this section, or made by any other party committee under authority assigned by a national committee of a political party under 11 CFR 109.33, on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b) *Coordinated party expenditures in other Federal elections.* (1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make coordinated party expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The coordinated party expenditures shall not exceed:

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(A) Two cents multiplied by the voting age population of the State (see 11 CFR 110.18); or

(B) Twenty thousand dollars.

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) The limitations in paragraph (b)(2) of this section shall be increased in accordance with 11 CFR 110.17.

(4) Any coordinated party expenditure under paragraph (b) of this section shall be in addition to any contribution by a political party committee to the candidate permissible under 11 CFR 110.1 or 110.2.

§ 109.33 May a political party committee assign its coordinated party expenditure authority to another political party committee?

(a) *Assignment.* The national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by 11 CFR 109.32 to another political party committee. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assignee committee before any coordinated party expenditure is made pursuant to the assignment.

(b) *Compliance.* For purposes of the coordinated party expenditure limits, *State committee* includes a subordinate committee of a State committee and includes a district or local committee to which coordinated party expenditure authority has been assigned. State committees and subordinate State committees and such district or local committees combined shall not exceed the coordinated party expenditure limits set forth in 11 CFR 109.32. The State committee shall administer the limitation in one of the following ways:

(1) The State committee shall be responsible for insuring that the coordinated party expenditures of the entire party organization are within the coordinated party expenditure limits, including receiving reports from any subordinate committee of a State committee or district or local committee making coordinated party expenditures under 11 CFR 109.32, and filing consolidated reports showing all coordinated party expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission, that permits control over coordinated party expenditures.

(c) *Recordkeeping.* (1) A political party committee that assigns its authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

(2) A political party committee that is assigned authority to make coordinated party expenditures under this section must maintain the written assignment for at least three years in accordance with 11 CFR 104.14.

[68 FR 451, Jan. 3, 2003, as amended at 69 FR 63920, Nov. 3, 2004]

§ 109.34 When may a political party committee make coordinated party expenditures?

A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate

has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination.

§ 109.35 [Reserved]

§ 109.36 Are there circumstances under which a political party committee is prohibited from making independent expenditures?

The national committee of a political party must not make independent expenditures in connection with the general election campaign of a candidate for President of the United States if the national committee of that political party is designated as the authorized committee of its Presidential candidate pursuant to 11 CFR 9002.1(c).

§ 109.37 What is a "party coordinated communication"?

(a) *Definition.* A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of any of the foregoing, when the communication satisfies the conditions set forth in paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(1) The communication is paid for by a political party committee or its agent.

(2) The communication satisfies at least one of the content standards described in paragraphs (a)(2)(i) through (a)(2)(iii) of this section.

(i) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see 11 CFR 109.21(d)(6).

(ii) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(iii) A public communication, as defined in 11 CFR 100.26, that satisfies paragraphs (a)(2)(iii)(A) or (B) of this section:

(A) *References to House and Senate candidates.* The public communication refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.

(B) *References to Presidential and Vice Presidential candidates.* The public communication refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or nominating convention or caucus in that jurisdiction, up to and including the day of the general election.

(3) The communication satisfies at least one of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR 109.21(e), (g), and (h). A candidate's response to an inquiry about that candidate's positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in 11 CFR 109.21(d)(1) through (d)(6). Notwithstanding paragraph (b)(1) of this section, the candidate with whom a party coordinated communication is coordinated does not receive or accept an in-kind contribution, and is not required to report an expenditure that results from conduct described in 11 CFR 109.21(d)(4) or (d)(5), unless the candidate, authorized committee, or an agent of any of the foregoing, engages in conduct described in 11 CFR 109.21(d)(1) through (d)(3).

(b) *Treatment of a party coordinated communication.* A payment by a political party committee for a communication that is coordinated with a candidate, and that is not otherwise exempted under 11 CFR part 100, subpart C or E, must be treated by the political party committee making the payment as either:

(1) An in-kind contribution for the purpose of influencing a Federal election under 11 CFR 100.52(d) to the candidate with whom it was coordinated, which must be reported under 11 CFR part 104; or

(2) A coordinated party expenditure pursuant to coordinated party expenditure authority under 11 CFR 109.32 in connection with the general election campaign of the candidate with whom it was coordinated, which must be reported under 11 CFR part 104.

[68 FR 451, Jan. 3, 2003, as amended at 71 FR 33210, June 8, 2006]