



# STETSON UNIVERSITY

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**Statement of Ciara Torres-Spelliscy<sup>1</sup>  
Assistant Professor of Law  
Stetson University College of Law  
Senate Committee on Rules and Administration  
Hearing on the DISCLOSE Act of 2012**

Dear Chairman Schumer and Ranking Member Alexander,

Two years after the Supreme Court's landmark decision in *Citizens United v. FEC*, I encourage you to at long last take up the invitation by eight of nine Justices to bring transparency to American elections.

Attached is a law review article I wrote in the wake of *Citizens United* which highlights how the use of intermediaries mask the true identities of political spenders. It is entitled, "Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws."<sup>2</sup>

Reform in this area of the law is long overdue.

Sincerely,

Prof. Ciara Torres-Spelliscy

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<sup>1</sup> Professor Torres-Spelliscy writes on her own behalf and not on the behalf of her University.

<sup>2</sup> If you are interested in how lower courts have embraced disclosure post-*Citizens United*, see "Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics after *Citizens United* and *Doe v. Reed*," 27(4) Georgia State University Law Review 1057 (Summer 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1878727](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878727).



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# **Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws**

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# Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws

Ciara Torres-Spelliscy\*

## Introduction

The 2010 midterm federal election may go down in history as the “Dark Election.” Why? The source of a large percentage of outside political spending

in the federal midterms was masked through the use of non-profit organizations.<sup>1</sup> The 2010 federal election was the most expensive federal election on record, but independent spending by outside

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\* The Author was Counsel at the Brennan Center for Justice at NYU School of Law and is an incoming Assistant Professor of Constitutional Law at Stetson University in the Fall of 2011. The author would like to thank Professor Frances Hill, Professor Jill Manny, Ezra W. Reese, Paul S. Ryan and Tara Malloy for reviewing an earlier draft of this piece, as well as Brennan Center lawyers Susan Liss, Monica Youn, Angela Migally, Mimi Marziani, Kelly Williams and legal intern Justin Krane for their helpful input.

1. See T.W. Farnam & Dan Eggen, *Interest-group Spending for Midterm Up Fivefold from 2006*; Many Sources Secret, WASH. POST, Oct. 4, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664_pf.html); Mike McIntire, *Hidden Under a Tax-Exempt Cloak, Private Dollars Flow*, N. Y. TIMES, Sept. 23, 2010, <http://www.nytimes.com/2010/09/24/us/politics/24donate.html?pagewanted=1>; Michael Crowley, *The New GOP Money Stampede*, TIME, Sept. 16, 2010, <http://www.time.com/time/printout/0,8816,2019509,00.html#>; Kristin Jensen & Jonathan D. Salant, *Republican Groups Use Hidden Money to Overcome Democrats' Cash*, BLOOMBERG BUSINESS WEEK, Sept. 21, 2010, [http://www.businessweek.com/bwdaily/dnflash/content/sep2010/db20100921\\_184373.htm](http://www.businessweek.com/bwdaily/dnflash/content/sep2010/db20100921_184373.htm); Chisun Lee, *Higher Corporate Spending on Election Ads Could Be All but Invisible*, PROPUBLICA, Mar 10, 2010; Al Hunt, *More Cash Blots Out 'Sunlight' in U.S. Elections*, BLOOMBERG, Oct. 17, 2010, <http://www.bloomberg.com/news/2010-10-17/more-cash-blots-out-sunlight-in-u-s-elections-albert-hunt.html>.

groups in particular jumped markedly.<sup>2</sup> As Professor Michael M. Franz noted in a recent study, “[a]ll told, interest groups in 2010 increased their advertising totals over 2008 by 168 percent in House races and by 44 percent in Senate races.”<sup>3</sup> By one measure, over one third of the outside spending was undisclosed,<sup>4</sup> and by another measure, 46% of outside spending was undisclosed.<sup>5</sup>

What types of disclosure are required of non-profits may have an enormous effect on how and when for-profit corporations spend money on politics after *Citizens United v. Federal Election Commission*, the Supreme Court case which permits unlimited political expenditures directly from corporate treasuries on political advertisements.<sup>6</sup> One way that for-profit corporations can throw their support behind, or undermine, a particu-

lar candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, purchases a political ad. Under current tax law, for-profit political spending through non-profits such as social welfare organizations organized under Internal Revenue Code (IRC) Section 501(c)(4) or trade associations organized under IRC Section 501(c)(6) is undetectable by the public. Meanwhile, for-profit corporations typically disclose their spending through political 527s long after an election is over.

The President has highlighted the issue of campaign finance disclosure repeatedly in the past year after *Citizens United*. Not only did he take time during his first State of the Union to talk about the case,<sup>7</sup> he repeatedly raised the issue of disclosure, in particular in his Saturday addresses to the American people,<sup>8</sup> as

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2. Press Release, *Election 2010 to Shatter Spending Records as Republicans Benefit from Late Cash Surge*, Center for Responsive Politics (Oct. 27, 2010), <http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r.html#> (predicting spending would top \$4 billion in the 2010 election); see also Center for Responsive Politics, *2010 Overview*, <http://www.opensecrets.org/overview/index.php> (showing over \$3.6 billion raised during the 2010 election), last visited Feb. 2, 2011.

3. Michael M. Franz, *The Citizens United Election? Or Same as it Ever Was?*, THE FORUM Vol 8: Iss. 4, Article 7 at 6 (2010).

4. Bill De Blasio, *Citizens United and the 2010 Midterm Elections*, 3 (Public Advocate for the City of New York Dec. 2010), <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf> (finding 36% of outside spending in the 2010 federal election was funded by secret sources).

5. Congress Watch, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process*, 12 (Public Citizen Jan. 2011), <http://www.citizen.org/documents/Citizens-United-20110113.pdf> (finding “[g]roups that did not provide any information about their sources of money collectively spent \$135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.”).

6. Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since ‘Citizens United’ Ruling*, (Ctr. for Public Integrity Oct. 4, 2010), <http://www.publicintegrity.org/articles/entry/2462/> (arguing “[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous.”).

7. President Barack Obama, State of the Union Address (Jan. 27, 2010) (“With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.”).

8. Press Release, *Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the Citizens United Decision*, WHITE HOUSE (Sept. 18, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/>

well as from the Rose Garden.<sup>9</sup> As President Obama summed up his argument, “the American people [ ] have the right to know when some group like ‘Citizens for a Better Future’ is actually funded entirely by ‘Corporations for Weaker Oversight.’”<sup>10</sup>

If the past is prologue, we should anticipate a marked increase in the use of non-profits to mask for-profit money in politics. History shows that for-profit corporations spend through non-profits to enjoy their anonymity while spending without accountability from shareholders or customers.<sup>11</sup> And *Citizens United* may only expand this corporate habit of spending through intermediaries. If for-profit corporations are purposefully using non-profits to hide the true source of their funds, then it is possible that the degree of disclosure required of non-profits in the future may have an impact on

whether for-profits give money to ideological and politically active non-profits.<sup>12</sup>

*Citizens United* changed many aspects of American campaign finance law. The Supreme Court’s decision ended decades-old restrictions on the use of union and corporate treasury funds to pay for independent expenditures and electioneering communications.<sup>13</sup> But the one area where the *Citizens United* Court increased the ability of Congress to regulate was the disclosure of the sources of money in politics.<sup>14</sup> Indeed, the Supreme Court found that the Bipartisan Campaign Reform Act of 2002’s (BCRA’s) disclaimer and disclosure provisions could be constitutionally applied to the plaintiff in *Citizens United*, a 501(c)(4) organization, as well as to its ads and its film entitled “Hillary: The Movie.”<sup>15</sup>

As *Citizens United* reaffirms, in order for voters to make informed choices at the

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18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes-; Press Release, *Weekly Address: President Obama Challenges Politicians Benefiting from Citizens United Ruling to Defend Corporate Influence in Our Elections*, WHITE HOUSE (Aug. 21, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/21/weekly-address-president-obama-challenges-politicians-benefiting-citizen>.

9. Jesse Lee, *President Obama on Citizens United: Imagine the Power this Will Give Special Interests over Politicians*, WHITE HOUSE BLOG, July 26, 2010, <http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

10. President Barack Obama, *Weekly Address to the Nation* (May 1, 2010), <http://www.whitehouse.gov/the-pressoffice/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corpor>.

11. See BRUCE F. FREED & JAMIE CARROLL, *HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING 1-2* (2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932>.

12. See PAUL DENICOLA, BRUCE F. FREED, STEPHAN C. PASSANTINO, & KARL J. SANDSTROM, *HANDBOOK ON CORPORATE POLITICAL ACTIVITY, EMERGING CORPORATE GOVERNANCE ISSUES 6* (Conference Board 2010) (noting that disclosure by for-profit corporations is still not the norm finding “as of October 2010, seventy-six major American corporations, including half of the S&P 100, had adopted codes of political disclosure. However, a similar shift toward political disclosure has not yet taken place outside of the S&P 100.”).

13. See *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876 (2010).

14. *Id.*

15. *Citizens United* went on to avoid federal disclosure requirements by claiming that it is a press entity. In an advisory opinion, the FEC agreed, thereby granting *Citizens United* a media exemption from disclosure. See Federal Election Comm., A.O. 2010-08, *CITIZENS UNITED* (2010) (The remainder of this article assumes that this media exemption is not available for most 501(c)(4)s or 501(c)(6)s).

ballot box, they must know who is paying for each side of a political fight. Campaign finance disclosure and disclaimer laws should be adopted at the federal level to achieve this end, regardless of the tax status of the spender. Yet the question remains, how expansive is this governmental right to mandate disclosure? And in particular, what types of disclosure can non-profit social welfare organizations or trade associations be subject to in the future once they purchase political advertisements? These are the questions that I will endeavor to answer.

While the Treasury Department's Internal Revenue Service (IRS) grants 501(c)(4)s and 501(c)(6)s a large degree of anonymity for tax reporting purposes, the Federal Election Commission (FEC) already requires certain reporting from any entity that funds an independent expenditure or an electioneering communication in a federal election. Because of gaps in the law, non-profit structures can be used as conduits for unregulated campaign spending. To fill these holes in the law, federal regulators should go further than they have in the past to require more detailed and meaningful disclosure of the original sources of the money in politics.

As the Supreme Court has noted, “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>16</sup> This article explores the disclosure that is and that can be required of 501(c)(4)s and 501(c)(6)s when they engage in political advertising. To fully explore this topic, this article, by necessity, also examines the tax treatment of 501(c)(3)s and 527s.<sup>17</sup> Although the IRS's treatment of these four types of tax-exempt organizations will be explained, my focus is on the disclosure that federal elections administrators can require of 501(c)(4)s and 501(c)(6)s once they fund political advertisements for or against federal candidates.<sup>18</sup> To capture the way that money is often moved around a series of entities, disclosure at the federal level needs to be bolstered to move beyond FECA and BCRA.

Of course, not every voter will pour through campaign disclosure filings to find out who is funding each and every race on the November ballot. Instead, voters, like other busy adults, rely on mental shortcuts, to place the candidates into a sensible framework. Or put another way, “[e]mpirical psychological research demonstrates that voters rely upon heuristics, or cognitive shortcuts, in

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16. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed. 1933), *quoted in* *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

17. While this article will discuss 501(c)(3)s, 501(c)(4)s, and 501(c)(6)s, these are just three of twenty-eight types of non-profits listed in Section 501 of the IRC. *See generally* Ellen Aprill, *Background on Nonprofit, Tax-Exempt Section 501(c)(4) Organizations*, ELECTION LAW BLOG (undated), <http://electionlawblog.org/archives/aprill.pdf>.

18. For a detailed discussion of the tax implications of *Citizens United*, *see* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, Loyola Law School Los Angeles Legal Studies Paper No. 2010-57 (Dec. 17, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1727565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1727565).

determining vote choice.”<sup>19</sup> One of these shortcuts is seeing who is supporting or opposing a given candidate. If a candidate is getting praise from an industry that the voter distrusts, the voter may distrust the candidate too. But when it is unclear who is praising the candidate, the voter is deprived of a useful democratic heuristic.<sup>20</sup>

First, the “Dark Election of 2010” was not inevitable. Instead, it is the result of key policy choices. As this article will demonstrate, the case law and federal elections statutes both support disclosure of who is spending money in federal elections. Rather, the Dark Election was caused by a regulatory gap between the FEC and the IRS. Yet, at the regulatory level, the FEC has long failed to require disclosure of underlying donors to the entities that purchase federal election ads, and while the IRS gathers donor information from 501(c)(4)s and 501(c)(6)s, it does not make this donor information publicly available. Then this article will discuss the past and the present abuses of this disclosure gap. Finally, I argue that the FEC should require detailed disclosure by all political spenders, tax status notwithstanding.

This is an area where definitions of very similar words have different mean-

ings in the tax and the election contexts. Here, the focus is primarily political campaign activity in the form of purchasing an advertisement that supports or opposes a candidate by certain tax-exempt entities. This article will be limited to the purchasing of what are defined by federal election law as independent expenditures and electioneering communications. Independent expenditures are advertisements which support or oppose a candidate for office by using *Buckley v. Valeo*’s “magic words” of express advocacy.<sup>21</sup> Meanwhile, electioneering communications are defined by BCRA as advertisements which mention a federal candidate, are broadcast 30 days before a federal primary or 60 days before a federal general election, to at least 50,000 persons, costing at least \$10,000 and targeted at that federal candidate’s electorate.<sup>22</sup>

At times to be complete, I will reference the ability of certain tax-exempt entities to lobby. However, lobbying is not a primary focus of this article and should not be considered synonymous with political campaign activity. Furthermore, the 501(c)(3) non-profits that are referenced throughout are public charities, not private foundations.<sup>23</sup> And finally, as used herein, the term “political campaign ac-

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19. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications of the Supreme Court’s Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 681 (Jan. 2010).

20. Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 265 (2010) (“Heuristic cues that are not misleading, however, are at least an improvement for the relatively uninformed.”).

21. *Buckley*, 424 U.S. at 44, n.52.

22. 2 U.S.C. § 434(f)(3)(A)(i) (BCRA § 201).

23. B. HOLLY SCHADLER, *THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(c)(3)s, 501(c)(4)s AND POLITICAL ORGANIZATIONS*, 1 (2006) (“In 1969, Congress divided 501(c)(3) organizations into two classes: ‘private foundations’ and ‘public charities.’ Private foundations are subject to several restrictions on their advocacy activities that do not apply to public charities. . .”).

tivity” does not include non-partisan activities like voter registration, get out the vote efforts, voter education guides or hosting candidate debates.<sup>24</sup> The term is limited to activities such as supporting or opposing candidates or what a layperson might refer to as “partisan politicking.”

### Part I. Emerging Agreement on the Need for Transparency in Elections

In a rare instance of convergence, the controlling majorities in all three branches of government in 2010, agreed that transparency is a necessary prerequisite for a strong democracy.<sup>25</sup> As part of the Congressional responses to *Citizens United*, committee hearings were held in both the House and Senate. The Committee for House Administration, which has primary jurisdiction over federal elections, concluded after these hearings that transparency in elections is key to safeguarding the health of our democracy. As the Committee wrote, “[t]o prosper, our democracy requires transparency and accountability in our political campaigns. [K]nowing the source of political spending allows voters to better assess

the truthfulness and accuracy of the claims of the spenders and the candidates. It invites a healthy skepticism and allows voters to investigate the motives of the sponsor.”<sup>26</sup>

This belief that transparency is an integral part to a functioning democracy is also shared by President Obama. As he warned, disclosure loopholes can be exploited at the voter’s expense:

[I]n my State of the Union Address, I warned of the danger posed by a Supreme Court ruling called *Citizens United*. . . . It gave the special interests the power to spend without limit – and without public disclosure – to run ads in order to influence elections. Now, as an election approaches, it’s not just a theory. We can see for ourselves how destructive to our democracy this can become. We see it in the flood of deceptive attack ads sponsored by special interests using front groups with misleading names. We don’t know who’s behind these ads or who’s paying for them. Even foreign-controlled corporations seeking to influence our democracy are able to spend freely in order to swing an election toward a candidate they prefer.<sup>27</sup>

And as will be detailed further below, the Supreme Court has repeatedly endorsed the democratic-reinforcing power

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24. *Id.* at 11-12 (The IRS does not consider the following to be political activities: nonpartisan voter registration, candidate questionnaires, hosting debates, or get-out the vote programs).

25. Of course there is not total unanimity on this topic. Every Republican Senator in the 111th Congress voted against stronger disclosure of campaign spending. See Ciara Torres-Spelliscy, *Why Can 41 Senators Crush Popular Will to Temper Money in Politics?*, THE HILL, July 28, 2010, <http://thehill.com/blogs/congress-blog/politics/111381-why-can-41-senators-crush-popular-will-to-temper-money-in-politics>.

26. See COMM. ON HOUSE ADMIN., DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS ACT’ OR THE “DISCLOSE ACT,” H.R. 5157, H.R. REP. NO. 111-492 (May 25, 2010), [http://www.rules.house.gov/111/CommJurRpt/111\\_hr5175\\_rpt.pdf](http://www.rules.house.gov/111/CommJurRpt/111_hr5175_rpt.pdf).

27. See Press Release, *Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the Citizens United Decision*, WHITE HOUSE (Sept. 18, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes->.



of transparency around elections in case after case for the past thirty-five years.<sup>28</sup>

This belief in the power of transparency within the democratic framework is shared not only by the government, but also by legal scholars. Professor Cass Sunstein has noted that disclosure laws have proliferated in the past few decades across all sorts of legal topics including campaign finance:

[R]egulation through disclosure, has become one of the most striking developments in the last generation of American law. . . . [C]onsider . . . the Freedom of Information Act ("FOIA"), and the Federal Election Campaign Act ("FECA"). Here the goal is to allow more in the way of public monitoring of governmental decisions, with particular issues (. . . [like] unlawful behavior during campaigns [and] official corruption) receiving special attention.<sup>29</sup>

Or in other words, disclosure of how politics is funded boosts the government's anti-corruption interest in campaign finance. And as Professor Burt Neuborne has written, campaign finance disclosure helps voters place candidates on a political spectrum: "compelled public disclosure of campaign contributions, campaign expenditures, and individual

expenditures on behalf of a candidate was sustained in *Buckley*, in part, because the Court believed that knowledge of a candidate's financial supporters was of great value to voters in assessing the candidate's political positions."<sup>30</sup> Or as Professor Franz put it succinctly, "greater disclosure seems a no-brainer. Even the strongest of reform opponents, like Senator Mitch McConnell, have argued for many years that disclosure regulations are not only fair but normatively good."<sup>31</sup> Thus, there is a growing consensus both inside and outside of government that increasing voter knowledge justifies robust disclosure in the campaign finance context.

## Part II. Case Law: the Supreme Court from *Buckley* through *Citizens United* and *Doe v. Reed* Finds Disclosure Constitutional

While the Roberts Supreme Court is generally hostile to campaign finance laws such as contribution and expenditure limits, like many previous Supreme Courts, it has endorsed the need for robust disclosure of campaign funding.<sup>32</sup> The case law is clearly on the side of re-

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28. Or as the Sixth Circuit stated in a different context, "[d]emocracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (explaining that the First Amendment prohibits the government from closing immigration hearings to the public and press).

29. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613-14 (Jan. 1999).

30. Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L. J. 1, 9 (Fall 1997).

31. Franz, *supra* note 3, at 19 (citing <http://www.mcclatchydc.com/2010/08/02/98492/commentary-mcconnells-about-face.html>).

32. *Democracy is Strengthened by Casting Light on Spending in Elections: Hearing on H.R. 5175 Before the H. Comm. on House Admin.*, 111th Cong. 2-3 (2010) (Statement Donald Simon, General Counsel, Democracy 21), available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBA57812%7D/uploads/%7BE0088B11-5E6C-4C59-A277-FD8F8F0C557D%7D.PDF> ("the Supreme Court has consistently endorsed the principle that the public has the right to know about expenditures being

formers who seek transparency; not the obfuscators.

In 1976, in *Buckley v. Valeo* the Supreme Court recognized that disclosure of campaign spending is “the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”<sup>33</sup> Since *Buckley*, the Court has consistently recognized that disclosure of political spending: (1) “deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;” (2) “provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office;” and (3) “[is] an essential means of gathering the data necessary to detect violations of the contribution limitations.”<sup>34</sup>

In *Buckley*, the Supreme Court upheld FECA’s disclosure requirements for independent expenditures, but limited this disclosure to “express advocacy” – an advertisement for or against a candidate that used specific “magic words,” such as “vote for” or “vote against.” This magic words test made it impossible to distinguish “sham issue ads” (ads that avoided these magic words, but were nonetheless

intended to influence an election) from genuine issue ads (ads that express an opinion on a public issue). Consequently, from 1976-2002, there were no limits on who could buy the sham issue ads or on how they were financed, and no disclosure was required. Hundreds of millions of dollars of corporate and union treasury funds – money that could not legally be used directly to influence elections pre-*Citizens United* – poured into federal campaign ads through the “sham issue ad” loophole.<sup>35</sup>

In the decades following *Buckley*, Congress observed that independent spenders found ways to mask express advocacy ads as sham issue ads to escape disclosure. To plug this loophole, Congress enacted BCRA. It banned the use of corporate and union general treasury funds for “electioneering communications” – broadcast ads aired just prior to a primary or general election that refer to a candidate and target the candidate’s constituents – but allowed such communications to be paid for through separate segregated funds (SSFs), which are often also called corporate or union political action committees (PACs).<sup>36</sup> SSFs are subject to contribution limits, disclosure of contributors, and solicitation restrictions. BCRA also mandated disclosure and dis-

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made to influence election campaigns, and about the sources that are providing the funds used for such expenditures.”).

33. *Buckley*, 424 U.S. at 68 (footnotes omitted).

34. *Id.* at 67.

35. CRAIG B. HOLMAN & LUKE P. McLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 10-11 (Brennan Center 2001), [http://brennan.3cdn.net/efd37f417f16ee6341\\_4dm6iid9c.pdf](http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf); see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003) (finding political advertising sponsors often hid behind misleading names, such as “Citizens for Better Medicare” (the pharmaceutical industry) or “Americans Working for Real Change” (business groups opposed to organized labor)).

36. 2 U.S.C. §§ 441b(b)(2), 441b(c) (BCRA § 203).

claimer requirements for electioneering communications.

Reasoning that “they do not prevent anyone from speaking,” the Supreme Court in *McConnell v. FEC* expressly upheld BCRA’s electioneering communications reporting provisions by a vote of eight to one.<sup>37</sup> (For more details about BCRA’s disclosure requirements, see Part III of this article.) Like the Court in *Buckley*, the *McConnell* Court concluded that government interests were sufficiently strong to support disclosure of who funded broadcast electioneering communications. Specifically, interests in “providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce

more substantive electioneering restrictions” justified any incidental burden imposed by BCRA’s disclosure requirements.<sup>38</sup>

While *Citizens United* invalidated the corporate SSF/PAC requirement, it did nothing to disturb the disclosure required for federal campaign ads. On the contrary, as in *McConnell*, eight Supreme Court Justices in *Citizens United* voted to uphold disclosure of who funds political advertisements and where those funders get their money.<sup>39</sup> Moreover, *Citizens United* clarified a legal issue that had previously split the lower courts by rejecting the contention that disclosure can only be required of communications that are the functional equivalent of express advocacy.<sup>40</sup>

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37. 540 U.S. at 201 (quoting *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)).

38. *Id.* at 196.

39. *Id.* at 194-95, 199 (upholding 47 U.S.C. § 315(e)(1)(A)). In both *Citizens United* and *McConnell*, Justice Thomas was the lone dissenter.

40. The 2007 Supreme Court case *Wisconsin Right to Life (WRTL II)* did great mischief to state disclosure laws in the lower courts in a case that clearly did not apply to disclosure. Courts reached varying conclusions in *WRTL II*’s wake. See, e.g., *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1177 (9th Cir. 2007) (*WRTL II* did not reach disclosure); *Citizens United v. Fed. Election Comm’n*, 530 F.Supp.2d 274, 281 (D.D.C. 2008) (same), *rev’d in part* 130 S.Ct. 876 (2010); and *Koerber v. Fed. Election Comm’n*, 583 F.Supp.2d 740, 746 (E.D.N.C. 2008) (“The *WRTL II* decision makes no mention of the disclosure requirements upheld in *McConnell*”), but see *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 304 (4th Cir. 2008) (finding disclosure by political committees is both “costly” and “burdensome.”); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F.Supp.2d 777 (S.D.W.Va. 2009) (granting the plaintiff’s request for a preliminary injunction of West Virginia’s definition of electioneering communications); *Broward Coalition of Condominiums, Homeowners Associations & Community Organizations, Inc. v. Browning*, No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009) (permanently enjoining the electioneering portions of the Florida law); *Nat’l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F.Supp.2d 1132, 1150 (D. Utah 2008) (holding “advertisements [at issue] are not unambiguously campaign related and thus cannot be constitutionally regulated.”). This trend has reversed itself again after *Citizens United*. Now lower courts are overwhelmingly upholding disclosure laws. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1012 (9th Cir. 2010) (upholding Washington’s political committee financial disclosure requirements); *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 697 (D.C. Cir. 2010) (upholding ongoing disclosure requirements for organization making federal independent expenditures); *National Organization for Marriage v. Roberts*, 2010 WL 4678610, \*5 (N.D. Fla. Nov. 8, 2010) (finding that Florida disclosure requirements connected to “electioneering communications organizations” “would not prohibit [plaintiff] from engaging in its proposed speech”); *Yamada v. Kuramoto*, 2010 WL 4603936, \*1 (D. Haw. Oct. 29, 2010) (finding that “*Citizens United* also endorsed disclosure”); *Iowa Right to Life (IRTL) v. Smithson*, 2010 WL 4277715, \*3 (S.D. Iowa Oct. 20, 2010) (finding “under *Citizens United*, [t]he Government may regulate

*Citizens United* expressly affirmed the importance of disclosure as a means of “provid[ing] the electorate with information’ about the sources of election-related spending.”<sup>41</sup> As the Court explained, “[t]here was evidence in the [*McConnell*] record that independent groups were running election-related advertisements while hiding behind dubious and misleading names. The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens make informed choices in the political marketplace.”<sup>42</sup> The Court also concluded that FEC disclaimer requirements could be constitutionally applied to *Citizens United*’s ads.

The disclaimers required by § 311 “provid[e] the electorate with information,” *McConnell*, *supra*, at 196, and “insure that the voters are fully informed” about the person or group who is speaking, *Buckley*, *supra*, at 76; *see also Bellotti*, 435 U. S., at 792, n. 32 (“Identifi-

cation of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected”). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.<sup>43</sup>

Finally, *Citizens United* rejected the so-called “functional equivalence” test articulated in *Wisconsin Right to Life II* in the disclosure context. The “functional equivalence” test stated that an ad could only be subject to corporate money source restrictions by the FEC if it were functionally equivalent to express advocacy.<sup>44</sup> As Justice Kennedy noted,

*Citizens United* claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U. S. C. § 441b’s restrictions on independent expenditures to express advocacy and its functional equivalent. *Citizens United* seeks to import a similar distinc-

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corporate political speech through disclaimer and disclosure requirements. . .”); *Wisconsin Club for Growth v. Myse*, 2010 WL 4024932 (W.D. Wis. Oct. 13, 2010) (“plaintiffs’ reliance on *FEC v. WRTL* ignores the Supreme Court’s later treatment of disclosure and disclaimer regulations in *Citizens United*”); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 2010 WL 3768041, \*9 (D. Minn. Sept. 20, 2010) (“The law to which Plaintiffs object is, in fact, a disclosure law—a method of requiring corporations desiring to make independent expenditures to disclose their activities. Such laws are permissible under *Citizens United*.”) *affd.* No. 10-3126 (8th Cir. May 16, 2011); *Center for Individual Freedom v. Madigan*, 2010 WL 3404973, \*4 (N.D. Ill. Aug. 26, 2010) (“in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent.”); *Nat’l Org. for Marriage v. McKee*, No. 09-538, 2010 WL 3270092, at 10 (D. Me. Aug. 19, 2010) (upholding Maine’s political committee financial disclosure requirements and finding “NOM’s desire to limit campaign finance disclosures to ‘major purpose’ groups would yield perverse results, totally at odds with the interest in ‘transparency’ recognized in *Citizens United*.”).

41. *Citizens United*, 130 S.Ct.at 914 (quoting *Buckley*, 424 U.S. at 66).

42. *Id.* at 885 (quoting *McConnell*) (internal citations and quotations omitted).

43. *Id.* at 915.

44. Trevor Potter, *Trevor Potter Testifies on DISCLOSE Act*, CAMPAIGN LEGAL CENTER BLOG (May 11, 2010), [http://www.clcblog.org/blog\\_item-327.html](http://www.clcblog.org/blog_item-327.html) (“As to the argument that disclosure requirements should be limited to “express advocacy,” Justice Kennedy’s [*Citizens United*] Opinion flatly declared: ‘We reject this contention.’ He noted that the Supreme Court had, in a variety of contexts, upheld disclosure requirements that covered constitutionally protected acts, such as lobbying.”).

tion into BCRA's disclosure requirements. *We reject this contention.*<sup>45</sup>

In short, *Citizens United* breathed new life into the longstanding constitutionality of disclosure of campaign spending, even as applied to a 501(c)(4) non-profit organization.<sup>46</sup>

Furthermore, in June of 2010, the Supreme Court also reaffirmed its endorsement of the values of disclosure in *Doe v. Reed*. In *Reed*, the question was the constitutionality of requiring disclosure of certain information about petition signers. The plaintiffs in the case argued that the Washington State statute requiring such disclosure was facially invalid as well as unconstitutional as applied to the plaintiffs, signers of a petition to get an anti-gay question on the ballot. The Supreme Court reviewed the facial challenge. Chief Justice Roberts wrote for the majority that disclosure helped ensure the integrity of the ballot:

Public disclosure [] helps ensure . . . the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process [We] conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.<sup>47</sup>

Justice Scalia wrote a particularly forceful concurrence in *Reed* arguing that the mechanisms of democracy require the

willingness to be subject to certain minimal disclosures. As Justice Scalia implored,

harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society . . . [where] even exercises [of] the direct democracy of initiative and referendum [are] hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.<sup>48</sup>

However, several Justices in *Reed* did state that if the plaintiffs should succeed in showing that disclosure of their personal information related to a particular petition about gay marriage would result in harassment or intimidation, then they may be excused from disclosure.<sup>49</sup> This "as-applied" part of the case is still being litigated. Nonetheless, *Reed*, like *Citizens United*, stands firmly for the proposition that disclosure during the political process is a benefit to the voter.

The Supreme Court's last chance to opine on the regulation of a 501(c)(6)'s (trade association's) political activities was in 1990, in *Austin v. Michigan Chamber of Commerce*. In that case, the issue was the corporate independent expenditure ban and not disclosure. This case has been overruled by *Citizens*

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45. *Citizens United*, 130 S.Ct. at 915 (emphasis added) (citations omitted).

46. *Citizens United* was cited in *SpeechNow.org* which held that federal PAC contribution limits could not apply to individuals giving to an independent expenditure committee organized under Section 527 of the Internal Revenue Code, but that such contributions must be disclosed and that the group must register as federal PAC. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010).

47. *Doe v. Reed*, 130 S.Ct. 2811, 2820 (2010).

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

49. *Id.* at 2823 (Alito, J., concurring).

*United*. However, it is worth noting that in his dissent in *Austin*, Justice Kennedy was supportive of disclosure as a more tailored regulation. He wrote, “[t]he more narrow alternative of recordkeeping and funding disclosure is available.”<sup>50</sup>

Neither 501(c)(4)s nor 501(c)(6)s are entitled to blanket anonymity. A recent case from 2009 in the DC Circuit makes this crystal clear. The case concerned the constitutionality of a 2007 federal lobbying law<sup>51</sup> which was challenged both facially and as applied to the National Association of Manufacturers (NAM).<sup>52</sup> Under that law, members of NAM who actively participated in planning, supervision or control of Congressional lobbying activities would be disclosed.<sup>53</sup> NAM, which generally keeps its membership confidential, claimed that disclosure of the names of the corporations who actively participated in lobbying Congress would have a chilling effect.<sup>54</sup> The DC Circuit, however, rejected the idea that Supreme Court cases concerning limited

exceptions from disclosure rules provided reason to exempt NAM from disclosure.<sup>55</sup> The Court also stated that the lobbying law was narrowly tailored to better inform Congress about who was behind lobbying campaigns.<sup>56</sup>

In conclusion, case law from *Buckley* to today, clearly stands for the legality and constitutionality of disclosure and disclaimer requirements for political ads, ballot petitions and direct lobbying. And these holdings do not hinge on the tax status of the spender.

### Part III. Statutory Law Also Requires Disclosure

The case law could not be more clear in its endorsement of disclosure of political spending around elections. So was the Dark Election brought to us by poorly drafted statutory laws? As it turns out, the federal elections laws themselves also require robust disclosure not only of the entity making federal political ads (whether independent expenditures or

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50. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J. dissenting).

51. The federal lobbying law challenged was the Honest Leadership and Open Government Act (HLOGA), which applies to all lobbying coalitions and associations and does not hinge on 501(c)(6) status. *National Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 7-8 (D.C. Cir. 2009).

52. *Id.* at 8.

53. *Id.* at 12.

54. *Id.* at 9.

55. *Id.* at 20-22 (“This, then, is a case like *Buckley*, not *NAACP*. As in *Buckley*, the plaintiff has tendered no record evidence of the sort proffered in *NAACP v. Alabama*.”) (internal citation omitted). *NAACP* (and its progeny) holds that if a group will be subject to harassment, then it can be excused from disclosure that would otherwise apply. *See also* *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 98-99 (1982) (protecting individual contributors to widely ostracized minority political parties from harassment by invalidating certain disclosure requirements).

56. *Id.* at 20. (“[T]here is more than a substantial relation between the governmental interest in greater transparency and the information that amended § 1603(b)(3) requires to be disclosed; in fact, the section’s disclosure requirements are narrowly tailored and effectively advance that interest. Moreover. . . the governmental interest in providing information about who is being hired, who is putting up the money, and how much they are spending to influence federal decisionmakers is not just some legitimate governmental interest. It is a vital national interest.”) (internal citations omitted).

electioneering communications), but also the underlying money sources behind the expenditures. For example, *Citizens United* and *McConnell* affirmed the constitutionality of the campaign finance disclosure required by BCRA § 201. Here are the relevant portions of the federal elections law:

[BCRA] SEC. 201. DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.

(a) "(f) DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.—

"(1) STATEMENT REQUIRED.—Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

"(2) CONTENTS OF STATEMENT.—

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

"(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

"(B) The principal place of business of the person making the disbursement, if not an individual.

"(C) The amount of each disbursement of more than \$200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

"(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

...  
"(F) . . . the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.<sup>57</sup>

In short, a plain reading of the meaning of the statute indicates that those spending \$10,000 or more on electioneering communications must disclose that fact to the FEC before the election and must name every donor who provided \$1,000 or more to fund the ad.<sup>58</sup> FECA's older treatment of independent expenditures is also clearly intended to capture underlying donors and not just the reporting entity.<sup>59</sup>

#### Part IV. FEC's Lax Disclosure Requirements

So if the Supreme Court's case law is on the side of disclosure and the federal

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57. Bipartisan Campaign Reform Act of 2002, § 202 (2002), available at <http://news.findlaw.com/ny-times/docs/fec/bpcmpnrfrmact2002.pdf>.

58. See 2 U.S.C. § 434(f)(2)(E)-(F) (2007) (requiring any "person" who makes electioneering communications that aggregate more than \$10,000 during the year to report, among other things, the identity of donors who have contributed at least \$1,000 during the period between the first day of the preceding calendar year and the date of the communication; however, if the disbursement was paid out from a separate bank account that contains only contributions by U.S. citizens or green cardholders made directly to the account for electioneering communications, then only the donors who have contributed at least \$1,000 to that account are disclosed).

59. See 2 U.S.C. § 434(c) (requiring any "person" who makes independent expenditures that aggregate more than \$250 during the year to report, among other things, the identity of donors who have contributed at least \$200 for the purpose of furthering the independent expenditure, a certification that the expenditure was truly independent, and an indication of which candidate is supported or opposed by the expenditure.).

election statutes are also clear on their face that disclosure of donors is required by anyone who pays for independent expenditures and electioneering communications in federal elections, then how could we have a federal election like the 2010 midterm election where the sources of political ads are hidden from the public view? The system falls apart where the rubber meets the road, in the regulations. To be more specific, there can be federal elections with veiled political actors because the FEC's poor regulatory choices enable obfuscation. In addition, as will be discussed in more detail below, the IRS does not require public disclosures of underlying funders to 501(c)(4)s or 501(c)(6)s. Thus any political spending through such groups can be missed by both the FEC's and the IRS's regulations.

### A. Federal PAC Disclosure Requirements<sup>60</sup>

The remainder of this article assumes that after *Citizens United*, corporations and non-profit organizations will spend money on political ads directly from their general treasury funds. However, 501(c)(4)s and 501(c)(6) do retain the right to spend through a PAC. Spending through federal PACs is fully transparent.

Under federal law, a PAC or party committee must itemize its payments for

independent expenditures once the calendar-year total paid to a vendor or other person exceeds \$200 with respect to a particular election.<sup>61</sup> Once a committee's aggregate independent expenditures reach or exceed \$10,000 with respect to a given election at any time up to and including the 20th day before an election, the PAC must file a 48-hour independent expenditure report after the independent expenditure communication is publicly distributed. Once a political committee's aggregate independent expenditures reach or exceed \$1,000 with respect to a given election, and are made fewer than 20 days, but more than 24 hours, before an election, the independent expenditure must be reported to, and received by, the FEC within 24 hours of the time the communication is publicly distributed. These reports must include all independent expenditures with respect to that election that have not been previously disclosed.<sup>62</sup> All reports of independent expenditures must contain the following information: the name and mailing address of the person to whom the expenditure was made,<sup>63</sup> the amount, date and purpose of the expenditure and a statement that indicates whether such expenditure was in support of, or in opposition to, a candidate, to-

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60. Fed. Election Comm'n, *Federal PAC Disclosure Requirements* (2010), [http://www.fec.gov/pages/brochures/indexp.shtml#Reporting\\_IE](http://www.fec.gov/pages/brochures/indexp.shtml#Reporting_IE).

61. 11 C.F.R. §104.3(b)(3)(vii)(A); §104.4(a)-(c).

62. 11 C.F.R. 104.4(b)(2), (e)(2)(ii) and (f); 109.10(c); 109.10(d).

63. Such identification is only made for persons who have received disbursements for independent expenditures from the political committee aggregating over \$200 during the calendar year with respect to a given election. 11 C.F.R. § 104.3(b)(3)(vii)(A) (2009).



gether with the candidate's name and office sought.<sup>64</sup>

In other words, federal PACs must account for every dollar in and every dollar out, and this information is reported to the FEC where the public can find it in the FEC's online database.<sup>65</sup> But because of *Citizens United*, political spending by corporations is no longer required to go through PACs. Instead, corporations can either spend funds on politics directly from their treasury in their own names or they can use less transparent non-profits as a vehicle to spend money in politics.

## B. Federal Electioneering Communication Disclosure

FEC regulations require disclosure by any entity that purchases an electioneering communication in a federal election. However, the FEC has taken a narrow approach to interpreting BCRA's clear language requiring disclosure of underlying funders. Instead of requiring advertisers to name each \$1,000 donor as the statute directs, the FEC has only required the name of donors who specifically earmarked their \$1,000 donations. Since many donors give unrestricted

funds, there are often no "earmarked" donors to report.

FEC electioneering communication disclosures are required of all entities, including 501(c)(4)s and 501(c)(6)s. But to fully understand the current state of regulatory affairs, a little history is necessary to gain perspective. Before *Citizens United*, the FEC applied BCRA § 201 disclosure requirements to certain 501(c)(4)s that were allowed to make electioneering communications under the "MCFL exemption."<sup>66</sup> MCFL 501(c)(4) corporations – called "Qualified Nonprofit Corporations" (QNCs) by the FEC – could already use general treasury funds to pay for campaign ads in federal elections pre-*Citizens United*. But to enjoy the MCFL exemption, the non-profit could not take in money from for-profit corporations, which were themselves banned at the time from spending in federal elections.

MCFL 501(c)(4)s that funded electioneering communications have always been subject to the same reporting requirements as any other funder.<sup>67</sup> In other words, these 501(c)(4)s had to disclose on FEC Form 9<sup>68</sup> not only that they had funded an electioneering communication costing \$10,000 or more, but also the

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64. 11 C.F.R. § 104.3(b)(3)(vii) (2009); 11 C.F.R. § 109.10(e).

65. Fed. Election Comm'n, *FEC Electronic Filing Report Retrieval* (2010), [http://www.fec.gov/finance/disclosure/efile\\_search.shtml](http://www.fec.gov/finance/disclosure/efile_search.shtml).

66. The name of this exemption comes from the 1986 Supreme Court case, *Massachusetts Citizens for Life, Inc. (MCFL)* which held the prohibition on corporate and union treasury spending on independent expenditures found in 2 U.S.C. § 441b could not apply to ideological non-profits that do not take corporate or union money. Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986).

67. Fed. Election Comm'n, *Electioneering Communications Brochure* (Jan. 2010), <http://www.fec.gov/pages/brochures/electioneering.shtml#Application>.

68. FEC Form 9 requires disclosure of donations made for the purpose of electioneering. 11 C.F.R. § 114.14(d)(2) (2010); 11 C.F.R. § 104.20(c)(7) (2010). The corresponding statute, 2 U.S.C. § 434(f)(2), was unsuccessfully challenged as unconstitutional. *Citizens United*, 130 S. Ct. at 914; *Koerber v. Fed. Election Comm'n*, 583 F. Supp. 2d 740, 746 (E.D.N.C. 2008). *Koerber* rejected a preliminary injunction because the

names of any donor who provided \$1,000 or more for the communication.<sup>69</sup> As alluded to above, there is a reporting loop-hole.<sup>70</sup> According to the instructions for Form 9, “[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter ‘0’ (zero).”<sup>71</sup> Therefore, if a 501(c)(4) does not have any earmarked contributions which were given specifically for the electioneering contribution, then the organization does not have to report the source of its funds to the FEC even if that 501(c)(4) ends up funding millions of dollars of political ads.<sup>72</sup>

After *Citizens United* and *WRTL II*,<sup>73</sup> a 501(c)(4) need not be a QNC in order to fund an electioneering communication; now, all 501(c)(4)s, whether funded by for-profit corporations or individuals, can

purchase electioneering communications in federal elections. Moreover, FECA’s definition of “person” includes corporations.<sup>74</sup> Therefore after *Citizens United*, all non-*MCFL* entities (such as 501(c)(4)s and (c)(6)s) are subject to the same disclosure requirements that have been applied to *MCFLs* for years and can take advantage of the same reporting loop-holes that *MCFLs* have used to evade full disclosure of underlying donors.

### C. Federal Independent Expenditure Disclosure Requirements

*Citizens United* also left intact FECA’s disclosure requirements for independent expenditures which were affirmed by *Buckley*. An independent expenditure is an expenditure for a communication “expressly advocating the election or defeat of a clearly identified candidate that is not made in coopera-

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court found that the plaintiffs would not ultimately succeed on a constitutional challenge to the disclosure requirements. *Koerber*, 583 F. Supp at 746 (citing *McConnell*, 540 U.S. at 198).

69. Fed. Election Comm’n, *FEC Form 9 24 Hour Notice of Disbursements / Obligations for Electioneering Communications* (Dec. 2007), <http://www.fec.gov/pdf/forms/fecfrm9.pdf>.

70. See Notice 2007–26, *Electioneering Communications, Federal Election Commission Final Rule and Transmittal of Rule to Congress*, 72 Fed. Reg. 72911 (Dec. 26, 2007), [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-26.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf) (“Donations made for the purpose of furthering an EC [electioneering communication] include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor.”); however, the solicitation prong was invalidated by the DC Circuit in 2009. *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 18 (D.C. Cir. 2009).

71. Fed. Election Comm’n, *Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements for Electioneering Communications)* 4 (undated), <http://www.fec.gov/pdf/forms/fecfrm9i.pdf>.

72. A new FEC rulemaking is in order to broaden disclosure not only for money that was earmarked, but also money that was used to pay for electioneering communications.

73. *WRTL II* allowed non-QNCs to fund electioneering communications as long as the ads were not the functional equivalent of express advocacy. See *WRTL II*, 551 U.S. 449, 481 (2007). *Citizens United* allows all corporations, whether for-profit or not-for-profit, to fund all electioneering communications. See *Citizens United*, 130 S.Ct. at 917.

74. 2 U.S.C.A. § 431(11) (2002) (a “person” includes “an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government. . .”).

tion, 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 or its agents."<sup>75</sup> As *Citizens United* explains, "[i]n *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures."<sup>76</sup>

The FEC requires disclosure of any person or entity funding independent expenditures of \$250 or more as well as contributors who provided \$200 or more for the advertisement.<sup>77</sup> As the FEC mandates, "[i]n the case of a person other than a political committee, [disclosure must include] the identification of each person who made a contribution in excess of \$200 to the person filing such report for the purpose of furthering the reported independent expenditure."<sup>78</sup>

Funders, including *MCFLs*, making independent expenditures have consistently been required to adhere to these disclosure provisions by filing a FEC Form 5.<sup>79</sup> Like the flaws in FEC Form 9, there is a significant reporting loophole

on FEC Form 5. The instructions for the form note that "[the reporting entity must] [p]rovide the requested information for each contribution over \$200 that was made *for the purpose of furthering the independent expenditures*."<sup>80</sup> In other words, only donations over \$200 that were designated or earmarked for the independent expenditures are reported to the FEC. Thus, going forward, the FEC may apply the same disclosure requirements for all independent expenditures, but they are also hampered by the Form 5 loopholes which thwart meaningful disclosure of underlying donors.<sup>81</sup> The current FEC rules facilitate Alice in Wonderland Cheshire Cat reports, where \$1 million could be spent on a federal political ad and yet no one is listed as an underlying donor.

One way to strengthen the federal disclosure on both FEC Form 5 and FEC Form 9 is to require disclosure of all corporate funders of the reporting spender regardless of whether the corporate funds were earmarked or not. Such blanket disclosure may sweep in donors who have not given to support the ad in question.

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75. Fed. Election Comm'n, *Coordinated Communications and Independent Expenditures Brochure 7* (2009), [http://www.fec.gov/pages/brochures/ie\\_brochure.pdf](http://www.fec.gov/pages/brochures/ie_brochure.pdf); 11 C.F.R. §100.16(a) (2010).

76. *Citizens United*, 130 S.Ct. at 914.

77. Fed. Election Comm'n, *Coordinated Communications Brochure*, *supra* note 75, at 8 ("Any other person (individual, partnership, qualified non-profit corporation or group of individuals) must file a report with the FEC on FEC Form 5 at the end of the first reporting period in which independent expenditures with respect to a given election aggregate more than \$250 in a calendar year. . .").

78. *Id.* at 10 (citing 11 CFR 104.3(b)(3)(vii) and 109.10(e)).

79. Fed. Election Comm'n, *FEC Form 5 Report of Independent Expenditures Made and Contributions Received to be Used by Persons (Other than Political Committees) including Qualified Nonprofit Corporations* (2009) <http://www.fec.gov/pdf/forms/fecfrm5.pdf>.

80. Fed. Election Comm'n, *Instructions for FEC Form 05 and Related Schedules*, 3 (Sept. 2005) (emphasis added).

81. A new FEC rulemaking is in order to broaden disclosure not only for money that was earmarked, but also money that was used to pay for independent expenditures.

The Congressional Research Service has argued:

[D]onors who make non-earmarked contributions are supporting the entirety of the organization's activities, and it might be questioned whether the government can require the public disclosure of their identities simply because the organization happens to engage in limited amounts of campaign activity. Such an argument might be extended to the disclaimer requirements as well. On the other hand, it is arguably unclear whether this argument has constitutional merit [because] [t]he Court has generally looked favorably on disclosure and disclaimer requirements. . .<sup>82</sup>

So while it is an open question of law how a court would rule on such a requirement to reveal non-earmarked corporate donations, as detailed above in the case law section, the Court has been consistently supportive of robust disclosure in the campaign finance and election contexts from *Buckley v. Valeo* to *Doe v. Reed*.

#### D. FEC Disclaimer Requirements

In addition to the disclosure requirements that the FEC applies to the funders of electioneering communications and independent expenditures, the FEC also requires specific disclaimers on political broadcast advertisements. These disclaimer requirements are sometimes

known as “stand by your ad” requirements. These disclaimer requirements for electioneering communications were just upheld by the Supreme Court eight to one in *Citizens United* as being fully constitutional.

Federal independent expenditures must include the following types of disclaimers:

For messages that are not authorized, and are not financed by a candidate or a candidate committee, the disclaimer statement must:

- State that the communication is not authorized by any candidate or the candidate's committee; and
- Identify the name and street address, telephone number or World Wide Web address of the person who financed the communication.<sup>83</sup>

For electioneering communications, the required disclaimers are quite similar:

##### *Radio*

The disclaimer notice must include the name of the political committee or person responsible for the communication and any connected organization. Example, “ABC is responsible for the content of this advertising.” 11 CFR 110.11(c)(4).

##### *Television*

The disclaimer . . . must be conveyed by a “full-screen view of a representative of the political committee or other person making the statement,” or a “voice-over” by the representative.<sup>84</sup>

The disclaimer statement must also appear in writing at the end of the communication in a “clearly readable manner” with a “reasonable degree of color contrast” be-

82. L. PAIGE WHITAKER, ERIKA K. LUNDER, KATE M. MANUEL, JACK MASKELL, & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V. FEC*: CONSTITUTIONAL AND LEGAL ISSUES 6 (2010), <http://www.fas.org/sgp/crs/misc/R41096.pdf>.

83. Fed. Election Comm'n, *Coordinated Communications Brochure*, *supra* note 75, at 10; 11 C.F.R. §109.11, 110.11(a)(2) and (b)(3) (2010).

84. Fed. Election Comm'n, *Special Notices on Political Ads and Solicitations* (Oct. 2006), <http://www.fec.gov/pages/brochures/notices.shtml#disclaimers>; 11 C.F.R. §110.11(c)(4)(ii)(2010) (2 U.S.C. § 441d(d)(2)).

tween the background and the printed statement “for a period of at least four seconds.”<sup>85</sup>

These federal stand-by-your-ad disclaimer requirements assist the voter in discerning who is funding a given political advertisement.

After *Citizens United*, bills were introduced in the 111th Congress to increase the disclaimer requirements for political ads that are funded by corporations and labor unions. One such bill, H.R. 4527, would have required the corporate or union logo to appear in the ad along with a picture of the CEO or labor leader.<sup>86</sup> Also, the DISCLOSE Act (H.R. 5175) introduced by Senator Schumer and Congressman Van Hollen included a new requirement that the top five funders also be listed in campaign ads so that for-profit corporations could not hide behind the name of another person or entity when funding political advertisements.<sup>87</sup> Thus far, these federal bills have not become law. However, Connecticut, a national leader in this area, changed its law to provide for top five funder disclaimers.<sup>88</sup> A sample of the Connecticut law can be found at Appendix A.

## Part V. Does Tax Status of a Political Funder Matter for an Election Regulator?

From the democratic perspective, the determinative question when it comes to the disclosure of campaign finance should be: what types of disclosure will facilitate an educated and informed electorate? In accordance with the Supreme Court precedent described above, the correct answer for Congress is to require disclosure of the funders of partisan political advertisements no matter what the tax status of the spender.

The FEC has regulated the disclosure of all “persons”, including non-profit corporations making independent expenditures for decades, nonetheless there is confusion generated by the fact that the FEC and IRS have overlapping yet non-identical jurisdiction over the same entities. Moreover, the IRS and the FEC are not in perfect harmony. Whether contributors are disclosed by the IRS to the public and whether expenditures will be taxed depends on which type of tax exempt status is adopted (for example, 501(c)s face different tax consequences than 527s).<sup>89</sup> Meanwhile, the FEC’s dis-

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85. *Id.*; 11 C.F.R. § 110.11(c)(4).

86. H.R. 4527 (111th Cong. 2d Sess. 2010).

87. H.R. 5175 (111th Cong.) (requiring the top five contributors to an organization that purchases political advertising will be listed on the screen of the advertisement.); see also Justin Levitt, *Confronting the Impact of Citizens United*, Loyola Law School Los Angeles Legal Studies Paper No. 2010-39, 10 (2010), <http://ssrn.com/abstract=1676108> (“Consider a few simple elements designed to appear, in standardized form, within a communication itself: a sort of ‘Nutrition Facts’ label for democracy. Such a label would signal the importance of the information it contains, as well as providing the information itself. This, in turn, would improve the chance that voters pay attention, increasing the cognitive processing.”).

88. Connecticut Public Act No. 10-187, “An Act Concerning Independent Expenditures” (2010).

89. See Ezra W. Reese, *The Other Agency: The Impact of Recent Federal Law Enforcement on Nonprofit Political Activity*, 58 TAX ANALYSTS 131 (2007), available at <http://www.moresoftmoneyhardlaw.com/clientfiles/Reese%20EOTR%20Article.pdf> (“Section 501(c)(4) social welfare organizations may engage in some political

closure regulations are triggered by the type of speech (e.g., independent expenditures and electioneering communications) and not by the type of speaker (501(c)(4)s or 501(c)(6)s).

The IRS has a revenue-generating interest in regulating tax-exempt entities to ensure they are not abusing their tax-exempt status (or in the case of 501(c)(3)s their ability to receive tax deductible contributions). Unlike the FEC, the IRS is not interested in the integrity of elections. Each tax status is subject to particular regulations about how much (if any) political activity that entity can do without either jeopardizing its tax status or triggering an excise tax liability. From the point of view of the IRS, tax-exempt organizations fall on a spectrum with respect to political engagement. On one end of the spectrum, 501(c)(3)s are barred from political campaign activities. Meanwhile 501(c)(4)s and (6)s may engage in political campaign activities so long it is not the organization's primary purpose. Once a tax-exempt organization has political campaign activity as its primary purpose, it is a 527. One source of the different treatment among the federal agencies is the IRS uses a facts and circumstances test for non-profit political intervention while the FEC regulates sources of independent expenditures that contain express advocacy and election-

eer communications as defined under federal law regardless of tax status. Although the differences in tax treatment have no bearing on the scope of disclosure an election regulator can require, much ink has been spilled over what disclosure requirements have been and can be applied to various types of tax-exempt entities. Below is a short overview of those facts.

## **Part VI. The IRS's Perspective on Political Activity by Tax Exempt Organizations**

### **A. Four Types of Tax Exempt Organizations (501(c)(3)s, 501(c)(4)s, 501(c)(6)s and 527s)**

#### **1. 501(c)(3)s (Public Charities)**

According to the IRS, a charitable 501(c)(3) organization may not engage in political campaign activity but may conduct limited lobbying.<sup>90</sup> As the IRS explains, 501(c)(3)s "may not attempt to influence legislation as a substantial part of its activities[,] . . . may not participate in any campaign activity for or against political candidates[,] [and they] are eligible to receive tax-deductible contributions. 501(c)(3) organizations are restricted in how much political and legislative (lobbying) activities they may conduct."<sup>91</sup> Thus, 501(c)(3)s stand on one

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activity, but their primary purpose cannot include 'direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.' Labor unions and business leagues are subject to similar limitations. The interpretation and enforcement of this phrase is also dependent on 'all the facts and circumstances.'" (citing Rev. Rul. 2004-6, 2004-1 C.B. 328.).

90. 26 U.S.C. § 501(c)(3).

91. IRS, *Exemption Requirements - Section 501(c)(3) Organizations* (Dec. 7, 2009), <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html>.

end of the partisan political campaign activity spectrum where such activity is barred by the IRS.

## 2. 501(c)(4)s (Social Welfare Organizations)

A 501(c)(4) is a social welfare organization that may engage in a certain amount of political campaign activity so long as it is not its primary activity.<sup>92</sup> According to the IRS:

[A 501(c)(4)] must not be organized for profit and must be operated exclusively to promote social welfare. . . . To be operated exclusively to promote social welfare, an organization must operate primarily to further the common good and general welfare of the people of the community. . . . Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes. Thus, a section 501(c)(4) social welfare organization may further its exempt purposes through lobbying as its primary activity without jeopardizing its exempt status. . . . The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity. However, any expenditure it makes for political activities may be subject to tax under section 527(f).<sup>93</sup>

Social welfare organizations organized under IRC Section 501(c)(4) are in the middle of the political campaign activity spectrum. They can do some politi-

cal activity, but if it becomes the organization's primary activity, then the organization will become a 527 and be subject to the rules and taxes that apply to a 527.

## 3. 501(c)(6)s (Trade Associations)

501(c)(6)s, including trade associations, can also participate in a certain amount of political campaign activity so long as it is not its primary activity.<sup>94</sup> According to the IRS:

Section 501(c)(6) of the Internal Revenue Code provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . . Trade associations and professional associations are business leagues. To be exempt, a business league's activities must be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons. No part of a business league's net earnings may inure to the benefit of any private shareholder or individual and it may not be organized for profit to engage in an activity ordinarily carried on for profit. . . . Chambers of commerce and boards of trade are organizations of the same general type as business leagues. They direct their efforts at promoting the common economic interests of all commercial enterprises in a trade or com-

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92. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

93. IRS, *Social Welfare Organizations* (Sept. 15, 2009), <http://www.irs.gov/charities/nonprofits/article/0,,id=96178,00.html>; the IRS regulations provide that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." See Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) and (ii).

94. Treas. Reg. § 1.501(c)(6)-1 (1995).

munity.<sup>95</sup> Participating directly or indirectly, or intervening, in political campaigns on behalf of or in opposition to any candidate for public office does not further exempt purposes under Internal Revenue Code section 501(c)(6). However, a section 501(c)(6) business league may engage in some political activities, so long as that is not its primary activity. However, any expenditures it makes for political activities may be subject to tax under section 527(f).<sup>96</sup>

501(c)(6)s stand in the same place as 501(c)(4)s on the political campaign activity spectrum for the IRS. Trade associations and business leagues can do some political campaign activity, but it cannot become their primary activity.

#### 4. 527s (Political Organizations)

Finally, 527s are organizations whose primary purpose is political.<sup>97</sup> According to guidance from the IRS: “Political organizations are organized and operated primarily to accept contributions and make expenditures for the purpose of influencing the ‘selection, nomination, election, or appointment of any individual to Federal, State, or local public office or office in a political organization, or the election of

Presidential electors.” Political organizations include . . . PACs[.]”<sup>98</sup> 527s stand at the opposite extreme of political campaign activity spectrum from the 501(c)(3)s. A 527 can do as much political activity as it desires, but as will be detailed more below remains subject to public disclosure of its contributors by the IRS.<sup>99</sup> Many 527s qualify as political action committees (PACs) under federal or state law.

### B. IRS Disclosure of Political Activity by Tax Exempt Organizations

The IRS requires different types of disclosures from each of the four types of tax exempt organizations mentioned above.

#### 1. 501(c)(3)s IRS Disclosure

Public charities organized under Section 501(c)(3) of the IRC must disclose their lobbying activities. 501(c)(3)s must file Form 990 annually, which after the redesign in 2007, requires a total lobbying expenditures on new Schedule C.<sup>100</sup>

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95. IRS, *Business Leagues* (Aug. 31, 2009), <http://www.irs.gov/charities/nonprofits/article/0,,id=96107,00.html>.

96. IRS, *Political Campaign Activities - Business Leagues* (Nov. 6, 2009), <http://www.irs.gov/charities/nonprofits/article/0,,id=163922,00.html>.

97. 26 U.S.C. § 527; Treas. Reg. § 1.527-6(f).

98. IRS, *Definition of Political Organization* (October 31, 2007), <http://www.irs.gov/newsroom/article/0,,id=103480,00.html>.

99. DeNicola et al., *supra* note 12, at 12 (“Heightened political activity on the part of some independent 527s has led to an increase in regulation. This greater regulation has thus made 501(c)(4) and 501(c)(6) organizations more attractive vehicles for some donors.”).

100. IRS, *Instructions for Form 990 Return of Organization Exempt From Income Tax* (2009), <http://www.irs.gov/pub/irs-pdf/i990.pdf>; IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, <http://www.irs.gov/pub/irs-tege/f990rschc.pdf>; IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, <http://www.irs.gov/pub/irs-pdf/i990sc.pdf>.



Because 501(c)(3)s are barred from partisan political activity, they do not report political activity on Form 990.<sup>101</sup> They have to disclose their contributors who gave over \$5,000 on Form 990 to IRS, but this information is not publicly disclosed.<sup>102</sup>

## 2. 501(c)(4)s (Social Welfare Organizations) IRS Disclosure

501(c)(4) social welfare organizations must disclose their lobbying and political campaign activities on Form 990 including a narrative description of such activity on Part IV of the form.<sup>103</sup> They must also detail in particular, under Part I-C of the Form 990, the names, addresses and employer identification numbers of all 527 political organizations to which payments were made and whether any funds were delivered to a Separate Segregated Fund (SSF) or Political Action Committee

(PAC).<sup>104</sup> They have to disclose their contributors who gave over \$5,000 on Form 990 to IRS, but this information is not publicly disclosed.

## 3. 501(c)(6)s (Trade Associations) IRS Disclosure

501(c)(6) trade associations and business leagues must disclose their lobbying and political campaign activities on Form 990 including a narrative description of such activity on Part IV of the form.<sup>105</sup> They must also detail in particular, under Part I-C of the Form 990, the names, addresses and employer identification numbers of all 527 political organizations to which payments were made and whether any funds were delivered to a SSF or PAC.<sup>106</sup> They have to disclose their contributors who gave over \$5,000 on Form 990 to IRS, but this information is not publicly disclosed.

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101. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities for Organizations Exempt from Income Tax Under Section 501(c) and Section 527*, <http://www.irs.gov/pub/irs-tege/f990rschc.pdf> (instructing 501(c)(3)s to not to fill in Part I-C regarding political expenditures).

102. Whitaker, et al., *supra* note 82, 6 n.41 (“Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least \$5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization). IRC § 6104(b), (d).”).

103. There are no specifics about what must be included in the narrative description according to the Form 990’s instructions. See IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, <http://www.irs.gov/pub/irs-pdf/i990sc.pdf>.

104. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, <http://www.irs.gov/pub/irs-tege/f990rschc.pdf> (See instructions under Part I-C, line 5.)

105. There are no specifics about what must be included in the narrative description according to the Form 990’s instructions. See IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, <http://www.irs.gov/pub/irs-pdf/i990sc.pdf>.

106. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, <http://www.irs.gov/pub/irs-tege/f990rschc.pdf> (See instructions under Part I-C, line 5.).

#### 4. 527s (Political Organizations) IRS Disclosure

After a change in the law in 2000, 527s are required to make very detailed public disclosure of their contributions and political expenditures on Form 8872.<sup>107</sup> As one treatise explains, “A political organization which accepts a contribution, or makes an expenditure, for an exempt function [ ] during any calendar year must submit reports to IRS, on Form 8872, providing information on the organization’s contributions, contributors, expenditures and expenditure recipients. . . .”<sup>108</sup> Forms 8872 from 527s are searchable on the IRS’s webpage.<sup>109</sup> While the IRS’s disclosure of contributions to and expenditures from 527s is extensive, the reports often are not disclosed in time to inform a voter: “[u]nfortunately, voters are not privy to most of the financial transactions of 527s involved in [elections], as the IRS’s database is neither easily searchable, nor timely (the pre-election Form 8872 is not disclosed until the January after the elec-

tion).”<sup>110</sup> Thus, even though the IRS has robust contributor disclosure to the public for 527s, it does not serve the role of educating voters because it is not available before most federal elections.

#### 5. 501(c)(3)s with 501(c)(4) and 527 Arms

As noted above, 501(c)(3)s cannot engage in political campaign activity. Instead, if they want to engage in political campaign activity they need to establish an affiliated 501(c)(4) to conduct the political spending.<sup>111</sup> This requirement of public charities’ establishing an affiliated 501(c)(4) to engage in partisan politicking was upheld by the Supreme Court in *Reagan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983).<sup>112</sup>

In some cases, 501(c)(3)s have established an affiliated 501(c)(4), which in turn creates a 527 to allow them to engage in a greater amount of political activity.<sup>113</sup> “Often 501(c)(4) organizations are affiliated with 501(c)(3) corporations, an arrangement that allows the charita-

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107. IRS, *Instructions for Form 8872 Political Organization Report of Contributions and Expenditures* (Jan. 2007), <http://www.irs.gov/pub/irs-pdf/i8872.pdf>; Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, *supra* note 18, at 66 (complaining “[w]ithin three months of their introduction, amendments to section 527 adding notification and disclosure requirements became law, without formal legislative history.”).

108. *Political Organizations*, 34 Am. Jur. 2d Federal Taxation ¶ 20658 (Jan. 2010) (internal citations omitted).

109. IRS, *Political Organization Filing and Disclosure* (2010), <http://www.irs.gov/charities/political/article/0,,id=109644,00.html> (follow the link entitled Search Political Organization Disclosures).

110. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 319-20 (2005).

111. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1981).

112. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, *supra* note 18, at 97 (noting “[c]lose examination of *Citizens United* reassures that it did not undermine the holding or reasoning of [*Reagan v. Taxation with Representation*].”).

113. Schadler, *supra* note 23, at 28 (“In *Reagan v. Taxation with Representation*, the Supreme Court ruled that a 501(c)(3) organization may establish a separate 501(c)(4) to expand its capacity to lobby. . .”).

ble organizations an outlet for their political activities, and the 501(c)(4) can create a . . . 527. . . . [I]ngenious tax lawyers [can] construct complicated arrangements . . . to accomplish political objectives while erecting a virtually impenetrable curtain over the identity of those funding the organizations.”<sup>114</sup> These 3-part structures are manageable only by the most sophisticated of non-profits, however, the 501(c)(3)’s tax deductible money cannot be used by the affiliated 501(c)(4) or 527 for political campaign activity.<sup>115</sup> The three types of affiliated entities can share space and common solicitations.<sup>116</sup>

### C. IRS Taxation and Political Activity by Tax Exempt Organizations

#### 1. Tax Implications for 501(c)(3)s Political Activity

501(c)(3)s can lose their tax exempt status if they engage in political cam-

paign activities or could be subject to penalties.<sup>117</sup> As this article explains: “Violation of this prohibition can result in a penalty against the organization and against the organization managers who agree to the political activity; the IRS also has the authority, in the case of ‘flagrant’ political campaign activity, to seek an injunction in federal court to prevent future political expenditures. Violation can also result in the revocation of exemption.”<sup>118</sup> The threat of loss of status is not a theoretical one. Churches that have engaged in political spending have had their tax-exempt status revoked.<sup>119</sup> Thus far, the Supreme Court has supported the strict limits on 501(c)(3)s’ political engagement.<sup>120</sup> Whether this restriction on political engagement by 501(c)(3)s will survive the reasoning of *Citizens United* is an open question.

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114. Garrett & Smith, *supra* note 110, at 310 (internal citations omitted).

115. Schadler, *supra* note 23, at 7 (For example, “a 501(c)(3) may not do anything indirectly through participating in a coalition that it may not do individually.”); *id.* at 28 (“the 501(c)(3) must be able to demonstrate that it is not subsidizing, directly or indirectly, the political work of its affiliated 501(c)(4) or the 501(c)(4)’s affiliated political organization.”).

116. *Id.* at 30 (“A 501(c)(3) and 501(c)(4) may share employees, equipment and office space.”).

117. Donald B. Tobin, *Political Advocacy and Taxable Entities: Are they the Next ‘Loophole?’*, 6 FIRST AMENDMENT L. REV., 41, 51 (Fall 2007) (“In order to ensure that tax-exempt status is not used as a means of subsidizing political campaign activity, the tax code prohibits 501(c)(3) organizations from participating or intervening in ‘any political campaign on behalf of (or in opposition to) any candidate for public office.’ There is no de minimus exception to this rule, and even a small amount of campaign activity is prohibited.”).

118. Reese, *supra* note 89, at 131 (internal citations omitted).

119. See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (upholding revocation of church’s tax exempt status for its purchase of two full page political ads in a news paper.).

120. *Reagan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (holding “Congress has not violated [an organization’s] First Amendment rights by declining to subsidize its First Amendment activities.”); see also Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(C)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1315 (Apr. 2007) (“In order to deal with the increase in alleged violations of the political campaign ban during the 2004 elections, the IRS instituted a compliance initiative. As part of the compliance initiative, the IRS examined 110 501(c)(3) organizations that were alleged

## 2. Tax Implications for 501(c)(4)s Political Activity

In contrast to 501(c)(3)s, which are barred from political interventions, 501(c)(4)s can engage in a measure of political activities.<sup>121</sup> However, a 501(c)(4) that uses a substantial part of its resources on political campaign activities may lose its tax-exempt status.<sup>122</sup> A “501(c)(4)[s]. . . primary purpose cannot include ‘direct or indirect participation or intervention in political campaigns[.] . . . If engaging in political intervention were to constitute a primary activity of a section 501(c)(4) organization, the IRS could revoke its tax-exempt status (either prospectively or retroactively), which could result in significant monetary consequences.”<sup>123</sup>

According to the Alliance for Justice (which counsels non-profits on complying with IRS regulations), “[n]o clear test exists for determining when political activity becomes an organization’s primary purpose. If political activity expenditures

exceed 50 percent of total program expenditures, the primary purpose most likely is *not* social welfare.”<sup>124</sup> However, 501(c)(4)s’ political activity may trigger tax consequences. As one article explains, “political intervention expenditures are subject to a tax at the highest corporate rate (currently 35 percent) on the lesser of (i) the net investment income of the organization for the taxable year in which those expenditures are made, or (ii) the aggregate amount of expenditures made by the organization for political intervention during the taxable year.”<sup>125</sup> Furthermore, individual (not corporate) donors to 501(c)(4)s who give large donations may trigger gift taxes.<sup>126</sup>

Non-profits organized as 501(c)(4)s that engage in too much political activity will likely be deemed 527s by the IRS. As another article states, “an organization that fails to be a 501(c)(4) because it primarily engages in political activity will be treated as a 527, and that 527 is not an elective provision. . . . The organization that guesses wrong stands not only to

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to have violated the campaign ban. Of the 82 cases closed by the IRS at the time the report was issued, 59 (72%) were found to be in violation of the campaign prohibition.”)

121. Revenue Ruling 81-95 states affirmatively, “an organization may carry on lawful political activities and remain exempt under § 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.”

122. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i), (ii) (1959).

123. Reese, *supra* note 89, at 131 (internal citations omitted).

124. Schadler, *supra* note 23, at 11.

125. Reese, *supra* note 89, at 132 (internal citations omitted).

126. William P. Barrett, “Hey, Secret Big Political Donor, Don’t Forget The 35% Gift Tax,” *FORBES*, Oct. 14 2010, <http://blogs.forbes.com/williambarrett/2010/10/14/hey-secret-big-political-donor-dont-forget-the-35-gift-tax/>; I.R.C. § 2501 gift tax is imposed on the gratuitous transfer of cash and property by individuals; it does not apply to transfers made by corporations. See Alliance for Justice, “Contributions to Nonprofits and the Gift Tax”, (Jun. 2009), <http://www.afj.org/assets/resources/nap/gift-tax-fact-sheet.pdf>, but see Ellen P. Aprill, “Section 501(c)(4) Organizations, the Gift Tax, and Election Law Disclosure,” Loyola Law School Los Angeles Legal Studies Paper No. 2010-50 (Nov. 2010) (addressing the ambiguity of whether the gift tax applies to donations to 501(c)(4)s); Ben Smith IRS Gift Tax Move Could Hit New Anonymous Groups, *POLITICO*, May 11, 2011 (noting that the IRS has begun to enforce the gift tax on 501(c)(4) donors).

lose its 501(c)(4) status but also to face severe penalties for failure to comply with the registration and disclosure requirements of § 527.<sup>127</sup> Therefore, any 501(c)(4) that inadvertently turns into a 527 by engaging in political campaign activity as its primary activity is subject to the more rigorous public IRS disclosure applicable to a 527.

Taxpayers do not have a private right of action to sue 501(c)s that may be abusing their status, but taxpayers who suspect that a non-profit may be abusing its exempt status can raise their concerns with the IRS. As Professor Aprill explains, “[t]axpayers do not have the option of supplementing IRS enforcement efforts by suing organizations to challenge their exempt status. They lack standing to do so. *See In re United States Catholic Conference*, 885 F.2d 1020 (1989), *cert. denied* 495 U.S. 918 (1990). Taxpayers can, however, file a complaint with the IRS if they believe that the activities or operations of a tax-exempt organization are inconsistent with its tax-exempt status.”<sup>128</sup> Such taxpayer complaints have already been filed against a 501(c)(4) operating in the 2010 election.<sup>129</sup>

### 3. Tax Implications for 501(c)(6)s Political Activity

Federal law pre-*Citizens United* required 501(c)(6) trade associations to pay for express advocacy through a PAC. As a PLI practice guide from 2007 indicates, “Generally, political involvement of trade associations is limited to the solicitation of voluntary contributions to a separate segregated fund or PAC that is established and administered by a trade association. As a consequence, transfers of [trade association] dues receipts to a PAC are severely restricted.”<sup>130</sup> This funding restriction on independent expenditures by trade associations is likely unconstitutional after *Citizens United*. 501(c)(6)s cannot, however, have political campaign activities as their primary activity. Once they do, they risk losing their tax status and just like a political 501(c)(4), a political 501(c)(6) may be deemed to a 527.<sup>131</sup>

### 4. Tax Implications for 527s Political Activity

Under the tax code, 527s must either disclose their contributors and expenditures or be subject to a 35% tax.<sup>132</sup>

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127. Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 107-08 (2004) (internal citations omitted) (referencing IRS Field Service Advice 2000-37-040).

128. Aprill, “Background on Nonprofit, Tax-Exempt Section 501(c)(4) Organizations,” *supra* note 17, at 4.

129. Dan Eggen, *Campaign Watchdogs Accuse Top Conservative Group of Violating Tax Laws*, WASH. POST, Oct. 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100501790.html> (noting Campaign Legal Center and Democracy 21 have filed a complaint with the IRS against American Crossroads and Crossroads GPS).

130. Kenneth A. Gross, Ki P. Hong & Lawrence M. Noble, *Political Activity by Trade Associations*, 1624 PLI Corporate Law and Practice Course Handbook Series 325, 333 (Oct. 2007) (internal citations omitted).

131. Rev. Rul. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for § 501(c)(4) status); Gen. Couns. Mem. 34233 (Dec. 30, 1969) (applying similar reasoning to § 501(c)(6) organizations).

132. 26 U.S.C. § 527(i)(1); 26 U.S.C. § 527(j)(3); § 527(j)(1).

Under section 527(i), an organization must give formal notice to the Secretary of the Treasury in order to receive tax-exempt treatment for campaign-related income. 26 U.S.C. § 527(i)(1). Under section 527(j), such an organization must disclose the name, address and occupation of each contributor who gives more than \$200 in the aggregate, as well as the name and address of each recipient of more than \$500 in aggregate expenditures. 26 U.S.C. § 527(j)(3). If an organization that gives notice under section 527(i) fails to make the required disclosures, it must pay the highest corporate tax rate on “the amount to which the failure relates.” 26 U.S.C. § 527(j)(1).<sup>133</sup>

A few groups have chosen to pay the tax rather than disclose.<sup>134</sup> Those 527s who do disclose do so using Form 8872.<sup>135</sup> 527s are not subject to the gift tax.<sup>136</sup>

The IRS treatment of tax exempt organizations as a whole creates a structure where public charities, which are entitled raise funds through tax-deductible contributions, may not engage in any political campaign activities. Trade associations can engage in some politics provided it is not their primary purpose, but there is strong tax incentive to avoid

this activity (since this activity may be taxed and the portion of dues attributable to this activity is not deductible as a business expense by members).<sup>137</sup> Instead, they, like 501(c)(4) social welfare organizations, are incentivized to create SSFs or PACs for their political spending which are completely transparent.<sup>138</sup>

### Part VII. Evidence of the Non-Profit Disclosure Loophole Problem

Even before *Citizens United*, political spending by tax exempt entities was sizable in the 2008 and 2004 federal election cycles. According to the Campaign Finance Institute, 501(c)s and 527s spent more than \$400 million in the 2008 federal elections, slightly down from \$426 million in 2004.<sup>139</sup> Of those, \$60 million was from 501(c)s in 2004 and \$196 million was from 501(c)s in 2008. While the totals are not in yet for the 2010 midterm, press reports on spending in

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133. *Mobile Republican Assembly v. U.S.*, 353 F.3d 1357, 1360 (11th Cir. 2003) (upholding disclosure to IRS under IRC Sec. 527).

134. Garrett & Smith, *supra* note 110, at 319 (“The Center for Responsive Politics has determined that a few dozen 527s have used this provision to avoid disclosure. . .”).

135. IRS, *Instructions for Form 8872* (Jan. 2007), <http://www.irs.gov/pub/irs-pdf/i8872.pdf>.

136. IRC § 2501(a)(5) exempts contributions to 527s from the gift tax.

137. See IRC § 162(e) (disallowing deductions for political spending as an exception to the IRC 162(a) which allows deductions for certain ordinary and necessary business expenses). IRC § 162(e) applies to 501(c)(6) dues. See also *American Soc’y of Ass’n Executives v. U.S.*, 195 F.3d 47 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1108 (2000).

138. Aprill, *Section 501(c)(4) Organizations, the Gift Tax, and Election Law Disclosure*, *supra* note 126, at 50 (“to the extent an organization exempt under section 501(c) does engage in politicking using monies from its general funds, the organization is subject to tax under section 527(f) on the lesser of their net investment income or the amount spent on politicking. They can avoid this section 527(f) tax, however, if they maintain a separate segregated fund for all funds to be used for politicking.”); 26 U.S.C. § 527(f); Treas. Reg. § 1.527-6(f).

139. Press Release, Campaign Finance Institute, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election* (Feb 25, 2009), <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221>.

midterm already indicate that these records are likely to be shattered.<sup>140</sup>

Recent history warns that when regulators fail to craft tightly-worded disclosure requirements that capture all political funders, some 501(c)(4)s and 501(c)(6)s exploit these loopholes to fund political speech anonymously. This occurred with federal sham issue ads before BCRA;<sup>141</sup> it has also occurred in state after state where loose disclosure rules have failed to capture political funding by non-PACs such as 501(c)(4)s and 501(c)(6)s. By contrast, see Appendix A for sample language from Connecticut which requires detailed reporting from entities funding independent expenditures.

### A. Daisy Chains and Russian Dolls

Modern, post-Watergate campaign finance law was premised on political spending through transparent political action committees since federal political spending through corporations was largely illegal in the 1970s under the Taft Hartley, the Tillman Act and FECA.<sup>142</sup> Not surprisingly, modern campaign finance disclosure rules have not kept up with the shell game of moving money

around before it is spent on a political ad to avoid public accountability.

The practice of giving through many entities to hide the true funder of a political spending is a long standing campaign finance problem which has been made worse by *Citizens United*. Before *Citizens United*, both corporations and trade association had to give through transparent PACs in federal elections or go through the ruse of sham issue ads. Now they can fund express advocacy without the discipline or disclosure of a PAC.<sup>143</sup>

Professors Elizabeth Garrett and Daniel A. Smith detail this problem of veiled political actors, noting that “[c]omplicated arrangements consisting of nonprofit corporations, unregulated entities, and unincorporated groups can lead to structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money.”<sup>144</sup> One way to address this “daisy chain” or “Russian doll” problem where the reporting organization is not the original funder is to adopt a disclaimer that requires not only the name of the reporting organization but also the names of the top funders within the ad itself. This approach has been advocated by Congressional leaders

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140. Jim Kuhnhenh, *GOP Groups Plan \$50 Million Advertising Drive*, MSNBC, Oct. 13, 2010 (reporting 501(c)(4)s American Crossroads and Crossroads Grassroots Policy Strategies have raised \$56 million and the 501(c)(6) Chamber of Commerce has spent \$20 million).

141. HOLMAN & McLOUGHLIN, *supra* note 35, at 10-11.

142. See *United States v. U.S. Brewers Ass’n*, 239 F. 163 (W.D. Pa. 1916) (upholding the Tillman Act and finding “[t]hese artificial creatures [e.g., corporations] are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.”); Pub. L. No. 80-101, 61 Stat. 159 (1947); 2 U.S.C. § 441b.

143. See Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, 7 (Brennan Center 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1550990](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990).

144. Garrett & Smith, *supra* note 110, at 296.

Senator Schumer and Congressman Van Hollen as a desirable change in federal law in the wake *Citizens United*.<sup>145</sup> When it comes to disclaimers, the states beat the federal government to the punch. For example, in the wake of *Citizens United*, Connecticut adopted this “top-funders” disclaimer approach to capture those funders that try to hide behind a benign sounding organization.<sup>146</sup>

Another problem is the use of misleading names which may make a voter think that the funder is someone else entirely. Courts— including the Supreme Court— generally agree that voters need to know who is funding matters on the ballot. Professors Garrett and Smith explain the courts’ hostility to stealth political spending through misleading fronts: “In *McConnell*, the [Supreme] Court was particularly concerned that interest groups had run advertisements to influence candidate elections and yet had hidden their sponsorship behind ‘dubious and misleading names.’”<sup>147</sup> As noted earlier, the Supreme Court’s hostility to secretive political spending has been

echoed again in more recent cases such as *Citizens United* and *Doe v. Reed*.

The abuse of front groups could be curbed if simple disclaimer rules required disclosure of big funders. As the Brennan Center noted in Congressional testimony, front groups can be incredibly misleading to the voting public: “In a recent Colorado ballot measure election. . . a group called ‘Littleton Neighbors Voting No’ spent \$170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. When the disclosure reports for these groups were filed, it was revealed that ‘Littleton Neighbors’ was exclusively funded by Wal-Mart, and not a grass roots organization.”<sup>148</sup> But without disclaimers which include the names of top-funders, the public is easily misled by ads produced by a benign sounding name. And this problem of hidden donors may be masking donations from for-profit companies in general and publicly traded corporations in particular. Remember pre-*Citizens United* and pre-*Wisconsin Right to Life II*, in order for a 501(c)(4) to take advantage of the *MCFL* exemption, they had to assert to the FEC that they

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145. H.R. 5175, *supra* note 87; see also President Barack Obama, “Weekly Address: No Corporate Takeover of Our Democracy” (Aug. 21, 2010), <http://www.whitehouse.gov/blog/2010/08/21/weekly-address-no-corporate-takeover-our-democracy> (supporting passage of bill requiring more disclosure of political funders).

146. See An Act Concerning Independent Expenditures, Conn. Public Act No. 10-187, § 10 (2010) (“In the case of an entity making or incurring such an independent expenditure [in Connecticut], which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such communication shall also bear upon its face the words “Top Five Contributors” followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication.”).

147. Garrett & Smith, *supra* note 110, at 300 (internal citations omitted).

148. “Testimony of the Brennan Center at NYU School of Law before the Committee on House Administration, U.S. House of Representatives” 9 (May 11, 2010), available at <http://www.brennancenter.org/page/-/Democracy/CFR/BCtestimonyDISCLOSEact.pdf?nocdn=1>; Def.’s Response Br. to Pls.’ Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).



were not acting as a conduit for for-profit corporations.<sup>149</sup> That *MCFL* requirement is gone for issue ads under *WRTL II* and gone for all express advocacy ads under *Citizens United*.

## B. Evidence of the Social Welfare Organization Obfuscation Problem

As alluded to earlier, Section 527 of the IRC was amended in 2000 to require more disclosure of contributions and expenditures from 527s, but this robust public disclosure was not extended to 501(c)s by Congress. As Professor Donald B. Tobin explains, “Congress chose not to require other 501(c) organizations . . . to disclose their contributors. . . . It appears that there was not support in Congress for extending the disclosure provisions to other 501(c) organizations, so the disclosure provisions only apply to section 527 political organizations.”<sup>150</sup> *Citizens United* makes clear that strong public disclosure can be applied to tax-exempt entities organized under Section 501(c). But the law needs to be adjusted to capture the underlying funding streams as well.

501(c)(4)s can be used to hide other political spenders. In 2008, the NRA and the Defenders of Wildlife, both 501(c)(4)s,

spent \$17 million and \$3 million respectively on independent expenditures advocating for the election or defeat of federal candidates.<sup>151</sup> Also as the Brennan Center noted in Congressional testimony,

Similarly, the Committee for Truth in Politics, a 501(c)(4) ironically dedicated to “honesty in government,” aired deceptive television advertisements attacking financial reform and Senators Max Baucus and Jon Tester just this year. The Committee for Truth in Politics has refused to make the minimal disclosures required by current law. But even if it had complied with existing law, it still would not have to identify the source of its funds.<sup>152</sup>

501(c)(4)s played a significant role in the 2010 general election as well.<sup>153</sup>

## C. Evidence of the Secretive Trade Association Problem

Trade associations, especially post-*Citizens United*, hold the potential for a total end-run around disclosure of corporate campaign financing at the federal level. As one law review article put it, “The most problematic part of trade organizations participating in elections is that their contributors, actions, and spending are secretive. [Loopholes] allow[] contributors to hide their influence on elections. . . . This covert nature of trade organizations makes it hard for voters to determine who is behind an ad, while si-

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149. *MCFL*, 479 U.S. at 249.

150. Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, n. 71 (Winter 2003) (internal citations omitted).

151. Center for Responsive Politics, *Independent Expenditures: 2008 Committees* (undated), <http://www.opensecrets.org/index/summ.php?cycle=2008&type=M>.

152. Brennan Center Testimony, *supra* note 148.

153. Barrett, *supra* note 126 (referencing 501(c)(4) Crossroads Grassroots Policy Strategies); *see also* Congress Watch, *supra* note 5.

multaneously increasing the fundraising power of the trade organization.<sup>154</sup>

Trade associations organized under section 501(c)(6) of Internal Revenue Code are currently not required to divulge the identity of those funding their political activities; similarly, most corporations do not reveal how much they have given to trade associations.<sup>155</sup> The use of trade associations and other non-profits may be particularly problematic when we consider that much of that money is traceable to shareholder investments.<sup>156</sup> As Professor John Coates noted in Congressional testimony, publicly traded corporations' use of trade association raises corporate governance issues:

Here, the role of nominally general purpose donations to advocacy groups is even more troubling, since for-profit corporations have sought to avoid being linked to direct election activity by turning over large sums with no formal strings attached to these groups. As a result, these groups have been free to diverge even farther from shareholder goals than corporate managers have been able to do directly. In effect, the role of general purpose donations to such advocacy groups has been to double down on the agency

problems troubling America's corporate governance system: first, managers diverge from shareholders' interests, and then the chieftains of the advocacy groups diverge even further, all without any information being provided to shareholders, on whose behalf all of this activity is supposedly undertaken.<sup>157</sup>

As the nonpartisan Center for Political Accountability has documented, the damage to shareholder value by secretive political spending through trade associations presents a real danger: "[It] allows companies to give political money and then claim they didn't know that it ended up supporting organizations and candidates with which they may not want to be publicly associated. It also prevents investors and directors from . . . being able to evaluate the risks . . . for shareholder value."<sup>158</sup> Consequently, the lack of transparency that is applied to non-profits can compound the already daunting corporate governance problems which are presented by *Citizens United*.<sup>159</sup> Furthermore the lack of transparency raises the specter that foreign-owned corporations may secretly funnel their dollars, or yen

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154. Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 314-15 (Fall 2007) (internal citations omitted).

155. Freed & Carroll, *supra* note 11, at 1.

156. See also Jeffrey Birnbaum, *The End of Legal Bribery*, WASHINGTON MONTHLY, June 2006 (noting risks of criminal prosecution for certain corporate political bribery) ("Ken Gross, head of the political law practice at Skadden, Arps, Slate, Meagher & Flom, has been swamped this year with requests for information and analysis from big corporations and trade associations eager to know how to stay out of trouble in post-Abramoff Washington. Gross is warning his big business clients to be extra careful about how they handle their millions of dollars in contributions to candidates for federal office. Tying those gifts even subtly to a request to take a specific action, he warns, could put both the giver and the receiver into legal jeopardy.").

157. John Coates, "Statement before the U.S. House of Representatives' Committee on House Administration," 5 (May 11, 2010), [http://cha.house.gov/UserFiles/306\\_testimony.pdf](http://cha.house.gov/UserFiles/306_testimony.pdf).

158. Freed & Carroll, *supra* note 11, at 7.

159. For a more in depth discussion of the corporate governance issues raised by *Citizens United*, see Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 143.

or francs into the American political system.<sup>160</sup>

One article notes that the most famous 501(c)(6), the U.S. Chamber of Commerce,<sup>161</sup> has been allowed to keep its contributing corporations secret: “[T]he public will never know who is funding the Chamber’s attack ads . . . because the Chamber is a registered 501(c)(6) trade organization, and therefore is not required to itemize its political activities.”<sup>162</sup> Even as the Chamber conceals the identity of its donor corporations, the Chamber itself has also hidden behind other organizations to conceal its role in politics. A recent example of the Chamber getting caught hiding behind a benign-sounding name was revealed in the case, *Voters Education Committee v. Washington State Public Disclosure Commission*.<sup>163</sup> The Chamber had given \$1.5 million dollars to a group called the “Voters Education Committee” (VEC), which in turn spent the money on political television advertisements without

registering as a political committee or disclosing information about its contributions and expenditures.<sup>164</sup> Concluding that VEC should have been registered as a PAC under Washington law, the Washington Supreme Court explained that “these disclosure requirements do not restrict political speech – they merely ensure that the public receives accurate information about who is doing the speaking.”<sup>165</sup>

Other examples of the trade association problem have also come to light. For instance, in a 2000 Michigan senate race, Microsoft used the U.S. Chamber of Commerce to fund \$250,000 in attack ads against a candidate. Microsoft’s involvement in the election would have remained secret but for the efforts of the press.<sup>166</sup> More recently, Americans for Job Security, a 501(c)(6), has reportedly spent over \$1 million on advertisements attacking a candidate in the 2010 Arkansas Democratic Congressional primary.<sup>167</sup>

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160. Kim Geiger, *Liberal Groups Say Foreign Funds Aid Republicans*, L.A. TIMES, Oct. 7, 2010 (noting accusations that the U.S. Chamber of Commerce of using foreign money to help fund GOP candidates in the 2010 election).

161. One of the reasons why policy maker should be mindful of how much political money is flowing through a group like the U.S. Chamber of Commerce is that the Chamber’s spending may dwarf that of political parties and yet can be cloaked under current reporting requirements. See Marc Ambinder, *The Corporations Already Outspend the Parties*, THE ATLANTIC, Feb. 1, 2010, <http://www.theatlantic.com/politics/archive/2010/02/the-corporations-already-outspend-the-parties/35113/>.

162. Kasel, *supra* note 154, at 298.

163. 161 Wash.2d 470 (2007).

164. *Id.* at 474.

165. *Id.* at 497.

166. John R. Wilke, *Microsoft Is Source of ‘Soft Money’ Funds Behind Ads in Michigan’s Senate Race*, WALL ST. JOURNAL, Oct. 16, 2000.

167. Greg Sargent, *Shadowy Outside Group Spending \$1.5 million to Influence Arkansas Dem Primary*, WASH. POST BLOG, May 6, 2010, [http://voices.washingtonpost.com/plum-line/2010/05/shadowy\\_outside\\_group\\_spending.html](http://voices.washingtonpost.com/plum-line/2010/05/shadowy_outside_group_spending.html); Robb Mandelbaum, *With a Provocative Ad, Another Business Group Backs Lincoln in Arkansas*, N. Y. TIMES BLOG, May 7, 2010, <http://boss.blogs.nytimes.com/2010/05/07/with-a-provocative-ad-another-business-group-backs-lincoln-inarkansas/?src=bushn>.

#### D. Evidence of Secretive Spending from the 2010 Midterm General Elections

In the lead up to the 2010 Congressional general election, articles in the press were replete with stories of how much of the independent spending in the federal election was not disclosed to the public.<sup>168</sup> Much of this undisclosed spending was done through 501(c)(4)s and 501(c)(6)s. And an initial study by government watchdog, Public Citizen, found an increase in undisclosed donors in the 2010 midterm election compared with previous elections.<sup>169</sup> These findings of hidden political spending were also noted by the nonpartisan group, the Center for Political Integrity, as well.<sup>170</sup>

This led Senator Max Baucus of Montana, Chairman of the Senate Finance Committee, to request an investigation by the Internal Revenue Service into whether certain tax exempt non-profits are misusing their tax status. As Senator Baucus wrote, “Is the tax code being used to eliminate transparency in the funding of our elections – elections that are the constitutional bedrock of our democracy? They also raise concerns about whether

the tax benefits of nonprofits are being used to advance private interests.”<sup>171</sup> But the Dark Election in 2010 was not inevitable. It could have been prevented by changing federal law.<sup>172</sup> American law makers need to come together to amend our laws before 2012’s presidential election.

#### Part VIII. Policy Solutions: Make all 501(c)s Funding Political Ads Report to the FEC

The sensible thing for Congress to do is craft campaign finance rules that require disclosure of campaign activity no matter what tax status is adopted by the spender. No matter what the tax consequence, there is a compelling governmental interest in providing real transparency for the sources of money in politics. If 501(c)s are going to refuse to spend through separate and transparent PACs, then they may open themselves to a more probing inquiry of where the money came from. Right now we do not know whether multi-million dollar 501(c)s who are buying political ads in the 2010 election are funded by a single

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168. See for example, Farnam & Eggen, *supra* note 2; McIntire, *supra* note 1; Crowley, *supra* note 1; Jensen & Salant, *supra* note 1.

169. Taylor Lincoln & Craig Holman, *Fading Disclosure Increasing Number of Electioneering Groups Keep Donors’ Identities Secret* (Public Citizen Sept. 15, 2010), <http://www.citizen.org/documents/Disclosure-report-final.pdf> (reporting only one third of the independent spending in the 2010 election named underlying donors).

170. Stone, *supra* note 6.

171. Letter from Sen. Max Baucus to Internal Revenue Service (Sept. 28, 2010), available at [http://www.politico.com/static/PPM176\\_100929\\_irs.html](http://www.politico.com/static/PPM176_100929_irs.html).

172. Interestingly, corporate managers at for-profit corporations may be less hostile to certain non-profit disclosure than predicted. See Zogby International, *Committee for Economic Development: October Business Leader Study* (Oct. 2010), <http://files.e2ma.net/1351457/assets/docs/zogbypoll2010.pdf> (finding in a poll of 301 business opinion leaders 88% supported the following statement “politically active organizations to which a company contributes should disclose to the company their direct and indirect political expenditures.”).

billionaire, a clutch of publicly traded companies or thousands of small donors.

As the *Harvard Law Review* argued a decade ago in 2001, disclosure should be the norm in politics no matter what the tax structure of the spenders:

Contribution and expenditure disclosure requirements should be imposed on all political organizations for two reasons. First, disclosure requirements reduce the appearance of corruption by informing voters of the possibility that candidates have made deals with generous supporters. The disclosure reports expose contributors to whom candidates are beholden for campaign funding and thereby make quid pro quo arrangements less likely. A second and related rationale is that disclosure aids voters in predicting candidates' behavior when in office. Information regarding which individuals and organizations support a particular candidate, and from whom the candidate has accepted support, provides valuable data points concerning the candidate's issue positions, including positions that the candidate may not have made public.<sup>173</sup>

So in sum, we need either new FEC regulations or revisions to FECA. I suggest that the FEC require the same types of disclosure for independent expenditures from all entities that they have required from *MCFL* 501(c)(4)s for decades. But that even these requirements can be strengthened by requiring disclosure of underlying donors, even if they do not earmark their funds for specific independent expenditures and electioneering

communications, and by adding top five donor disclaimers to the face of political ads.

## Conclusion

Following the plain language of FECA and BCRA, the FEC has long required minimal disclosure of any entity that funds political ads in federal elections. *Citizens United* makes clear that this disclosure, as well as BCRA's disclaimers, applies to any entity spending \$10,000 on a federal electioneering communication, including 501(c)(4)s. Despite the internal complexity of U.S. tax laws and the varied tax treatment of different non-profits, Congress should use *Citizens United* as clear permission to apply strong disclosure requirements to any player on the political stage that spends a high amount of money to reveal its underlying donors. The tax consequence of political spending is a matter for the Treasury Department to resolve. But for Congress, the integrity of their elections and empowering voters through the availability of basic information are of primary importance. The voter's right to make an informed vote must take precedence over a non-profit's claims to secrecy in political spending.<sup>174</sup>

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173. *Recent Legislation, Campaign Finance Reform-Issue Advocacy Organizations-Congress Mandates Contribution and Expenditure Requirements for Section 527 Organizations*, 114 HARV. L. REV. 2209, 2213-15 (2001) (arguing that disclosure provisions should apply to all 501(c) organizations) (internal citations omitted).

174. For a discussion of how states should deal with parallel issues of disclosure in states elections, see Ciara Torres-Spelliscy, *Transparent Elections After Citizens United* (Brennan Center 2011).

## Appendix A

### Selections from Connecticut Public Act No. 10-187

#### “An Act Concerning Independent Expenditures” (2010).

##### *Section 6*

(e) (1) Any individual, entity or committee acting alone may make unlimited independent expenditures. Except as provided in subdivision (2) of this subsection, any such individual, entity or committee that makes or obligates to make an independent expenditure or expenditures in excess of one thousand dollars, in the aggregate, shall file statements according to the same schedule and in the same manner as is required of a campaign treasurer of a candidate committee under section 9-608.

(2) Any individual, entity or committee that makes or obligates to make an independent expenditure or expenditures to promote the success or defeat of a candidate for the office of Governor, Lieutenant Governor, Secretary of the State, State Treasurer, State Comptroller, Attorney General, state senator or state representative, which exceeds one thousand dollars, in the aggregate, during a primary campaign or a general election campaign, as defined in section 9-700, on or after January 1, 2008, shall file a report of such independent expenditure to the State Elections Enforcement Commission. The report shall be in the same form as statements filed under section 9-608, except that such report shall be filed electronically. If the individual, entity or committee makes or obligates to make

such independent expenditure or expenditures more than ninety days before the day of a primary or election, the individual, entity or committee shall file such report not later than forty-eight hours after such payment or obligation. If the individual, entity or committee makes or obligates to make such independent expenditure or expenditures ninety days or less before the day of a primary or election, the person shall file such report not later than twenty-four hours after such payment or obligation. The report shall be filed under penalty of false statement.

(3) The independent expenditure report shall (A) identify the candidate for whom the independent expenditure or expenditures is intended to promote the success or defeat, (B) affirm under penalty of false statement that the expenditure is an independent expenditure, and (C) provide any information that the State Elections Enforcement Commission requires to facilitate compliance with the provisions of this chapter or chapter 157.

(4) Any person may file a complaint with the commission upon the belief that (A) any such independent expenditure report or statement is false, or (B) any individual, entity or committee that is required to file an independent expenditure report under this subsection has failed to do so. The commission shall make a prompt determination on such a complaint.

(5) (A) If an individual, entity or committee fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or obligated to be made more than ninety days before the day of a primary or

election, the person shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than five thousand dollars. If an individual, entity or committee fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or obligated to be made ninety days or less before the day of a primary or election, such individual, entity or committee shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than ten thousand dollars. (B) If any such failure is knowing and wilful, the person responsible for the failure shall also be fined not more than five thousand dollars or imprisoned not more than five years, or both.

*Section 10*

(h) (1) No entity shall make or incur an independent expenditure for any written, typed or other printed communication, or any web-based, written communication, that promotes the success or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless such communication bears upon its face the words "Paid for by" and the name of the entity, the name of its chief executive officer or equivalent, and its principal business address and the words "This message was made independent of any candidate or political party.". In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corre-

sponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such communication shall also bear upon its face the words "Top Five Contributors" followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication.

(2) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for television advertising or Internet video advertising, that promotes the success or de-feat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless at the end of such advertising there appears simultaneously, for a period of not less than four seconds, (A) a clearly identifiable video, photographic or similar image of the entity's chief executive officer or equivalent, and (B) a personal audio message, in the following form: "I am 'w. (name of entity's chief executive officer or equivalent), 'w. (title) of 'w. (entity). This message was made independent of any candidate or political party, and I approved its content.". In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt po-

## NEXUS

litical organization organized under Section 527 of said code, such advertising shall also include a written message in the following form: "The top five contributors to the organization responsible for this advertisement are" followed by a list of the five persons or entities making the largest contributions during the twelve-month period before the date of such advertisement.

(3) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for radio advertising or Internet audio advertising, that promotes the election or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless the advertising ends with a personal audio statement by the entity's chief executive officer or equivalent (A) identifying the entity paying for the expenditure, and (B) indicating that the message was made independent of any candidate or political party, using the following form: "I am 'w. (name of entity's chief executive officer or equivalent), 'w. (title), of 'w. (entity). This message was made independent of any candidate or political party, and I approved its content." In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such advertising

shall also include (i) an audio message in the following form: "The top five contributors to the organization responsible for this advertisement are" followed by a list of the five persons or entities making the largest contributions during the twelve-month period before the date of such advertisement, or (ii) in the case of such an advertisement that is thirty seconds in duration or shorter, an audio message providing a web site address that lists such five persons or entities. In such case, the organization shall establish and maintain such a web site with such listing for the entire period during which such organization makes such advertisement.

(4) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for automated telephone calls that promote the election or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless the narrative of the telephone call identifies the entity making the expenditure and its chief executive officer or equivalent. In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such narrative shall also include an audio message in the following form: "The top five contributors to



the organization responsible for this telephone call are” followed by a list of the five persons or entities making the largest contributions during the twelve-month period before the date of such telephone call.