NOTES

DEREGULATE BUT STILL DISCLOSE?: DISCLOSURE REQUIREMENTS FOR BALLOT QUESTION ADVOCACY AFTER *CITIZENS UNITED V. FEC* AND *DOE V. REED*

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A relatively unheralded aspect of the Supreme Court's controversial decision in Citizens United v. FEC *is its strong affirmation of the constitutionality and utility of disclosure requirements for individuals and groups engaged in political advocacy. In both* Citizens United *and* Doe v. Reed*, decided a few months later, the Court issued prodisclosure holdings indicating its support for such laws. Nevertheless, the federal circuit courts of appeals disagree over whether disclosure requirements imposed on advocacy for ballot questions and referenda can be as strong as disclosure requirements imposed on advocacy for candidates. In* Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit upheld Washington's disclosure requirements for issue committees dedicated to supporting or defeating ballot measures. The Tenth Circuit, however, took a different approach in* Sampson v. Buescher*, holding that disclosure requirements similar to those upheld in* Brumsickle *were unconstitutional as applied to the plaintiffs. The courts' disagreement centers on the relative values of the informational and anonymity interests at stake in the context of ballot questions. This Note endorses an approach that is most similar to that taken in* Brumsickle*, while maintaining the* Sampson *court's sensitivity to the burdens placed on very small advocacy groups.*

INTRODUCTION

Crossroads GPS, a conservative political advocacy group founded by Republican strategist Karl Rove, emerged as one of the largest and most controversial organizations of its kind in the United States' 2010 midterm and 2012 presidential elections.[1] The group, along with liberal counter-

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1. See T.W. Farnam, Mystery Donor Gives $10 Million to Crossroads GPS Group to Run Anti-Obama Ads, Wash. Post, Apr. 13, 2012 [hereinafter Farnam, Mystery Donor], available at http://articles.washingtonpost.com/2012-04-13/politics/35453282_1_crossroads-gps-mystery-donor-jonathan-collegio (on file with the *Columbia Law Review*) (describing activities of Crossroads GPS in 2010 and 2012 elections); see also T.W. Farnam, Watchdog Group Files FEC Complaint Against Crossroads GPS, Wash. Post, Nov. 15, 2012, available at http://www.washingtonpost.com/politics/watchdog-group-files-fec-

parts like Priorities USA,[2] has been criticized as much for its funding scheme, which relies on a gap in federal disclosure laws[3] to receive anonymous donations from individuals and corporations exceeding $1 million,[4] as it has been for its message. For its opponents, Crossroads GPS epitomizes the evils of unrestrained political spending coupled with inadequate disclosure. But organizations that wield disclosure of political contributions to further their messages have also been the subject of recrimination. Prop 8 Maps, a website that takes the publicly disclosed names and addresses of financial supporters of California's Proposition 8 against gay marriage and overlays them on an accessible Google map,[5] has been blamed for facilitating death threats and other harassment against Proposition 8 backers.[6] For its opponents, Prop 8 Maps represents the dangers of excessive disclosure of political contributions. At the center of both controversies is the interaction of the Supreme

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complaint-against-crossroads-gps/2012/11/15/9bab8f02-2f5f-11e2-a30e-5ca76eeec857_story.html (on file with the *Columbia Law Review*) (outlining legal challenges to Crossroads GPS activities); Diane Freda, Anonymous Donations Can Remain Secret Despite IRS Requirement to Disclose, Bloomberg BNA Pol. Capital Blog (July 26, 2012, 11:46 AM), http://go.bloomberg.com/political-capital/2012-07-26/anonymous-donations-can-remain-secret-despite-irs-requirement-to-disclose/ (on file with the *Columbia Law Review*) ("Always an issue around election time, the identity of those contributing to these groups that funnel funds into candidate-related activities is more pronounced than ever.").

2. See Freda, supra note 1 (calling Crossroads GPS and Priorities USA "two of the best known" groups of their kind and reporting their "pledg[e] to raise millions for issue advocacy related to their respective candidates").

3. See Emma Schwartz, The Rules That Govern 501(c)(4)s, Frontline (Oct. 30, 2012, 9:12 PM), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/the-rules-that-govern-501c4s/ (on file with the *Columbia Law Review*) (explaining how groups organized under § 501(c)(4) of Internal Revenue Code can engage in political advocacy without revealing donors' identities).

4. See S.V. Dáte, NPR Analysis: Crossroads GPS Funded Heavily by $1 Million-Plus Donations, NPR It's All Pol. Blog (June 1, 2012, 7:06 PM), http://www.npr.org/blogs/itsallpolitics/2012/06/01/154168293/npr-analysis-crossroads-gps-funded-heavily-by-1-million-plus-donations (on file with the *Columbia Law Review*) (noting "nearly 90 percent of the $77 million raised by the Karl Rove-founded group in its first 18 months came from donors who gave at least $1 million" and "Crossroads GPS' donors have remained anonymous"); see also Farnam, Mystery Donor, supra note 1 (discussing two anonymous donors, "who could be individuals, corporations or other interest groups," each giving $10 million to Crossroads GPS).

5. Prop 8 Maps, http://www.eightmaps.com/ (last visited Mar. 7, 2013).

6. See Brad Stone, Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword, N.Y. Times, Feb. 7, 2009, at BU3, available at http://www.nytimes.com/2009/02/08/business/08stream.html (on file with the *Columbia Law Review*) ("[Proposition 8 backers] have received death threats and envelopes containing a powdery white substance, and their businesses have been boycotted. The targets of this harassment blame a controversial and provocative Web site, eightmaps.com."); see also Kathleen Richards, Online Map of Prop. 8 Donors Fuels Controversy, East Bay Express Seven Days Blog (Feb. 11, 2009, 10:31 AM), http://www.eastbayexpress.com/SevenDays/archives/2009/02/11/online-map-of-prop-8-donors-fuels-controversy (on file with the *Columbia Law Review*) (describing "privacy concerns" and harassment allegations associated with Prop 8 Maps).

Court's prominent decision in *Citizens United v. FEC* with federal and state campaign finance disclosure laws.

Citizens United is most well known for its controversial holding that limits on independent campaign expenditures by corporations and unions are unconstitutional, but the case also affected the constitutionality of disclosure requirements for groups that spend money on political advocacy.[7] In general, disclosure laws require advocacy groups to give the names of their members and financial supporters; these laws usually face challenges from such groups, which wish to keep their members or contributors secret. While many assumed the Supreme Court would limit the reach of disclosure laws as part of a shift in favor of corporate First Amendment rights, it instead strongly reaffirmed the validity and importance of disclosure requirements in *Citizens United* and *Doe v. Reed*,[8] decided a few months later.[9]

Nevertheless, the federal circuit courts of appeals disagree over whether disclosure requirements imposed on advocacy for ballot initiatives and referenda can be as strong as disclosure requirements imposed on advocacy for candidates. *Citizens United* did not deal with the question, and, in the absence of a firm Supreme Court ruling on the issue, different circuits have read Supreme Court precedent differently in deciding whether to treat the two kinds of disclosure requirements equivalently. In *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit upheld Washington's disclosure requirements for issue committees dedicated to supporting or defeating ballot measures, finding the disclosure requirements constitutional both facially and as applied to the plaintiffs.[10] The Ninth Circuit reasoned that the State's interest in gathering and disseminating information to the electorate regarding the supporters and opponents of a ballot proposition—often called the state's "informational interest"[11]—enabled the challenged laws to survive "exacting scrutiny."[12] This result accords with the Ninth Circuit's approach in a line of cases predating *Citizens United* and *Doe v. Reed*,[13] as well as the recent practices

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7. 130 S. Ct. 876 (2010); see infra notes 141–143, 145–153 and accompanying text (outlining *Citizens United*'s holding).

8. 130 S. Ct. 2811 (2010); see infra notes 144, 154–163 and accompanying text (discussing *Reed*'s holding).

9. See infra note 143 (describing some academics' surprise at disclosure holdings of *Citizens United* and *Reed*).

10. 624 F.3d 990, 994–95 (9th Cir. 2010).

11. See infra notes 63–65 and accompanying text (detailing informational interest).

12. 624 F.3d at 1014; see infra notes 183, 200 and accompanying text (outlining *Brumsickle*'s holding and treatment of competing interests).

13. See, e.g., Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1092 (9th Cir. 2003) (holding California's regulation of ballot advocacy through disclosure laws constitutional if state can prove compelling interest on remand).

in other circuit courts, including the First Circuit.[14] This Note focuses on *Brumsickle* as an illustration of the Ninth Circuit's traditional perspective. The Tenth Circuit, however, has taken a different approach. In *Sampson v. Buescher*, it ruled disclosure requirements similar to those upheld in *Brumsickle* to be unconstitutional as applied to the plaintiffs.[15] For the *Sampson* court, the individual's interest in making anonymous political donations outweighed the State's informational interest.[16]

While there are factual differences between the advocacy groups involved in *Brumsickle* and *Sampson*, the interplay of the informational interest and the anonymity interest forms the core of the circuits' disagreement. Exemplifying its historical practice, the Ninth Circuit's *Brumsickle* decision accorded great weight to the informational interest while giving little importance to an individual's interest in donating anonymously. In *Sampson*, the Tenth Circuit took the opposite approach, showing skepticism about the value of the informational interest while extolling the virtues of anonymity in ballot initiative expenditures.[17]

This split is important because, as corporations, unions, and wealthy individuals are able to raise and spend more money to influence ballot initiatives, disclosure laws remain the most potent tool available to ensure accountability in elections.[18] This Note endorses an approach that most closely resembles *Brumsickle*, while maintaining the *Sampson* court's sensitivity to the burdens placed on very small advocacy groups. More specifically, this Note argues that courts should give great weight to the state's informational interest when deciding the constitutionality of disclosure laws in the context of a ballot initiative. Further, this Note proposes that courts avoid giving much weight to an advocate's interest in remaining anonymous except in rare cases when disclosure would place disproportionately high financial burdens on small groups or would expose unpopular groups to serious threats of harassment or violence.

Part I of this Note examines the elements of typical disclosure laws, describes the Supreme Court's foundational campaign finance decisions, and discusses the Court's treatment of disclosure laws in particular. Part II details the opposing circuit court opinions of *Brumsickle* and *Sampson*, analyzes the reasoning of each opinion, and explains why they are in conflict. Part III proposes a resolution of the conflicts over relevant in-

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14. See, e.g., Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 41 (1st Cir. 2011) (upholding Maine's disclosure laws); see also Nat'l Org. for Marriage v. Daluz, 654 F.3d 115, 116 (1st Cir. 2011) (relying on *McKee* in upholding Rhode Island's disclosure laws).

15. 625 F.3d 1247, 1249 (10th Cir. 2010).

16. See infra notes 189, 218 and accompanying text (summarizing *Sampson*'s holding and consideration of opposing interests).

17. See infra Part II.B (contrasting *Sampson*'s and *Brumsickle*'s views of relevant interests).

18. See infra note 37 and accompanying text (noting importance of disclosure laws in American electoral regulation).

terests and Supreme Court jurisprudence and concludes that *Brumsickle* accords better with the suggested resolution.

I. SUPREME COURT DOCTRINE ON DISCLOSURE

Modern disclosure law in the United States is the result of decades of statutory and doctrinal development; this Part traces that development. Part I.A explains important disclosure-related phrases and terms and describes federal disclosure laws and the disclosure regimes of Washington and Colorado, the states whose laws were challenged in *Brumsickle* and *Sampson* respectively. Part I.B describes the origin of modern disclosure jurisprudence in the landmark cases of *NAACP v. Alabama* and *Buckley v. Valeo*, which form the basis of the Supreme Court's treatment of the state and individual interests at stake in the context of disclosure laws. Part I.C traces the Court's holdings and dicta on the topic of disclosure schemes in cases decided after *Buckley*. Part I.D discusses the Court's two most recent cases involving disclosure, *Citizens United* and *Doe v. Reed*.

A. *An Outline of Federal and State Disclosure Law and Relevant Terms*

State governments first enacted campaign finance disclosure laws in the late nineteenth century, and the federal government followed suit in the early twentieth century.[19] Congress created a more comprehensive disclosure scheme for federal elections with the Federal Election Campaign Act (FECA) in 1972.[20] FECA required detailed reporting and disclosure of campaign contributions and expenditures and provided an enforcement mechanism through the statutorily created Federal Election Commission (FEC).[21] These provisions, as amended over time and as expanded by the Bipartisan Campaign Reform Act of 2002 (BCRA),[22] remain the core of federal campaign finance disclosure law.

FECA defines a "political committee" as any group of persons that spends or receives more than $1,000 in a year to influence an election for

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19. See Richard Briffault, Campaign Finance Disclosure 2.0, 9 Election L.J. 273, 273 (2010) [hereinafter Briffault, Disclosure 2.0] (identifying origin of disclosure laws in states and subsequent development of federal laws).

20. Pub L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–457).

21. See Deborah G. Johnson, Priscilla M. Regan & Kent Wayland, Campaign Disclosure, Privacy and Transparency, 19 Wm. & Mary Bill Rts. J. 959, 966 (2011) (outlining FECA's disclosure provisions). Briffault breaks down analysis of disclosure laws based on questions of "who," "what," and "when." See Briffault, Disclosure 2.0, supra note 19, at 277 ("Who is required to disclose information? What information must be disclosed and in what form? When is the information to be reported and when and how is it made public?").

22. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered titles of U.S.C.).

federal office.[23] Political committees and candidates are required to register with the FEC and keep extensive records of their donors and their own spending.[24] Donations to political committees under the threshold of $50 need not be recorded or disclosed. For donations above $50 but below $200, political committees must record the donor's name and address, but these records are not made public.[25] For donations above $200, political committees must also record the donor's occupation and place of business, and all this information must be reported to the FEC, which then discloses the information to the public by making it available for public inspection.[26] Additionally, FECA requires that political committees report all their own spending to the FEC, which then publicly discloses these reports.[27] Finally, any individual or group other than a political committee must follow similar procedures to disclose independent spending greater than $250 to influence federal elections.[28]

In its first examination of FECA's constitutionality, the Supreme Court laid out a critical distinction between "independent expenditures" and "contributions."[29] According to the Court, "independent expenditures" are made independently of candidates—by an individual or political committee, for example—to advocate for a candidate's election or defeat.[30] In contrast, the Court defined "contributions" as direct contributions to a candidate or political committee.[31] The Court also narrowed FECA's coverage of independent expenditures by persons or groups other than political committees to require disclosure only of spending on express advocacy for the election or defeat of a specific candidate.[32] In response, BCRA defined a new term, "electioneering

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23. 2 U.S.C. § 431(4) (2006).

24. Id. § 432(c) (imposing recordkeeping requirements on political committees).

25. Id. § 432(c)(2) (imposing recordkeeping requirements for donations above $50).

26. Id. § 432(c)(3) (requiring additional recordkeeping for donations above $200); id. § 434(b)(3) (imposing reporting requirements for donations above $200); id. § 438(a)(4) (requiring public disclosure of reports).

27. Id. § 432(c)(5) (detailing recordkeeping requirements for expenditures by political committees); id. § 434(b)(4) (reporting expenditures by political committees); id. § 438(a)(4) (requiring public disclosure of reports).

28. Id. § 434(c)(2)(A) (requiring disclosure of independent expenditures by individuals and groups other than political committees).

29. Buckley v. Valeo, 424 U.S. 1, 19–23 (1976) (per curiam) (distinguishing independent expenditures and contributions); see infra notes 53–54 and accompanying text (describing distinction).

30. *Buckley*, 424 U.S. at 19 & n.19 (referring to $1000 limit on spending in relation to candidates as "independent expenditure ceiling").

31. Id. at 20–21 (explaining "contribution" as money given directly to candidate or political committee).

32. Id. at 80 ("[W]e construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candi-

communication," to cover a broader range of political communication and advertising beyond express advocacy.[33] BCRA requires disclaimers identifying the source of electioneering communications and requires any individual or group spending more than $10,000 on electioneering communications to file a disclosure report with the FEC.[34]

State disclosure laws generally track the approach of federal laws. The disclosure laws of the two states at issue in this Note, Colorado and Washington, mirror federal law in defining covered individuals and groups and imposing disclosure requirements on the defined categories, with monetary thresholds determining the amount of information disclosed. Colorado defines "issue committees" as any organization or group of people with a major purpose of supporting or opposing a ballot question and spending or receiving over $200 and subjects them to a number of reporting and disclosure obligations, with tiers based on the size of donations.[35] Washington imposes reporting and disclosure requirements on "political committees," defined as any group receiving or spending money in support of or opposition to a candidate election or ballot question. Political committees are subject to disclosure obligations that increase with the amount of spending, and any person or group not covered by the political committee provision (other than candidates) that expends more than $100 on election or initiative advocacy must disclose such spending and include disclaimers on any advertising.[36] The general trend in the United States has been to strengthen disclosure requirements over time; the result is that "the United States has a particularly strong disclosure regime, and disclosure is probably the most successful element of our campaign finance system."[37]

B. *The Supreme Court's Foundational Treatment of Individual and State Interests*

In two landmark cases, *NAACP v. Alabama*[38] and *Buckley v. Valeo*,[39] the Supreme Court set out the guideposts for future disclosure controversies. *NAACP*, discussed in Part I.B.1, dealt with individuals' right to anonymity

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date." (footnote omitted)). *Buckley* listed several phrases that would trigger the disclosure requirements for express advocacy, such as "vote for," "vote against," "elect," or "defeat." Id. at 44 n.52. Communications not containing "magic words" like these were thus deemed not to be covered by FECA.

33. 2 U.S.C. § 434(f)(3)(A) (defining electioneering communication).

34. Id. § 434(f) (requiring disclosure for electioneering communications); id. § 441d(d) (requiring disclaimers on electioneering communications); see infra notes 133, 147 and accompanying text (discussing BCRA disclaimer and disclosure requirements for electioneering communications).

35. See infra notes 185–187 and accompanying text (describing Colorado laws).

36. See infra notes 177–181 and accompanying text (describing Washington laws).

37. Briffault, Disclosure 2.0, supra note 19, at 273 (footnote omitted).

38. 357 U.S. 449 (1958).

39. 424 U.S. 1 (1976) (per curiam).

and the problem of harassment infringing on the First Amendment rights of those who wish to remain anonymous while supporting a cause. *Buckley*, discussed in Part I.B.2, laid out the permissible government interests behind disclosure laws and added an important gloss on *NAACP*'s consideration of harassment.

1. NAACP *and Individuals' Interests*. — Modern Supreme Court jurisprudence on compelled disclosure begins with *NAACP*. While *NAACP* is not a case about disclosure of campaign activity, it crucially was the first case to consider that disclosure could burden the First Amendment associational rights of members of groups forced to disclose their members' identities.[40] The case originated when an Alabama state court ordered the NAACP to turn its membership lists over to the State Attorney General in 1956 and imposed a $100,000 fine and ban on intrastate operations when the NAACP refused.[41] While the State insisted it merely wanted the lists in order to determine the NAACP's compliance with the state's foreign corporations statute, there is little doubt that it had more sinister goals in mind.[42] The Supreme Court held that "the closest scrutiny" applied to infringements on the "freedom to engage in association for the advancement of beliefs and ideas," which was secured by the First Amendment and applied to the states by the Fourteenth.[43] The Court further stated that it had previously "recognized the vital relationship between freedom to associate and privacy in one's associations," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[44]

Turning back to the facts of the case, the Court referred to the NAACP's "uncontroverted showing" that past disclosure of members' names had exposed them to serious harassment and reprisal, and that disclosure in this case was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[45] Recognizing the serious danger the NAACP's members in Alabama would face if their names

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40. See Richard Briffault, Two Challenges for Campaign Finance Disclosure After *Citizens United* and *Doe v. Reed*, 19 Wm. & Mary Bill Rts. J. 983, 988 (2011) [hereinafter Briffault, Two Challenges] (discussing *NAACP* as first in "series of cases . . . which demonstrated that government-mandated disclosure of the identity of individuals affiliated with controversial organizations could threaten politically vulnerable groups").

41. *NAACP*, 357 U.S. at 452–54 (describing facts of case).

42. See id. at 452–53, 464 (explaining State Attorney General and Alabama Circuit Court arguments for compelling disclosure); infra text accompanying note 45 (discussing likelihood disclosure of members' names would lead to severe harassment).

43. *NAACP*, 357 U.S. at 460–61.

44. Id. at 462 (citing United States v. Rumely, 345 U.S. 41, 56–58 (1953) (Douglas, J., concurring)).

45. Id. at 462–63.

were made public, the Court asserted that it was "unable to perceive that the disclosure of the names of [the NAACP's] rank-and-file members has a substantial bearing" on the State's purported reasons for disclosure.[46] Thus, in this case, the Supreme Court first set out language asserting the importance of anonymity in protecting the freedom of association of a group that engendered as much opposition as the NAACP.

This language would soon spawn a new line of anonymity interest jurisprudence, as the Court decided two cases that expanded on its *NAACP* holding two years later. In *Bates v. City of Little Rock*, the Court again protected the anonymity of the NAACP's members when the group was faced with a disclosure demand in connection with a tax assessment.[47] In *Talley v. California*, the Court invalidated a Los Angeles city ordinance prohibiting the distribution of anonymous leaflets.[48] The Court would not have an occasion to further define the government's competing interests in favor of disclosure until the next decade.

2. Buckley *and Government Interests.* — Following the trio of *NAACP*, *Bates*, and *Talley*, the next major case to deal with disclosure was *Buckley*, the Court's landmark decision on campaign finance laws in general.[49] In *Buckley*, the Court grappled with constitutional challenges to FECA, the comprehensive campaign finance scheme Congress enacted in 1972.[50] The Court's per curiam decision struck down a number of provisions in FECA relating to limits on independent expenditures and those made by campaigns themselves[51] but upheld the law's reporting and disclosure requirements.[52] *Buckley* also introduced the crucial doctrinal distinction between independent expenditures, meaning spending on political

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46. Id. at 464.

47. 361 U.S. 516, 527 (1960) (denying demand for local NAACP branch's membership lists as part of Little Rock's effort to determine whether branch was subject to municipal occupational tax).

48. 362 U.S. 60, 65 (1960) ("The reason for [the holdings in *Bates v. Little Rock* and *NAACP*] was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity."); see also Briffault, Disclosure 2.0, supra note 19, at 280 ("The measure was not targeted at civil rights activists per se . . . . But the Court recognized that handbills and leaflets are a low-cost way for the poor, the politically marginal, and the unpopular to get their messages to the public.").

49. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

50. Id. at 7 ("The Court of Appeals . . . viewed [FECA] as 'by far the most comprehensive reform legislation [ever] passed by Congress concerning [elections].'" (second alteration in original) (quoting Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975), aff'd in part, rev'd in part, 424 U.S. 1 (1976))); see also infra notes 56–61 and accompanying text (outlining relevant FECA provisions).

51. *Buckley*, 424 U.S. at 39–59 ("These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

52. Id. at 84 ("[W]e find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.").

communications made independently of candidates,[53] and contributions, meaning direct donations to candidates or political committees.[54] Overall, *Buckley* laid the groundwork for the standard to apply and the interests at stake in campaign finance disclosure cases.[55]

Then, as now, FECA defined a "political committee" as a group of persons that receives contributions or makes independent expenditures above $1000 in a year for the purpose of influencing the election of a candidate for a federal office.[56] FECA's basic disclosure structure was much the same when *Buckley* was decided as it is now, but the thresholds were slightly lower back then. The threshold for triggering any sort of recording or reporting was $10.[57] Political committees had to record, but not publicly disclose, the name and address[58] of a donor who gave between $10 and $100,[59] while they had to record and publicly disclose this information, plus occupation and place of business, for a donor giving over $100.[60] Political committees were required to disclose all their spending, and any individual or group other than a political committee had to disclose its independent expenditures over $100.[61]

First, the Court held that disclosure laws must be subject to "exacting scrutiny," which required "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to

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53. Independent expenditure limitations are generally unconstitutional. See id. at 19 ("The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

54. Contribution limitations are generally less constitutionally problematic. See id. at 20–21 ("By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.").

55. See Briffault, Disclosure 2.0, supra note 19, at 283 ("*Buckley* set the tone for jurisprudence of disclosure over the next three and a half decades.").

56. 2 U.S.C. § 431(d)–(f) (Supp. IV 1970) (current version at 2 U.S.C. § 431(4), (8)–(9) (2006)).

57. Id. § 432(c)(2) (imposing recording requirements on political committees for donations above $10 threshold).

58. Id. § 431(j)(1) (defining "identification" of individual as "his full name and the full address of his principal place of residence").

59. Id. § 432(c)(2) (requiring records including "identification of every person making a contribution in excess of $10"); id. § 438(a)(8) (mandating FEC "to make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this subchapter").

60. Id. § 432(c)(2) (requiring records of "identification," "occupation," and "the principal place of business" for every person donating over $100); id § 434(b)(2) (outlining disclosure requirements relating to donors giving over $100); id. § 438(a)(4) (requiring FEC "to make the reports and statements filed . . . available for public inspection and copying").

61. Id. § 432(c)(3)–(4) (imposing disclosure requirements for expenditures by political committees); id. § 434(e) (requiring disclosure of independent expenditures by individuals and other groups).

be disclosed."[62] The Court identified three permissible interests the government could invoke in favor of disclosure laws: the informational interest, the anticorruption interest, and the data-gathering interest. A brief description of these interests, divorced from the context of *Buckley*, will be helpful, as they provide the framework for analyzing all disclosure laws.

The Court has defined the informational interest as the government's interest in providing voters with information about who supports and opposes candidates and ballot questions, including the amount of money spent on such advocacy, thereby helping voters evaluate the candidates and initiatives before them.[63] The informational interest is the "most significant" governmental interest behind disclosure laws.[64] Many commentators see the informational interest as particularly strong in the ballot question context, because information about an initiative's supporters and opponents can shed light on the expected effects of a proposed law, and because other information, such as party affiliation, is not available to help voters evaluate ballot questions.[65] The anticorruption

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62. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (quoting Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963)) (citing NAACP v. Alabama, 357 U.S. 449, 463 (1958)). The Court would refine the definition of "exacting scrutiny" over time. See Briffault, Two Challenges, supra note 40, at 989 ("Although the meaning of 'exacting scrutiny' was somewhat opaque, it was clearly less stringent than [strict scrutiny], albeit more 'exacting' than . . . rational basis review . . . .").

63. See *Buckley*, 424 U.S. at 66 ("[D]isclosure provides the electorate with information 'as to where political campaign money comes from . . . .'" (quoting H.R. Rep. No. 92-564, at 4 (1971))).

64. Briffault, Two Challenges, supra note 40, at 990; see also Briffault, Disclosure 2.0, supra note 19, at 281 (asserting "voter information provides the real foundation for today's disclosure requirements" and is "crucial to the constitutionality of most contemporary disclosure laws"); Elizabeth Garrett & Daniel A. Smith, Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy, 4 Election L.J. 295, 298 (2005) (arguing "[d]isclosure laws can . . . make relevant and credible information available to voters . . . at a time when it can be helpful in the voting decision"); Darryl R. Wold, Tell Us Who You Are—Maybe: Speaker Disclaimers After *Citizens United*, 16 NeXus: Chap. J.L. & Pol'y 171, 183 (2011) ("[T]he idea that the state has a legitimate interest in providing voters with information it thinks they should have continues to be an appealing interest."). Elizabeth Garrett and Daniel Smith suggest that providing information is a necessary step toward the ultimate goal of "improving voter competence." Garrett & Smith, supra, at 296. For more general language on the value of disclosure in candidate elections, see *Buckley*, 424 U.S. at 66–67 (contending disclosure "allows voters to place each candidate in the political spectrum more precisely," while "[t]he sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive"). Ascertaining the ideological views and financial interests behind a ballot question is useful in much the same way.

65. See Garrett & Smith, supra note 64, at 297 (arguing "citizens can obtain cues from certain limited political information that will help them decide [how] to vote," and "[i]n issue elections, an effective voter shortcut is provided by information revealing which groups support and which oppose an initiative and the intensity of their views"); id. at 300

interest is the government's interest in "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[66] While the anticorruption interest was "the original impetus for disclosure [laws]," it now takes a backseat to the informational interest.[67] In fact, the Supreme Court has determined that the anticorruption interest does not even exist in the case of ballot initiatives, as they do not present a risk of corruption.[68] Finally, the data-gathering interest reflects the idea that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations" that have been upheld by the Court.[69]

The *Buckley* Court applied these principles to the challenged disclosure and reporting requirements in FECA, upholding each of them in turn. In doing so, the Court relied heavily on the government's informa-

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("[T]he informational interest is present in direct democracy, and it is more acute because the information environment is less robust because of the absence of party cues."); William McGeveran, Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law, 19 Wm. & Mary Bill Rts. J. 859, 880 (2011) (acknowledging "voters may gain useful heuristic cues from information about the position of familiar organized entities with respect to candidates and, especially, ballot initiatives"); infra notes 190–196 and accompanying text (detailing Ninth Circuit's arguments in favor of ratcheting up informational interest in ballot question cases). But see infra notes 206–208 and accompanying text (discussing Tenth Circuit's arguments in favor of diminishing informational interest in ballot question cases).

66. *Buckley*, 424 U.S. at 66–67.

67. Briffault, Two Challenges, supra note 40, at 990; see id. ("[T]he anti-corruption role now plays a secondary role."); see also Briffault, Disclosure 2.0, supra note 19, at 281–82 (demonstrating diminished significance of anticorruption interest relative to informational interest).

68. See First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."); Briffault, Two Challenges, supra note 40, at 990 (listing ballot proposition advocacy among "campaign practices which, the Court has said, do not present the danger of corruption"); see also Citizens United v. FEC, 130 S. Ct. 876, 908–09 (2010) (holding "the anticorruption interest is not sufficient to displace the speech here in question" and "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption").

69. *Buckley*, 424 U.S. at 67–68. For a critique of the importance of the data-gathering interest, see Briffault, Disclosure 2.0, supra note 19, at 280 (arguing data-gathering justification "reflects a too-quick conflation of reporting with disclosure," as it does not require information be made public). Briffault argues persuasively that disclosure is not necessary to satisfy the data-gathering interest, as reporting to the government without public disclosure would be equally effective. See id. ("Law enforcement needs justify reporting, not disclosure."); Briffault, Two Challenges, supra note 40, at 990 ("Disclosure is really not necessary to the enforcement of other campaign finance rules . . . . That could be accomplished by requiring political actors to report their finances to the government; public disclosure of that information would not be necessary."). But see Doe v. Reed, 130 S. Ct. 2811, 2820 (2010) (explaining public disclosure of referendum petition signatures will allow public to aid Washington Secretary of State's verification and canvassing process).

tional interest.[70] With little discussion, the Court upheld the requirements that political committees keep records of contributors above the $10 threshold and publicly disclose records of contributors above the $100 threshold.[71] Although the Court agreed with the appellants' contention that the "thresholds are indeed low," the Court nevertheless sustained them in deference to Congress's discretion.[72] The Court reaffirmed the importance of the informational interest by noting, "[D]isclosure serves informational functions, as well as [anticorruption and data-gathering functions]. Congress is not required to set a threshold that is tailored only to the latter goals."[73] Thus, the informational interest provided the critical justification for these provisions.

The Court also upheld the provision requiring that any individual or group disclose its independent expenditures over $100 after construing it "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[74] In particular, the Court noted that additional information would come to light through the disclosure provisions. Discussing the requirements that advocacy groups register with the FEC and disclose independent expenditures over $100, the Court wrote that these provisions "[go] beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported."[75] The influence of the informational interest on these decisions is quite clear. With *Buckley* serving as the touchstone for the informational interest, "voter information provides the real foundation for today's disclosure requirements."[76]

In a gloss on *NAACP*, *Buckley* also dealt with the plaintiffs' contention that FECA's disclosure provisions would unduly burden minor parties

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70. *Buckley*, 424 U.S. at 81, 83 (justifying disclosure provisions based on service of informational interest).

71. Id. at 82–84 & n.113 (upholding reporting and recordkeeping provisions despite low monetary threshold required to trigger them).

72. Id. at 83 ("The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say . . . that the limits designated are wholly without rationality.").

73. Id.

74. Id. at 80 (citation omitted).

75. Id. at 81.

76. Briffault, Disclosure 2.0, supra note 19, at 281; see also Briffault, Two Challenges, supra note 40, at 990 ("The key constitutional justification for campaign finance disclosure is, thus, voter information."). Other commentators have nevertheless highlighted the importance of the anticorruption interest in *Buckley*. See Johnson, Regan & Wayland, supra note 21, at 967 (contending one effect of *Buckley* "has been to elevate the importance of the disclosure requirements . . . as a means of tracking the myriad routes that contributions can take").

and independent candidates.[77] Distinguishing from *NAACP*, the Court pointed out that "[n]o record of harassment on a similar scale was found in this case," and "any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative."[78] Nevertheless, declaring that it was "not unmindful that the damage done by disclosure to [minor parties and independents] could be significant,"[79] the Court set out an important, if hazy,[80] exception under which a minor party would be able to show that it deserved an exemption from the ordinary disclosure requirements. The minor party would have to show "a reasonable probability" that disclosure of contributors' names "[would] subject them to threat, harassment, or reprisals from either Government officials or private parties."[81] The Court would continue to struggle with the meaning of this exemption in a number of future cases.

C. *The Supreme Court's Holdings and Dicta on Disclosure Requirements Between* Buckley *and* Citizens United

Following *NAACP* and *Buckley*, the Supreme Court has dealt directly and indirectly with disclosure provisions in a wide variety of cases. There are two distinct lines of Supreme Court reasoning regarding disclosure laws. First, the Supreme Court has issued a limited number of direct holdings on various state and federal disclosure laws. These cases, in which a party challenges a particular disclosure law, tend to turn on specific factual considerations, particularly the vulnerable nature of the individual or organization challenging the law and the context in which they seek to keep certain information confidential.[82] The second strand comes from cases in which the Court considered other aspects of campaign regulations but commented in dicta on disclosure provisions that

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77. *Buckley*, 424 U.S. at 68–69 ("Appellants contend that the Act's requirements are overbroad insofar as they apply to contributions to minor parties and independent candidates . . . .").

78. Id. at 69–70.

79. Id. at 71.

80. See, e.g., McGeveran, supra note 65, at 868 ("[T]he Supreme Court never articulated the standard [for harassment exemptions] very clearly.").

81. *Buckley*, 424 U.S. at 74. At least one commentator has criticized these evidentiary standards as "onerous requirements [that] make it difficult to mount an as-applied challenge to any disclosure requirement." McGeveran, supra note 65, at 868.

82. Compare NAACP v. Alabama, 357 U.S. 449, 466 (1958) (upholding NAACP's challenge to Alabama state court's order that organization turn over its membership lists), with McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336, 357 (1995) (striking down Ohio statute prohibiting "distribution of anonymous campaign literature" in context of challenge by individual prosecuted for distributing anonymous handbills regarding proposed school tax levy), and Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 101–02 (1982) (holding Ohio disclosure provisions unconstitutional as applied to State Socialist Workers Party).

were not directly at issue. Invariably, the Court has approved of disclosure provisions in the dicta of these cases, and often with quite strong language. For this reason, many courts and analysts tend to latch onto the Court's prodisclosure language in this second thread of cases,[83] sometimes blurring the line between the Court's holdings and its dicta.

Part I.C.1 deals with cases in which disclosure requirements were not challenged before the Court, but the Court nevertheless spoke approvingly of them in dicta. Part I.C.2 examines the Court's direct holdings on a variety of disclosure laws, paying careful attention to the factual differences between the cases. This treatment proceeds in roughly chronological order, as most of the cases containing dicta supporting disclosure were decided before those that handed down specific holdings. The line between holding and dicta is particularly fuzzy in disclosure cases, contributing to a great deal of confusion.

1. *Prodisclosure Dicta in* Bellotti, Berkeley, *and* Massachusetts Citizens for Life. — Just two years after *Buckley* was decided, the Supreme Court issued another key opinion on campaign finance. In *First National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts criminal law that prohibited banks and businesses from spending money to influence the vote on a specified type of ballot initiative.[84] The Court found "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government."[85] In striking down the expenditure limits, the Court stated that the anticorruption interest was irrelevant in the context of ballot questions, because, in ballot question elections, there is no one to corrupt.[86] At the same time, and perhaps to point out an alternative regulatory scheme that would be permissible, the Court spoke in broad terms about the benefits of disclosure, even though no disclosure laws were at issue in the case: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and

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83. See, e.g., infra Part II.D.1 (detailing Ninth Circuit's deference to Supreme Court's prodisclosure dicta).

84. 435 U.S. 765, 768 (1978) (describing Massachusetts law and its application to banks and businesses); see also id. at 776 ("[T]he question must be whether [the statute] abridges expression that the First Amendment was meant to protect.").

85. Id. at 789–90 (footnote omitted).

86. Id. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citation omitted)). This statement was about spending limits, not disclosure requirements, but severing the anticorruption interest from ballot question cases nevertheless provides ammunition for those who oppose disclosure laws. See supra note 76 and accompanying text (noting central importance of informational interest rather than anticorruption interest).

credibility of the advocate."[87] When corporations advertise about a ballot initiative, "[i]dentification 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."[88] No disclosure requirements were challenged in *Bellotti*, but the Court's dicta clearly supported disclosure as an alternative to expenditure limits.

Another case, three years later, also struck down independent expenditure limits while affirming the importance of disclosure in dicta. *Citizens Against Rent Control v. City of Berkeley* concerned a city ordinance in Berkeley, California, that prohibited independent expenditures above $250 on either candidate elections or ballot questions.[89] A separate provision, not challenged in the suit, required that issue committees publish a list of all contributors giving more than $50 in local newspapers.[90] This turned out to be crucial. While striking down the contribution and expenditure limits, the Court noted in dicta that the disclosure provision sufficiently served the city's interest in informing the electorate.[91] Again speaking broadly about disclosure laws that were not squarely before the Court, the majority opined that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."[92] *Bellotti* and *Berkeley* are quite similar in their invalidation of expenditure limits and subsequent dicta in favor of disclosure laws as an acceptable alternative.[93]

Finally, a similar dynamic prevailed in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*).[94] The defendant, MCFL, was a nonprofit corporation,

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87. *Bellotti*, 435 U.S. at 791–92 (footnote omitted).

88. Id. at 792 n.32; see also id. ("[W]e emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed.").

89. 454 U.S. 290, 292 (1981). The plaintiff, which was a committee organized to defeat a ballot question that would have imposed rent control on the city, sued after being penalized for accepting nine contributions over the $250 limit. See id. at 292–93 (discussing facts of case).

90. Id. at 294 n.4.

91. Id. at 298–99 (denying usefulness of expenditure limits as "prophylactic measure" given the existence of separate disclosure requirements). But see id. at 309 (White, J., dissenting) (arguing expenditure limits are needed in light of insufficiency of basic disclosure requirements).

92. Id. at 299–300 (majority opinion). The contention that the government may ban anonymous contributions to political committees is dicta, but it is still strongly supportive of disclosure laws in principle.

93. See Garrett & Smith, supra note 64, at 301 (arguing *Bellotti* and *Berkeley* "hint that disclosure is constitutionally acceptable and even a necessary part of a legitimate electoral process"). According to Garrett and Smith, the dicta in these two cases "strongly suggest that the Supreme Court has understood the need for disclosure in the initiative process and acknowledges an independent informational interest." Id.

94. 479 U.S. 238 (1986).

financed by donations from individual members, that allegedly had violated FECA by expending general treasury funds on a "Special Edition" newsletter urging voters to support prolife candidates in the upcoming election.[95] The relevant section of FECA prohibited corporations from using treasury funds for expenditures to influence an election, requiring instead that such spending be made from a separate segregated fund financed by voluntary donations.[96] Without striking down the FECA provision on its face, the Court held it unconstitutional as applied to the plaintiff organization.[97] The majority rejected the FEC's argument, similar to the city's argument in *Berkeley*, that exempting the plaintiff would "open the door to massive undisclosed political spending by similar entities."[98] Instead, the Court reasoned that other FECA provisions requiring disclosure would suffice to prevent against this danger. The Court asserted that "[t]hese reporting obligations provide precisely the information necessary to monitor [MCFL's activities]. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act."[99] The Court thereby implicitly accepted the importance of the government's informational interest in requiring disclosure.

2. *Specific Holdings on Varied Disclosure Laws.* — Several times in the period between *Buckley* and *Citizens United*, the Supreme Court directly ruled on the constitutionality of various disclosure laws. The scope of the holdings that emerged from the case law was not entirely clear, leading to debate and confusion among commentators,[100] but in each case the Court attempted to balance the state's informational interest with individuals' and groups' anonymity interests.

In *Brown v. Socialist Workers '74 Campaign Committee*, the Court held a sweeping Ohio law, which required every political party to disclose the contributors to each of its candidates, unconstitutional as applied to the "minor" Socialist Workers Party (SWP).[101] The case seemed to turn on the unusual vulnerability of the SWP, as the Court made clear by

95. See id. at 241–44 (describing facts of case).

96. 2 U.S.C. § 441b (1982), invalidated by Citizens United v. FEC, 130 S. Ct. 879 (2010); see also *MCFL*, 479 U.S. at 238 (describing FECA provision).

97. *MCFL*, 479 U.S. at 241.

98. Id. at 262; see Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981) (rejecting city's argument that restriction on contributions to ballot issue committees was necessary to limit influence of corporations seeking to hide true identities).

99. *MCFL*, 479 U.S. at 262.

100. See, e.g., infra notes 121–122 and accompanying text (describing scholarly debate over direction of Supreme Court precedent, particularly following McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)).

101. 459 U.S. 87, 88 (1982) (affirming district court's judgment that statute was unconstitutional as applied).

formulating the question presented as whether the disclosure laws "can be constitutionally applied to the Socialist Workers Party (SWP), a minor political party which historically has been the object of harassment."[102] *Socialist Workers* thus factually resembled *NAACP*, in that it involved an organization with a well-documented history of harassment and reprisals.[103] Applying *Buckley*'s "minor-party exemption," the Court explained that, in the case of a minor party, the government's interest in compelling disclosure was diminished while the party's interest in anonymity was increased.[104] The Court further held that the law could not be constitutionally applied to either the SWP's contributors or the recipients of its campaign disbursements.[105] According to Richard Briffault, in *Socialist Workers* "the Court operationalized the exemption" for minor parties that it first recognized in *Buckley*.[106]

The next important case about disclosure requirements was *McIntyre v. Ohio Elections Commission*, a ballot proposition case that struck down an Ohio statute that prohibited the distribution of anonymous campaign literature.[107] The plaintiff, Margaret McIntyre, distributed self-made leaflets opposing a ballot question on a proposed school tax levy at consecutive public meetings, some of which indicated her name and some of which were merely signed "CONCERNED PARENTS AND TAXPAYERS."[108] When the Ohio Elections Commission fined her $100 for failing to include her name on some of the leaflets, she brought suit.[109] At the

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102. Id.; see also id. (reciting *Buckley*'s "reasonable probability" test for showing potential for harassment (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam))).

103. See id. at 98–99 (describing history of state and private harassment against SWP in Ohio and elsewhere); supra text accompanying notes 45–46 (highlighting Court's discussion of past harassment directed toward NAACP in Alabama).

104. *Socialist Workers*, 459 U.S. at 92–95 (discussing distortion of interests in minor-party disclosure cases).

105. Id. at 95.

106. Briffault, Two Challenges, supra note 40, at 991. The Court's allowance of an exemption from disclosure laws specifically based on evidence of harassment was unique. Ciara Torres-Spelliscy writes that *Socialist Workers* is "the only Supreme Court case to actually grant . . . a harassment exemption" under *Buckley*. Ciara Torres-Spelliscy, Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After *Citizens United* and *Doe v. Reed*, 27 Ga. St. U. L. Rev. 1057, 1096 (2011). By way of arguing that as-applied exemptions from disclosure requirements are difficult to obtain, another commentator points out that the SWP "was able to present plentiful specific evidence of severe government and private retribution aimed directly at the organization and its members." McGeveran, supra note 65, at 868. McGeveran asserts that "courts rarely grant exceptions to disclosure," and that "[m]ost of those are issued to marginal political groups, often socialists, with little realistic likelihood of influencing any election." Id. at 869.

107. 514 U.S. 334, 336, 357 (1995) (describing statute at issue and invalidating it).

108. Id. at 337 & n.2 (summarizing Mrs. McIntyre's activities and reproducing pamphlet she distributed).

109. Id. at 338 (describing Ohio Election Commission's decision). One commentator asserts that "the facts in *McIntyre* were arguably very narrow in the sense that the adver-

outset, the Court surveyed the historical use of pseudonyms in American literature and politics, most notably invoking the example of *The Federalist Papers*.[110] The Court also referred to "a respected tradition of anonymity in the advocacy of political causes . . . perhaps best exemplified by the secret ballot."[111]

Turning to the State's asserted informational interest, the Court found it to be insufficient. "Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document," the Court wrote, "we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."[112] The informational interest, which the Court described as "[t]he simple interest in providing voters with additional relevant information," could not justify forcing Mrs. McIntyre to "make statements or disclosures she would otherwise omit."[113] All told, the State's informational interest was "plainly insufficient to support the constitutionality of its disclosure requirement."[114]

The Court also noted the similar state interest of preventing fraud but found that interest inadequate to justify the statute's broad prohibition, which "encompasse[d] documents that are not even arguably false or misleading."[115] The Court distinguished the case from *Bellotti* and

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tisement in question was not a typical piece of literature disseminated by a campaign." Wold, supra note 64, at 179.

110. See *McIntyre*, 514 U.S. at 343 n.6 ("[The] tradition [of anonymity in the advocacy of political causes] is most famously embodied in *The Federalist Papers* . . . ."); see also id. at 357 ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."). But see id. at 371 (Scalia, J., dissenting) (noting consistent, widespread use of anonymity prohibitions in state electoral laws and asserting "the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics").

111. Id. at 343 (majority opinion). Some scholars in favor of fewer disclosure requirements have latched onto this connection to the secret ballot. Johnson, Regan, and Wayland write that campaign finance disclosure "comes directly into conflict with privacy," and that "there is a strong case to be made for privacy . . . because the secret ballot and associational privacy are not just individual privacy interests but are public goods essential to democratic governance." Johnson, Regan & Wayland, supra note 21, at 962. This argument conflates campaign finance disclosure and the act of voting, implying the need for secrecy in the voting booth bolsters the need for anonymity in campaign finance. A better view is to recognize that there are very different interests at stake in these two distinct areas, and that anonymity may not be equally desirable in both contexts.

112. *McIntyre*, 514 U.S. at 348; see also id. at 348–49 ("Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message.").

113. Id. at 348.

114. Id. at 349.

115. Id. at 351; see also id. at 351–53 (demonstrating statute's overbreadth).

Buckley, both factually and in terms of those cases' broader prodisclosure language. On the facts, unlike the case of Mrs. McIntyre, "neither [*Buckley* nor *Bellotti*] involved a prohibition of anonymous campaign literature."[116] Moreover, the Court argued that the dicta in *Bellotti* favoring corporate disclosure[117] "did not necessarily apply to independent communications by an individual,"[118] while *Buckley*'s holding in favor of contribution disclosures "had no reference to the kind of independent activity pursued by Mrs. McIntyre."[119] Finally, in distinguishing *Buckley*'s holding in support of independent expenditure disclosure, the Court stated that the case for disclosure is stronger when an individual simply donates money than it is when an individual spends money in order to create and distribute political writing, such as leaflets.[120]

McIntyre prompted debate on whether a new era of Supreme Court protection of anonymous political speech was at hand. Some felt that *McIntyre* had, or at least should have, paved the way for broader protection of anonymity.[121] Other scholars disagreed,[122] espousing a narrower

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116. Id. at 353.

117. See supra notes 87–88 and accompanying text (describing *Bellotti*'s prodisclosure dicta).

118. *McIntyre*, 514 U.S. at 354.

119. Id. But see id. at 385 (Scalia, J., dissenting) (arguing "[i]f *Buckley* remains the law, this is an easy case" that should come out opposite way).

120. See id. at 355 (majority opinion) ("Disclosure of an expenditure and its use, without more, reveals far less information [than disclosure of writing]. . . . [E]ven though money may 'talk,' its speech is . . . less likely to precipitate retaliation.").

121. "For a time," McGeveran writes, "it appeared that *McIntyre* might herald a more capacious understanding of the interests in anonymity when ordinary individuals engage in politically-related speech." McGeveran, supra note 65, at 859. This would have been a favorable result, in McGeveran's estimation. See id. at 865 (contending *McIntyre* represented broader, better view of privacy interests than cases that came before or after). Wold similarly argues that the holding should be read broadly. He writes, "[t]he Court considered a statute that required the identification of the speaker in printed material by or about candidates or ballot measures, and the majority held that such a statute impermissibly infringed on the right of anonymity protected by the First Amendment." Wold, supra note 64, at 184. But this prediction (or hope) for broader protection of anonymity post-*McIntyre* has not been borne out. Wold himself concedes that *McIntyre* may have pointed to the narrowness of its own decision. See id. ("[T]he opinion suggested there might be a limit to its own scope, to encompass only one type of document covered by the statute . . . ."). More directly, McGeveran writes of his prediction that the Court would start to view disclosure requirements with more skepticism, "Boy, was I wrong. High Court rulings since then have consistently upheld disclosure requirements in election law." McGeveran, supra note 65, at 859–60.

122. See Briffault, Two Challenges, supra note 40, at 992 (noting *McIntyre* did not "undermine[] the Court's general support for the public dissemination of campaign finance information"); Elizabeth Garrett, Voting with Cues, 37 U. Rich. L. Rev. 1011, 1042 n.105 (2003) (claiming, in 2003, "[t]he *McIntyre* holding seems limited to individuals attempting to get a political message out and preferring to do so anonymously, and it will likely not be extended to invalidate disclosure statutes"); Garrett & Smith, supra note 64, at 301 ("In our view, broad readings of *McIntyre* are inconsistent with other cases indicat-

view of *McIntyre* confirmed by later Supreme Court jurisprudence. After briefly extending *McIntyre*'s logic in *Buckley v. American Constitutional Law Foundation* (*ACLF*),[123] the Court began its retreat back toward a narrow understanding of the anonymity interest in *McConnell v. FEC*.[124]

In *ACLF*, the Court invalidated three Colorado provisions regulating the ballot initiative process, including requirements that petition gatherers wear an identification badge and that initiative sponsors disclose the name of and amount paid to every paid gatherer.[125] On the subject of the identification badges, the Court explained that its "decision in *McIntyre* . . . is instructive here" and that "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest."[126] Moreover, this method of disclosure was unnecessary because, under other constitutionally valid provisions of Colorado law, circulators had to attach affidavits identifying themselves when they handed in their gathered signatures, and these affidavits would be made public.[127] In distinguishing between these permissible and impermissible forms of disclosure, the Court identified the heightened importance of anonymity in the specific situation of gathering signatures for an initiative petition. The Court similarly struck down the requirement that those who sponsor an initiative disclose the names of paid petition circulators.[128] In doing so, the Court implied that the State's informational interest was inadequate to overcome the burden on petition circulators' anonymity.[129] At the same time, the Court stressed that it was not invalidating disclosure requirements for those who sponsored the initiative in the first place, as the State's information-

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ing approval of mandatory disclosure in issue elections . . . . Moreover, broad holdings are not compelled by *McIntyre*."); Torres-Spelliscy, supra note 106, at 1094 & n.135 (viewing *McIntyre* as "de minimis exception" case).

123. 525 U.S. 182 (1999).

124. 540 U.S. 93 (2003), overruled on other grounds, Citizens United v. FEC, 558 U.S. 310 (2010).

125. *ACLF*, 525 U.S. at 186–87 (describing laws at issue and case's holding).

126. Id. at 199. Briffault also notes the factual similarity to *McIntyre*. See Briffault, Two Challenges, supra note 40, at 992 ("As in *McIntyre*, the educational value for the voters was minimal, while the threat to political participation was significant.").

127. *ACLF*, 525 U.S. at 189 n.7 (reproducing affidavit requirement (quoting Colo. Rev. Stat. § 1-40-111(2) (1998))); id. at 198–200 (describing affidavit requirement as "separate[] from the moment the circulator speaks" and as "exemplif[ying] the type of regulation for which *McIntyre* left room").

128. See id. at 204 (holding "[l]isting paid circulators and their income from circulation 'forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts'" and is "no more than tenuously related to the substantial interests disclosure serves" (second alteration in *ACLF*) (quoting Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1105 (10th Cir. 1997))).

129. See Wold, supra note 64, at 187 ("Consistent with *McIntyre* . . . [the] informational interest supporting financial disclosure did not save Colorado's identification requirement.").

al interest supported disclosure of their names.[130] Later developments would show that *ACLF* marked the high point of the Court's protection of the anonymity interest, but it was a high point from which the Court quickly retreated.[131]

In 2003, the Court decided *McConnell v. FEC*, halting the movement toward greater recognition of individuals' anonymity interest in disclosure cases.[132] *McConnell* was chiefly about elements of the Bipartisan Campaign Reform Act of 2002 (BCRA) other than disclosure requirements, but it considered challenges to BCRA's new disclosure provisions as well. In particular, *McConnell* reviewed the constitutionality of BCRA's disclosure requirements for persons or groups engaged in "electioneering communications," a new term in BCRA meant to cover a broader range of political communication.[133] The Court upheld all the challenged disclosure provisions, finding that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA. Accordingly, *Buckley* amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'"[134]

The *McConnell* Court anchored its decision to *Buckley*, completely ignoring *McIntyre* and *ACLF*. As Briffault points out, "neither [*McIntyre* nor *ACLF*] was cited in the *McConnell* majority's analysis of disclosure, which treated the matter as governed by *Buckley*."[135] By relying solely on *Buckley*

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130. *ACLF*, 525 U.S. at 202–03 ("Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot . . . .").

131. See Briffault, Disclosure 2.0, supra note 19, at 284 ("Neither *McIntyre*'s nor *ACLF*'s restatement of the First Amendment costs of election-related disclosure led to any diminution in the Court's support for the reporting and public dissemination of campaign finance information."); Briffault, Two Challenges, supra note 40, at 992 ("Neither *McIntyre* nor *ACLF* undermined the Court's general support for the public dissemination of campaign finance information.").

132. 540 U.S. 93 (2003), overruled on other grounds, Citizens United v. FEC, 558 U.S. 310 (2010).

133. Id. at 189–90 (discussing BCRA's definition of "electioneering communications" and its "significant disclosure requirements for persons who fund electioneering communications"); see supra text accompanying notes 32–33 (describing narrow definition of "express advocacy" and broader meaning of "electioneering communication").

134. *McConnell*, 540 U.S. at 196; see also supra notes 63–75 and accompanying text (examining *Buckley*'s identification and application of permissible state interests).

135. Briffault, Disclosure 2.0, supra note 19, at 284; see also id. ("Justice Thomas's contention in his *McConnell* dissent that *McIntyre* changed the constitutional analysis of disclosure was rejected by the rest of the Court."); Wold, supra note 64, at 189–91 (noting *McConnell* did not treat *McIntyre* as controlling). Briffault argues that *McIntyre* and *ACLF* are reconcilable with *Buckley*, once one accounts for their particular facts. See Briffault, Disclosure 2.0, supra note 19, at 283 ("[T]he analysis in those cases is actually consistent with *Buckley*'s position that disclosure which produces information that educates the voters and does not raise a serious prospect of discouraging political activity is constitutional.").

for its reasoning in favor of disclosure laws and treating it as controlling, *McConnell* diminished the precedential force of *McIntyre* and *ACLF*, specifically eroding those cases' reasoning in favor of the anonymity interest. As it solidly reaffirmed the constitutionality of broad disclosure laws, voting 8-1 on the disclosure issues, the *McConnell* Court "initiated the turn away from" *McIntyre*.[136] This trajectory would continue as *Citizens United v. FEC*[137] and *Doe v. Reed*[138] saw the Court return unambiguously to its pre-*McIntyre* understanding of the relationship between anonymity and the state's informational interest.

D. *The Supreme Court's Recent Disclosure Jurisprudence in* Citizens United *and* Reed

For campaign finance cases, 2010 was a watershed year, as the Supreme Court decided *Citizens United*[139] and *Reed*.[140] *Citizens United*, which involved a challenge to BCRA, came first and is significantly more prominent for its controversial holding that limits on independent expenditures by corporations and unions are unconstitutional.[141] *Citizens United*'s holding affirming BCRA's disclosure requirements is not nearly as well known or publicized,[142] but it was a forceful affirmation.[143] Simi-

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136. McGeveran, supra note 65, at 862. McGeveran characterizes this as a turn from "the broader *McIntyre* view to an older and narrower understanding of relevant privacy interests." Id.

137. 130 S. Ct. 876 (2010).

138. 130 S. Ct. 2811 (2010).

139. 130 S. Ct. 876; see Torres-Spelliscy, supra note 106, at 1057 (calling *Citizens United* a "paradigm-shifting" case for its invalidation of corporate expenditure limits).

140. 130 S. Ct. 2811; see Briffault, Two Challenges, supra note 40, at 984 ("[B]oth *Citizens United* and *Doe v. Reed* confirmed the preferred position of disclosure in campaign finance regulation.").

141. See, e.g., Richard Briffault, Corporations, Corruption, and Complexity: Campaign Finance After *Citizens United*, 20 Cornell J.L. & Pub. Pol'y 643, 643 (2011) [hereinafter Briffault, Complexity] (noting that "[f]ew campaign finance cases have drawn more public attention than" *Citizens United* and that "most, albeit not all, of both the popular and academic commentary on the decision has been critical"); Torres-Spelliscy, supra note 106, at 1058 (discussing "media's coverage of the case's more shocking holding allowing unlimited corporate spending"); Adam Liptak, Justices Turn Minor Movie Case into a Blockbuster, N.Y. Times, Jan. 23, 2010, at A13, available at http://www.nytimes.com/2010/01/23/us/politics/23scotus.html?_r=0 (on file with the *Columbia Law Review*) (calling *Citizens United* "a judicial blockbuster"). The well-documented controversy over *Citizens United*'s holding on independent expenditure limits is beyond the scope of this Note.

142. See Wold, supra note 64, at 171 ("Much less remarked on has been the short section at the end of the *Citizens United* decision [on disclosure]."); Adam Liptak, Blockbuster Case Yields an Unexpected Result, N.Y. Times, Sept. 20, 2011, at A13**,** available at http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html (on file with the *Columbia Law Review*) ("An often-overlooked part of the Citizens United decision actually upheld disclosure requirements . . . . People forget the

larly, *Reed* upheld the facial validity of a Washington law requiring public disclosure of the names of those who signed petitions supporting ballot initiatives.[144]

While its consideration of independent expenditure limits was long and complex,[145] *Citizens United*'s discussion of disclosure requirements was short and sweet.[146] The challenged BCRA provisions required disclaimers on "electioneering communications"—campaign ads supporting or opposing a candidate that were funded by anyone other than a candidate—and required any individual or group spending more than $10,000 on electioneering communications to file a disclosure report with the FEC.[147] The Court relied heavily on the government's informational interest, as identified by *Buckley*, in upholding both challenged disclosure requirements.[148] Justice Kennedy's majority opinion listed at least four distinct (albeit similar) informational benefits of disclosure requirements: providing the electorate with information in general, ensuring that voters are fully informed about who is speaking, aiding the electorate in evaluating the arguments being made, and preventing voter confusion.[149] Consideration of the anonymity interest advanced in *McIntyre* and *ACLF* was nowhere to be found.[150] Despite the plaintiff advocacy

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second aspect of the decision, this one favoring disclosure and decided by a lopsided vote.").

143. See *Citizens United*, 130 S. Ct. at 914 (upholding BCRA's disclosure requirements after applying "exacting scrutiny"); Briffault, Two Challenges, supra note 40, at 984 ("[T]he Court confirmed that disclosure requirements could reach broadly . . . ."). For discussion of the surprise some in academia felt at the strength of the Court's disclosure holding, see id. at 983 ("2010 began . . . with the possibility that the Supreme Court . . . might impose new restrictions on disclosure."); Torres-Spelliscy, supra note 106, at 1059 (describing "dramatic 180 degree turn that the law has taken on the issue of the constitutionality of disclosure within the past four years").

144. 130 S. Ct. at 2815 ("We conclude that such disclosure does not as a general matter violate the First Amendment . . . . We leave it to the lower courts to consider [the plaintiffs'] more focused claim concerning disclosure of the information on this particular petition . . . .").

145. *Citizens United*, 130 S. Ct. at 888–913 (analyzing independent expenditure limit question).

146. Id. at 913–16 (analyzing disclosure question).

147. 2 U.S.C. § 434(f) (2006) (requiring disclosure for electioneering communications); id. § 441d(d) (requiring disclaimers on electioneering communications); see *Citizens United*, 130 S. Ct. at 913–14 (describing challenged BCRA provisions).

148. See *Citizens United*, 130 S. Ct. at 914 (beginning analysis of government's informational interest with citation to *Buckley*); Briffault, Two Challenges, supra note 40, at 995 (noting "*Buckley*, *McConnell*, and the deferential approach of those cases to disclosure were repeatedly invoked" in *Citizens United*).

149. See *Citizens United*, 130 S. Ct. at 915 (describing benefits of disclosure).

150. See Briffault, Two Challenges, supra note 40, at 995 (noting Court's reliance on *Buckley* and *McConnell* was to detriment of *McIntyre* and *ACLF*, which were neither discussed nor cited); Wold, supra note 64, at 191 ("[T]he Court's analysis . . . was dramatically inconsistent with the Court's jurisprudence set out in such detail in *McIntyre*, did not acknow-

organization's concern about harassment in the event of disclosure, the Court saw it as unlikely that the group would be subjected to harassment and therefore found no reason to narrow or strike down the laws or grant an as-applied exemption.[151] The Court ended its examination of the disclosure requirements by proclaiming, "[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[152] This statement epitomizes the *Citizens United* Court's view of disclosure.[153]

The Court's opinion in *Reed* is almost as concise as *Citizens United*'s section on disclosure. The case concerned a challenge to Washington's Public Records Act, which provided for public disclosure of the names and addresses of those who signed petitions to get an initiative on the ballot. The sponsors and certain petition signers backing an initiative to repeal a state law granting benefits to same-sex couples brought suit to challenge the disclosure requirement.[154] Taking the plaintiffs to have stated a facial challenge, rather than an as-applied challenge, the Court examined the law on its face.[155] The Court identified two relevant governmental interests: the interest in "preserving the integrity of the process" and the informational interest.[156] Intriguingly, the Court proceeded to

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ledge taking a different approach, and failed to even mention *McIntyre* . . . ."). For Wold, a proponent of *McIntyre*'s approach to anonymity, this is an unfortunate result, and "raises the question of whether *McIntyre* is still good law." Id. at 193. Wold argues, however, that "[i]t is hard to believe . . . that the Court would in effect totally abandon *McIntyre*, or limit it to its relatively inconsequential facts, especially without saying more about it in *Citizens United*." Id. But see Briffault, Disclosure 2.0, supra note 19, at 284 (arguing *McConnell* had already narrowed *McIntyre*'s reach well before *Citizens United* was decided); Briffault, Two Challenges, supra note 40, at 995 (contrasting *Citizens United* Court's reliance on *Buckley* and *McConnell* with its disregard of *McIntyre* and *ACLF*).

151. See *Citizens United*, 130 S. Ct. at 916 (noting examples of harassment in other contemporary events "are cause for concern" but finding "Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation").

152. Id.

153. See Briffault, Two Challenges, supra note 40, at 993 (contending *Citizens United* "strongly upheld" challenged disclosure provisions); Torres-Spelliscy, supra note 106, at 1079 (arguing Court "was very sympathetic to disclosure and disclaimers in *Citizens United*" and "gave a full-throated endorsement of disclosure").

154. Doe v. Reed, 130 S. Ct. 2811, 2815 (2010).

155. See id. at 2817 ("[P]laintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.").

156. See id. at 2819 (describing interests as "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability," and "providing information to the electorate about who supports the petition"); see also Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 191 (1999) ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . . ."); Garrett & Smith, supra note 64, at 300 ("[T]he Supreme Court has suggested that disclosure 'may well be justified . . . by the spe-

scrutinize the law based on the "integrity" interest and, finding that interest to be sufficient justification, chose not to address the informational interest.[157] The Court found that disclosure would invite public scrutiny of petition signatures and would give Washington's Secretary of State some much-needed help in identifying invalid signatures, thereby helping maintain the integrity of elections.[158] In addition, disclosure would "promote[] transparency and accountability in the electoral process to an extent other measures cannot."[159] Briffault argues that, by making the point about transparency, *Reed* "effectively linked up electoral integrity and voter information by suggesting an overarching public interest in being able to monitor and understand the workings of the political process."[160] Confronted only with a facial challenge, the Court upheld the law over plaintiffs' protests about potential harassment because they could not establish that harassment would generally occur under the statute.[161] *Reed*, along with *Citizens United*, thus "confirmed the preferred position of disclosure in campaign finance regulation."[162]

Remanding the case to the district court, the Supreme Court left open the possibility that the plaintiffs could succeed on an as-applied challenge and gain an exemption from the otherwise valid state law.[163] In separate concurrences, Justices Alito and Sotomayor disagreed about the

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cial state interest in protecting the integrity of the ballot-initiative process.'" (quoting Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 167 (2002))).

157. See *Reed*, 130 S. Ct. at 2819 ("Because we determine that the State's interest in preserving the integrity of the electoral process suffices . . . we need not, and do not, address the State's 'informational' interest.").

158. See id. at 2820 (noting, in particular, that "the secretary's verification and canvassing will not catch all invalid signatures . . . and the secretary can make mistakes, too").

159. Id.

160. Briffault, Two Challenges, supra note 40, at 997.

161. See *Reed*, 130 S. Ct. at 2821 ("Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs' broad challenge to the [Public Records Act]."); see also McGeveran, supra note 65, at 860 (arguing *Citizens United* and *Reed* "returned to an earlier understanding of privacy that requires proof of a 'reasonable probability' of 'threats, harassment, or reprisals' to raise constitutional problems" (quoting *Reed*, 130 S. Ct. at 2820; Citizens United v. FEC, 130 S. Ct. 876, 916 (2010))); cf. id. at 862 ("[T]hese cases represent an almost complete disregard for individual privacy interests, especially compared to the *McIntyre* decision.").

162. Briffault, Two Challenges, supra note 40, at 984; see also id. at 1014 (describing *Citizens United*'s and *Reed*'s protection of disclosure laws through "relatively relaxed standard of review," "relatively expansive view of the content of the communications that can be subject to disclosure," and "relatively heavy burden of persuasion" placed on those seeking exemption from disclosure requirements); Torres-Spelliscy, supra note 106, at 1103 ("*Citizens United* and *Doe v. Reed* provides [sic] considerable leeway for lawmakers to require more disclosure of more types of political advertisements than ever.").

163. *Reed*, 130 S. Ct. at 2815, 2821 ("[U]pholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one. . . . [P]laintiffs may press the narrower challenge . . . in proceedings pending before the District Court.").

proper standards to be applied to this future challenge.[164] Citing evidence of reprisals against supporters of California's Proposition 8, Justice Alito concluded that "[i]n this case . . . plaintiffs have a strong case that they are entitled to as-applied relief."[165] Justice Sotomayor hinted that plaintiffs' as-applied challenge should fail and argued that courts facing challenges of this nature "should be deeply skeptical of any assertion that the Constitution . . . compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process."[166]

The Supreme Court's jurisprudence on disclosure began with its consideration of individuals' anonymity interest in *NAACP* and the governmental interests, including the informational interest, supporting disclosure laws in *Buckley*.[167] Since then, the Court has issued several campaign finance decisions that have included prodisclosure dicta.[168] The Court has also handed down direct holdings on a number of specific federal and state disclosure provisions.[169] While the 1990s cases of *McIntyre* and *ACLF* seemed to indicate a turn toward greater protection of the anonymity interest, more recent cases have reversed this trend. *McConnell* ignored and thereby undermined *McIntyre* and *ACLF*,[170] while *Citizens United* and *Reed* forcefully reaffirmed broad constitutional protection for disclosure laws based on the government's informational and "integrity" interests.[171] Since *Citizens United* and *Reed*, lower courts have grappled with the constitutional validity of various state disclosure requirements, resulting in uncertain doctrine in the federal circuit courts.

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164. This disagreement between the two Justices roughly approximates the differing standards that the Ninth and Tenth Circuits applied in *Brumsickle* and *Sampson*, respectively, leading to divergent outcomes in those cases. See infra note 183 and accompanying text (describing Ninth Circuit's decision in *Brumsickle* upholding disclosure requirements and refusing as-applied relief); infra note 189 and accompanying text (explaining Tenth Circuit's decision in *Sampson* holding disclosure requirements unconstitutional as applied to plaintiffs).

165. *Reed*, 130 S. Ct. at 2823–24, 2827 (Alito, J., concurring).

166. Id. at 2829 (Sotomayor, J., concurring); see also McGeveran, supra note 65, at 870 & n.74 (noting several Justices, including Justice Sotomayor, "expressed palpable skepticism about as-applied exemptions"). On remand, the district court concluded that plaintiffs' showing "falls far short" of that required to sustain an as-applied challenge, and entered summary judgment for the defendants. Doe v. Reed, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011).

167. See supra Part I.B (discussing Court's foundational treatment of individual and state interests in *NAACP* and *Buckley*).

168. See supra Part I.C.1 (describing Court's prodisclosure dicta).

169. See supra notes 101–131 and accompanying text (recounting Court's disclosure holdings chronologically through *ACLF*).

170. See supra notes 132–136 and accompanying text (discussing *McConnell* and its relationship to *McIntyre* and *ACLF*).

171. See supra notes 137–166 and accompanying text (analyzing prodisclosure holdings of *Citizens United* and *Reed*).

II. ANALYTICAL DISAGREEMENT BETWEEN THE APPROACHES OF *BRUMSICKLE* AND *SAMPSON*

This Note analyzes the question of disclosure requirements for ballot questions through the lens of two circuit court cases. In 2010, following *Citizens United* and *Reed*, two circuit courts took fundamentally opposing views on disclosure laws for ballot question elections. In *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit rejected both facial and as-applied challenges to a state disclosure law.[172] This was in keeping with the Ninth Circuit's history of decisions upholding disclosure laws before *Citizens United* and *Reed*,[173] although this Note focuses on *Brumsickle* because it occurred after those two landmark Supreme Court cases and because it typifies the Ninth Circuit's historical approach.[174] In *Sampson v. Buescher*, on the other hand, the Tenth Circuit sustained an as-applied challenge to a series of state disclosure provisions.[175]

These courts disagree on how to view the interests at stake in challenges to disclosure laws for ballot questions, and they also treat relevant Supreme Court doctrine and language quite differently. Thus, while *Brumsickle* and *Sampson* are somewhat factually distinct, they also fundamentally differ on the value of disclosure laws for ballot questions and particularly the importance of the government's informational interest. Part II.A lays out the factual backgrounds and basic holdings of the two cases. The remaining subsections of Part II detail the areas of doctrinal disagreement between them, contrasting in turn the cases' consideration of governmental and individual interests, treatment of Supreme Court holdings, and treatment of Supreme Court dicta.

A. *Factual Backgrounds and Holdings of* Brumsickle *and* Sampson

1. *Facts and Holding of* Brumsickle. — In *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit rejected a challenge to Washington's Public Disclosure Law (PDL).[176] The PDL imposes reporting and disclo-

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172. 624 F.3d 990, 994–95 (9th Cir. 2010). While the plaintiff styled its challenge as both facial and as-applied, the court found that the plaintiff "does not provide any evidence to support an as-applied challenge, and it does not distinguish between its facial and as-applied claims in its briefs." Id. at 1021. Thus, the court summarily rejected the as-applied challenge after denying the facial challenge. Id. at 1021–22.

173. See, e.g., Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1092 (9th Cir. 2003) (holding state may constitutionally regulate ballot advocacy through disclosure laws and remanding to give state opportunity to identify compelling interest for doing so). When *Getman* was decided, "[w]hether a state may regulate speech advocating the defeat or passage of a ballot measure [was] an issue of first impression in the federal courts of appeal." Id. at 1100.

174. *Brumsickle* is thus an example of the Ninth Circuit's current approach to disclosure laws.

175. 625 F.3d 1247, 1261 (10th Cir. 2010).

176. 624 F.3d at 994.

sure requirements on political committees, defined as any group receiving or spending money in support of or opposition to a candidate election or ballot question,[177] and narrowed by Washington courts to include only organizations with a primary purpose to "'affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.'"[178] A political committee receiving or spending less than $5000 in a year is only required to file a registration form with the state, which includes the names of those who work for or run the committee,[179] while larger committees have to file additional reports that include the names of donors on a monthly basis and around election dates.[180] Separate provisions impose disclosure requirements on any person or group not covered by the political committee provision (other than candidates) who expends more than $100 in relation to an election or ballot question and requires disclaimers in political advertisements by such persons and groups.[181]

The plaintiff in *Brumsickle*, a prolife advocacy corporation, planned a campaign to advocate for the defeat of an initiative to legalize physician-assisted suicide in Washington; fearing the PDL, however, it held off and

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177. Wash. Rev. Code § 42.17.020(39) (2008) (current version at Wash. Rev. Code § 42.17A.005(37) (2012)) ("'Political committee' means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition."). This definition of "political committee" therefore also encompasses an individual so long as he or she is not dealing with his or her own funds or property.

178. *Brumsickle*, 624 F.3d at 997 (quoting Evergreen Freedom Found. v. Wash. Educ. Ass'n, 49 P.3d 894, 903 (Wash. Ct. App. 2002)).

179. Wash. Rev. Code § 42.17.040 (2008) (current version at Wash. Rev. Code § 42.17A.205 (2012)) (listing disclosure requirements for all political committees); see *Brumsickle*, 624 F.3d at 998 ("Filing the registration form is the sole requirement imposed on political committees that raise or spend less than $5,000 in a year and that raise no more than $500 from any single donor.").

180. Wash. Rev. Code § 42.17.080(2)(a)–(b) (2008) (current version at Wash. Rev. Code § 42.17A.235(2)(a)–(b) (2012)) (requiring reports around election dates); id. § 42.17.080(2)(c) (current version at Wash. Rev. Code § 42.17A.235(2)(c) (2012)) (requiring monthly reports); id. § 42.17.090(1) (current version at Wash. Rev. Code § 42.17A.240 (2012)) (requiring additional information, including donor identification); see *Brumsickle*, 624 F.3d at 998 (describing additional disclosure requirements for larger political committees).

181. Wash. Rev. Code § 42.17.020(38) (2008) (current version at Wash. Rev. Code § 42.17A.005(36) (2012)) (defining "[p]olitical advertising"); id. § 42.17.100 (current version at Wash. Rev. Code § 42.17A.255 (2012)) (defining "independent expenditure" and requiring disclosure of same when value exceeds $100); id. § 42.17.103 (current version at Wash. Rev. Code § 42.17A.260 (2012)) (requiring disclosure by person or group making independent expenditure of more than $1000 on political advertising); id. § 42.17.510 (current version at Wash. Rev. Code § 42.17A.320 (2012)) (requiring disclaimers in political advertising undertaken as independent expenditure); see also *Brumsickle*, 624 F.3d at 998–99 (detailing disclosure requirements for those not covered as political committees).

instead sought an injunction against the law.[182] Affirming the opinion of the district court, the Ninth Circuit held that all the challenged provisions were constitutional both facially and as applied to the plaintiff.[183]

2. *Facts and Holding of* Sampson. — The Tenth Circuit considered a suit against a variety of Colorado disclosure laws in *Sampson v. Buescher*.[184] Issue committees, defined in Colorado as any organization or group of people with a major purpose of supporting or opposing a ballot question and spending or receiving over $200, are subjected to registration and disclosure requirements.[185] Issue committees must register with the state and disclose all spending.[186] They must also disclose the name and address of anyone contributing more than $20 and the occupation and employer of anyone contributing more than $100.[187] The plaintiffs in *Sampson* were a group of residents, without formal organization, who opposed the annexation of their unincorporated neighborhood into a nearby town. They received approximately $1000 in support of their efforts to defeat a ballot question on incorporation, and they filed suit in federal court after being subjected to an administrative action before Colorado's administrative courts alleging that they had not complied with the disclosure laws.[188] The Tenth Circuit sustained the challenge and held the Colorado laws unconstitutional as applied to the plaintiffs.[189]

B. *Consideration of Governmental and Individual Interests*

1. *Interests in* Brumsickle. — In a line of cases predating *Citizens United*, the Ninth Circuit consistently argued for the importance of the

182. See *Brumsickle*, 624 F.3d at 994–96, 999 (outlining facts of case).

183. See id. at 994–95 ("[F]or many of the same reasons articulated by the well-reasoned opinion of the district court, we too conclude that Washington's disclosure requirements do not violate the First Amendment, either facially or as applied to Human Life . . . .").

184. 625 F.3d 1247 (10th Cir. 2010).

185. Colo. Const. art. XXVIII, § 2(10)(a)(I)–(II); see *Sampson*, 625 F.3d at 1249 n.1 (explaining dual requirements of constitutional provision are read conjunctively, not disjunctively).

186. Colo. Rev. Stat. § 1-45-108(1)(a)(I) (2010) (requiring disclosure of all spending); id. § 1-45-108(3) (requiring registration); see also *Sampson*, 625 F.3d at 1249–50 (outlining registration and disclosure requirements).

187. Colo. Rev. Stat. § 1-45-108(1)(a)(I) (requiring disclosure of donors contributing more than $20); id. 1-45-108(1)(a)(II) (requiring disclosure of additional information about donors contributing more than $100).

188. See *Sampson*, 625 F.3d at 1249–53 (discussing facts and procedural history of case).

189. See id. at 1249 ("We agree that Colorado law, as applied to Plaintiffs, has violated their constitutional freedom of association.").

State's informational interest as it upheld disclosure laws.[190] The court continued this approach in *Brumsickle*. After a relatively lengthy discussion of the applicable standard of review, the *Brumsickle* court confirmed that exacting scrutiny applied to the disclosure requirements because of the First Amendment issues at stake.[191] The court then went on to discuss the government's interests. In so doing, it provided a detailed description of the informational interest. In fact, the opening sentence of the section on the "Governmental Interest" stated, "[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment."[192] More importantly, the court wrote, "[w]e have observed that these considerations 'apply just as forcefully, if not more so, for voter-decided ballot measures.'"[193] Notably, this passage quotes *California Pro-Life Council, Inc. v. Getman*, a pre-*Citizens United* decision in the Ninth Circuit.[194] Thus, beyond merely recognizing the relevance of the informational interest underlying disclosure laws, the court reiterated that the interest might be even more important for ballot questions than candidate elections.

The *Brumsickle* court made two more specific arguments for ratcheting up the importance of the informational interest when it comes to ballot questions. First, the court contended that, in ballot initiative elections, "'[v]oters act as legislators,'" meaning that "the high stakes of the ballot context only amplify the crucial need to inform the electorate."[195] This assertion follows from a line of earlier Ninth Circuit opinions. Second, the court looked to the broader political context, arguing that *Citizens United*'s elimination of independent expenditure limits for corporations and unions only heightened the need for robust disclosure laws.[196]

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190. See, e.g., infra notes 193–195 and accompanying text (discussing Ninth Circuit's pre-*Citizens United* view of informational interest and noting similarity to circuit's current stance).

191. See Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1005 (9th Cir. 2010) (following *Citizens United* and *Reed* in applying exacting scrutiny).

192. Id.

193. Id. at 1006 (quoting Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003)).

194. 328 F.3d 1088.

195. *Brumsickle*, 624 F.3d at 1006 (quoting *Getman*, 328 F.3d at 1106). Again, this argument draws on *Getman*, a pre-*Citizens United* decision in the Ninth Circuit.

196. See id. at 1007–08 ("As trends in campaign finance jurisprudence have opened the door to even more political expenditures in the future, the magnitude of the state's interest is only likely to increase."). This obvious reference to *Citizens United* was immediately followed by a citation to that case's controversial holding. Id. at 1008. Notably, *Citizens United* itself asserted that strong disclosure laws are a permissible, even desirable, alternative to the expenditure limits it held unconstitutional. See Citizens United v. FEC, 130 S. Ct. 876, 915–16 (2010) (explaining "disclosure is a less restrictive alternative to

The Ninth Circuit's consideration of the countervailing anonymity interest of donors to ballot question causes was effectively nonexistent. The court analyzed the government's interest, focusing on the informational interest, but devoted no space to an explicit consideration of individuals' or groups' interest in anonymity. The closest the court came to such a discussion was in its consideration of the governmental interest. By emphasizing the value of disseminating information about financial support for or against a ballot question,[197] the court implicitly rejected the value of the anonymity interest. In other words, the Ninth Circuit's lack of analysis regarding the anonymity interest likely demonstrates its lack of concern for such an interest.[198] Similarly, the court did not discuss and gave no weight to the fact that the ballot question context does not raise a governmental anticorruption interest.[199] Based on this view of the interests at stake, the court concluded that both sections of the PDL survived exacting scrutiny and upheld their constitutionality both facially and as applied.[200] Ciara Torres-Spelliscy has described this decision as "upholding robust disclosure of who is funding a ballot measure."[201]

2. *Interests in* Sampson. — Unlike the Ninth Circuit, which accorded great deference to the government's interests, the Tenth Circuit in *Sampson* downplayed the importance of the governmental interests at stake before turning to an explicit consideration of the anonymity interests of donors supporting or opposing a ballot question. At the outset of *Sampson*, the Tenth Circuit signaled its skepticism regarding disclosure requirements as generally applied in the context of ballot questions, writing, "[T]he justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initia-

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more comprehensive regulations of speech" and that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way"). In contrast, the Tenth Circuit in *Sampson* did not consider this argument. Instead, it argued that *Citizens United* shows that excessively burdensome disclosure laws are unconstitutional. See infra notes 231–232 and accompanying text (outlining Tenth Circuit's arguments).

197. See supra notes 192–196 and accompanying text (discussing *Brumsickle* court's analysis of government's informational interest); see also *Brumsickle*, 624 F.3d at 1005–06 (describing informational interest as "a sufficiently important, if not compelling, governmental interest").

198. Aside from a brief discussion and distinction of *McIntyre*, the Ninth Circuit also declined to discuss the anonymity interest in *Getman*. See *Getman*, 328 F.3d at 1103–04 (analyzing and distinguishing *McIntyre*).

199. This was also not an issue in *Getman*, 328 F.3d at 1102–03 (acknowledging lack of anticorruption interest in ballot question cases but not discussing issue any further).

200. See *Brumsickle*, 624 F.3d at 1013–14, 1019, 1022 (summarizing holdings).

201. Torres-Spelliscy, supra note 106, at 1077. An even more recent case from the Ninth Circuit has similarly upheld the same disclosure requirements based on the informational interest. See Family PAC v. McKenna, 685 F.3d 800, 803 (9th Cir. 2012) ("We hold that Washington's disclosure requirements . . . survive exacting scrutiny because they are substantially related to the important governmental interest in informing the electorate.").

tive."[202] Such a view is diametrically opposed to that of the Ninth Circuit, which stated in *Brumsickle*—following older Ninth Circuit cases—that disclosure laws are, if anything, more important in the case of ballot questions.[203] The court then confirmed the application of exacting scrutiny, and identified the three permissible governmental interests potentially at stake: the data-gathering interest, the anticorruption interest, and the informational interest.[204] According to the court, the first two interests were irrelevant when it came to ballot questions, leaving only the informational interest.[205]

Even as to the informational interest, the Tenth Circuit wrote that "[i]t is not obvious that there is such a public interest" in the case of ballot questions.[206] The court contrasted candidate elections, in which "[t]he voter must evaluate a human being," with ballot question elections that involve a binary choice in which "[n]o human being is being evaluated."[207] The need to evaluate a human candidate makes information about that candidate's financial supporters important, the court reasoned, while financial information is less important when voters are not being asked to pass judgment on a human being.[208] Again, this view of the informational interest and its connection to ballot questions directly conflicts with the Ninth Circuit's, which has stressed the importance of providing voters with information about the supporters and opponents of a ballot question.[209]

The Tenth Circuit in *Sampson* also made a number of arguments against the informational interest based on the facts of the case, which involved a small group of homeowners who received about $1000 in donations to help challenge a ballot question on the annexation of their unincorporated neighborhood.[210] According to the Tenth Circuit, the informational interest "is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions

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202. Sampson v. Buescher, 625 F.3d 1247, 1249 (10th Cir. 2010).

203. See supra note 193 and accompanying text (describing Ninth Circuit's view).

204. See *Sampson*, 625 F.3d at 1256 (identifying permissible interests); see also supra notes 63–69 and accompanying text (discussing same three interests as first set forth in *Buckley*).

205. See *Sampson*, 625 F.3d at 1256 ("The first and second grounds do not support reporting and disclosure requirements for ballot-issue committees. . . . Thus, [the requirements] . . . must be justified on the third ground—the informational interest.").

206. Id.

207. Id. at 1256–57.

208. See id. (arguing "[t]he identities of those with strong financial ties to [a human] candidate are important data" for determining "what the candidate's personal beliefs are and what influences are likely to be brought to bear" when candidate makes decisions).

209. See supra notes 192–196 and accompanying text (discussing Ninth Circuit's views on importance of informing voters in ballot elections).

210. See supra note 188 and accompanying text (describing facts of *Sampson*).

and expenditures are slight."[211] Keeping its attention on the small size of the committee and the contributions at issue in the case, the Tenth Circuit concluded, "the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions."[212] This consideration of the small size of the donations may also reveal an additional concern behind the court's analysis, namely the low thresholds triggering disclosure requirements in Colorado. Issue committees in Colorado, like the plaintiffs in *Sampson*, are subject to the state's disclosure requirements once they spend or receive more than $200,[213] an especially low threshold compared to the already low thresholds of $1000 in federal law[214] and $5000 in Washington.[215]

Unlike the Ninth Circuit in *Brumsickle*, the Tenth Circuit in *Sampson* also gave considerable attention to donors' interest in remaining anonymous while giving money for ballot question advocacy. Questioning the value of attaching a name to every contributor to a ballot issue cause, the court argued that "[n]ondisclosure could require the debate to actually be about the merits of the proposition on the ballot."[216] The Tenth Circuit, quoting from the Supreme Court's opinion in *McIntyre*, reiterated that "'[a]nonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.'"[217]

Not surprisingly, then, the Tenth Circuit found the informational interest insufficient to justify the laws challenged in *Sampson* and held them unconstitutional as applied to the plaintiffs.[218] Notably, the court maintained that disclosure laws could be valid in other circumstances, but in doing so it referred to cases "involving the expenditure of tens of mil-

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211. *Sampson*, 625 F.3d at 1259.

212. Id. at 1261.

213. See supra note 185 and accompanying text (describing Colorado's disclosure threshold).

214. See supra notes 23–24 and accompanying text (describing federal disclosure threshold).

215. See supra notes 179–180 and accompanying text (describing Washington's disclosure threshold).

216. *Sampson*, 625 F.3d at 1257.

217. Id. (alteration in *Sampson*) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995)); see also supra notes 107–120 and accompanying text (discussing *McIntyre*). This follows some of Briffault's writing on the privacy costs of disclosure. See, e.g., Briffault, Disclosure 2.0, supra note 19, at 290 ("The real and growing problem with disclosure . . . is not just its limitations but its costs."). Given modern technology, which makes it easier than ever to compile and disseminate even the most minute disclosure information, Briffault writes, "[T]he potential threat to political activity [from disclosure] has increased." Id. at 295.

218. *Sampson*, 625 F.3d at 1261.

lions of dollars on ballot issues presenting 'complex policy proposals.'"[219] Thus, the *Sampson* court saw the government's informational interest and donors' anonymity interest in a fundamentally different light than the *Brumsickle* court. Despite the *Sampson* court's attempts to provide a hypothetical factual distinction that could possibly alter the outcome in future cases, its balance in weighing the interests at stake means that disclosure requirements for ballot questions are likely to be viewed quite differently in the Tenth Circuit than in the Ninth.[220]

C. *Treatment of Supreme Court Holdings*

1. *Supreme Court Holdings in* Brumsickle. — In *Brumsickle*, the Ninth Circuit did not address *Socialist Workers*, *McIntyre*, or *ACLF*. Instead, it limited its consideration to *Buckley*, *McConnell*, and *Citizens United*. The Ninth Circuit first quoted at length from *Buckley* and identified it as the touchstone for all Supreme Court disclosure jurisprudence.[221] Throughout this section of its opinion, the Ninth Circuit buttressed its arguments with

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219. Id. (quoting Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003)). Torres-Spelliscy characterizes *Sampson* as a holding about a de minimis exception to disclosure laws. See Torres-Spelliscy, supra note 106, at 1095 ("[T]he court articulated a narrow exception to de minimis spending . . . ."); see also McGeveran, supra note 65, at 862 (citing *Sampson* as instance of court exempting group from disclosure requirements "based on their administrative burdens on small-scale political activity"). But the focus in *Sampson* was on the interests at stake, and the fact of the plaintiffs' low spending buttressed the court's conclusion more than it guided it. See *Sampson*, 625 F.3d at 1254–59 (discussing relevant interests and Supreme Court precedent); id. at 1259–61 (supplementing discussion of interests and precedent with consideration of extent of plaintiffs' political spending). And, regardless of the effect of these facts, the Tenth Circuit's analysis of interests and Supreme Court precedent is what makes it so different from a case like *Brumsickle*.

220. Torres-Spelliscy believes that *Sampson* means states in the Tenth Circuit can unquestionably continue to regulate large spenders. See Torres-Spelliscy, supra note 106, at 1096 ("[T]he state clearly still has the ability to regulate persons or entities that make large expenditures on ballot measures."). This is not so clear-cut. The Tenth Circuit specifically stated it was not drawing a bright line for determining an expenditure limit above which the disclosure law could constitutionally be applied and below which it could not. See *Sampson*, 625 F.3d at 1261 ("We do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures."). This makes the outcome of future cases uncertain, particularly cases involving intermediate spenders, such as those spending hundreds of thousands of dollars, but not millions. And the Tenth Circuit's analysis of the interests at stake in disclosure controversies could well lead it to exempt a relatively large spender from the disclosure requirements, even when other circuits like the Ninth would not.

221. See Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1006 (9th Cir. 2010) ("*Buckley* recognized [the] informational interest as substantial, and in its campaign finance jurisprudence, the Supreme Court consistently has acknowledged the important role played by disclosure requirements in political discourse.").

citations to *McConnell*.[222] The Ninth Circuit then referred to the prodisclosure holding in *Citizens United* to support its own arguments about the importance of the government's informational interest.[223] The court described *Citizens United* as "recognizing the government's informational interest as substantial."[224] The court also quoted *Citizens United* when it wrote, "The increased 'transparency' engendered by disclosure laws 'enables the electorate to make informed decisions and give proper weight to different speakers and messages.'"[225] By focusing solely on *Buckley*, *McConnell*, and *Citizens United*, the Ninth Circuit identified fully with the line of Supreme Court precedent that moves away from the proanonymity position of cases like *McIntyre*.

2. *Supreme Court Holdings in* Sampson. — Taking a different tack, the Tenth Circuit relied on *McIntyre* and made unconventional arguments against disclosure based on *Citizens United* and *Reed*. First, the Tenth Circuit cited *McIntyre* as an instance in which the Supreme Court "suggested the limits of the public interest in disclosure in the ballot-issue context."[226] The Tenth Circuit then compared the Supreme Court's treatment of disclosure laws in *McIntyre* with other Supreme Court opinions that discussed disclosure laws only in dicta,[227] writing that "[i]n *McIntyre* the [Supreme] Court meticulously distinguished its precedents affirming disclosure requirements in candidate elections as it overturned a fine for distributing anonymous pamphlets opposing a school tax levy."[228] Thus, the Tenth Circuit viewed *McIntyre*'s language as more persuasive. Further, the Tenth Circuit did not cite to or mention *McConnell* anywhere in its opinion. This is the opposite of the Ninth Circuit's approach, in which it quoted *McConnell* and did not discuss *McIntyre*.[229]

The Tenth Circuit again took a different approach in dealing with *Citizens United* and *Reed*, which both contain forceful prodisclosure holdings. The Tenth Circuit first discussed how stringent disclosure require-

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222. See, e.g., id. (citing *McConnell*'s decision "upholding BCRA's disclosure requirements" to support argument that Supreme Court consistently recognizes value of disclosure laws).

223. See supra notes 192–196 and accompanying text (describing *Brumsickle* court's discussion of informational interest).

224. *Brumsickle*, 624 F.3d at 1006.

225. Id. at 1008 (quoting Citizens United v. FEC, 130 S. Ct. 876, 916 (2010)).

226. Sampson v. Buescher, 625 F.3d 1247, 1258 (10th Cir. 2010) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 353–56 (1995)). See generally supra notes 107–120 and accompanying text (discussing *McIntyre*).

227. According to the Tenth Circuit, the dicta failed to make "the precise and careful analysis necessary to resolve a particular issue fully presented to the [Supreme] Court." *Sampson*, 625 F.3d at 1258.

228. Id. (citing *McIntyre*, 514 U.S. at 353–56); see also infra Part II.D.2 (discussing *Sampson* court's treatment of Supreme Court dicta on disclosure).

229. See supra Part II.C.1 (describing Ninth Circuit's opposite approach).

ments could be excessively burdensome for small entities.[230] Then, the court pointed to *Citizens United*'s holding that corporate political action committees were an inadequate alternative for corporations prevented from making independent expenditures.[231] Although the court did not draw this inference explicitly, the implication seems to be that *Citizens United*, by analogy, supports the idea that overly burdensome disclosure laws are unconstitutional. Turning to *Reed*, the Tenth Circuit "[found] it significant" that *Reed* upheld the disclosure law at issue based on the government's integrity interest, rather than the informational interest.[232] By looking at the issue in this way, the Tenth Circuit bolstered its arguments diminishing the importance of the informational interest.[233] One might contrast this with the Ninth Circuit in *Brumsickle*, which cited *Citizens United* in support of its contentions in favor of the informational interest and declined to explicitly consider the integrity interest.[234]

D. *Treatment of Supreme Court Dicta*

1. *Supreme Court Dicta in* Brumsickle. — At several points throughout its decision, the Ninth Circuit in *Brumsickle* referred to prodisclosure language from Supreme Court cases in which disclosure requirements were not directly challenged.[235] In fact, the Ninth Circuit opened its opinion with a quote from *First National Bank v. Bellotti*, which stated, "'[t]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.'"[236] The Ninth Circuit also considered *Citizens Against Rent Control v. City of Berkeley*, which, according to the court, "recogniz[ed] . . . the

230. See *Sampson*, 625 F.3d at 1255 ("'Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of records, impose administrative costs that many small entities may be unable to bear.'" (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 254 (1986))).

231. See id. (drawing inference against disclosure requirements based on language in *Citizens United*); see also Citizens United v. FEC, 130 S. Ct. 876, 897 (2010) ("[T]he option to form [political action committees] does not alleviate the First Amendment problems with [the challenged law]. [Political action committees] are burdensome alternatives; they are expensive to administer and subject to extensive regulations.").

232. *Sampson*, 625 F.3d at 1259 (citing Doe v. Reed, 130 S. Ct. 2811, 2819 (2010)); see also supra notes 156–159 and accompanying text (discussing *Reed*'s treatment of integrity interest).

233. See supra notes 206–212 and accompanying text (describing *Sampson* court's skeptical treatment of informational interest).

234. See supra notes 223–225 and accompanying text (discussing *Brumsickle* court's citation of *Citizens United* to support importance of informational interest).

235. See supra Part I.C.1 (detailing prodisclosure dicta in three Supreme Court cases).

236. Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 994 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 791–92 (1978)).

interest of voters in knowing 'the identity of those whose money supports or opposes a given ballot measure.'"[237] Finally, the Ninth Circuit pointed out that, in *MCFL*, the Supreme Court argued that existing disclosure requirements would suffice to prevent "dangerous amounts of spending by nonprofits on behalf of corporations and unions."[238] Given the Ninth Circuit's stance in favor of the government's informational interest and citation to Supreme Court decisions that specifically upheld disclosure laws, this treatment of Supreme Court dicta in favor of disclosure is not surprising.

2. *Supreme Court Dicta in* Sampson. — According to the Tenth Circuit, "[t]he Supreme Court has sent a mixed message regarding the value of financial disclosure in a ballot-issue campaign," although "on three occasions it has spoken favorably of such requirements."[239] But the Tenth Circuit noted that, in the three Supreme Court cases discussing disclosure in the ballot issue context—*Bellotti*, *Berkeley*, and *ACLF*[240]—the language in favor of disclosure was dicta.[241] The Tenth Circuit argued that, while it "takes Supreme Court dictum very seriously . . . the absence of the precise and careful analysis necessary to resolve a particular issue fully presented to the Court makes it difficult . . . to assess the weight [of] the public interest in disclosure when balancing it against the burden on the . . . right of association" in a particular case.[242] Thus, the Tenth Circuit felt comfortable applying its analysis based on the particular facts of *Sampson* despite the Supreme Court's earlier dicta.

III. A SUGGESTED RESOLUTION FOR FUTURE CASES

Several scholars have suggested that disclosure laws need to be updated to take account of the rapid spread of information on the Internet and the need for aggregate data to track broader spending trends.[243] The focus of this Part, however, is the competing approaches of the Ninth and Tenth Circuits, including an evaluation of them based on the analytical tools they use. Part III.A considers the relevant interests, especially the opposing informational and anonymity interests, and suggests that

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237. Id. at 1007 (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981)).

238. Id. at 1006 (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986)).

239. Sampson v. Buescher, 625 F.3d 1247, 1257 (10th Cir. 2010).

240. See supra Part I.C (discussing language from these three cases).

241. See *Sampson*, 625 F.3d at 1257–58 (identifying language as dicta).

242. Id. at 1258.

243. See, e.g., Briffault, Two Challenges, supra note 40, at 986–87 (suggesting raising disclosure thresholds and focusing on aggregate rather than individual data as methods to mitigate privacy concerns while maintaining transparency); McGeveran, supra note 65, at 861 (arguing for more expansive view of privacy and its benefits); infra notes 248–249 (discussing Briffault's and McGeveran's views in more detail).

the informational interest should generally take precedence in the balance between the two. Part III.B looks at the different ways to treat Supreme Court doctrine on disclosure, and recommends an approach that follows prodisclosure cases like *McConnell*, *Citizens United*, and *Reed* more than pro-anonymity cases like *McIntyre* and *ACLF*. Finally, Part III.C concludes that the Ninth Circuit's decision in *Brumsickle*, which follows its earlier precedent and that of other courts like the First Circuit, fits better with this Part's suggested resolution than the Tenth Circuit's opinion in *Sampson*.

A. *Suggested Resolution of Competing Interests*

The informational interest, which is already the leading governmental interest behind disclosure laws,[244] should receive greater weight in the ballot question context. This approach echoes Briffault, who has written, "Disclosure may be particularly valuable in ballot proposition elections," because "[i]nformation about the contributions to and expenditures by groups supporting or opposing a measure can be quite helpful in understanding the likely consequences of what may be a difficult-to-parse measure."[245] The opposing argument that voter information is less important for an initiative because voters are not evaluating a human being is unpersuasive. It fails to recognize the value of financial information for judging an initiative, which does not come with other informational cues such as personality or party affiliation. In light of the recent changes to campaign finance law, the informational interest also has heightened importance across all electoral contexts. Since corporations and unions may now spend freely after *Citizens United*, and many advocacy groups choose ambiguous or even deceptive names, robust disclosure of spending and financial support will be an even greater imperative for ensuring transparency and accountability in elections and ballot contests.[246]

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244. See supra note 64 and accompanying text (describing importance of informational interest to disclosure laws).

245. Briffault, Disclosure 2.0, supra note 19, at 289. Briffault concludes that "campaign contribution information is both more relevant to voter choice and easier for the voters to use and, perhaps, more likely to be disseminated by interest groups." Id.; see also Garrett & Smith, supra note 64, at 300 ("[T]he informational interest is present in direct democracy, and it is more acute because the information environment is less robust because of the absence of party cues."); McGeveran, supra note 65, at 880 ("[V]oters may gain useful heuristic cues from information about the position of familiar organized entities with respect to candidates and, especially, ballot initiatives.").

246. See Briffault, Complexity, supra note 141, at 669 ("Given the ability of corporations to proliferate new corporations for campaign purposes, it is likely that more record-keeping and reporting will be necessary to make corporate disclosure effective . . . ."); Briffault, Two Challenges, supra note 40, at 985–86 ("With much of the independent spending undertaken by organizations with anodyne names that say little about the organization's purpose or backers . . . public interest in learning the identities of the donors

At the same time, disclosure can be burdensome for individuals and groups spending and receiving relatively small amounts of money,[247] and there is value in anonymity insofar as it prevents serious harassment.[248] Policymakers should be aware of these concerns facing groups that are small or likely to suffer severe harassment. Additionally, disclosure laws should do a better job of targeting big spenders and looking at aggregate data rather than focusing on small individuals.[249] But these are reasons for tailoring disclosure laws differently based on the interplay between transparency and privacy, not reasons for elevating the anonymity interest over the informational interest. As a general matter, the anonymity interest should not override the informational interest—especially as corporations and unions increase their spending—and, as current Justices of the Supreme Court rightly consider, electoral transparency should remain a normative goal for a robust democracy.[250]

B. *Suggested Treatment of Supreme Court Precedent*

To the extent that courts see mixed messages in the Supreme Court's disclosure doctrine, the better approach to Court precedent is to follow the analysis of *McConnell*, *Citizens United*, and *Reed*, which take their cues from *Buckley*, rather than following *McIntyre* and *ACLF*. The line of

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behind the organizations has grown."); Torres-Spelliscy, supra note 106, at 1102–03 (arguing "disclosure is the primary means left for regulating independent spending").

247. See Garrett & Smith, supra note 64, at 304 (contending "information rationale . . . must be balanced against the burdens of disclosure," including "costs of compliance that can be significant for smaller organizations"); see also Briffault, Two Challenges, supra note 40, at 1013 (arguing challenge is "to enable disclosure to perform its voter information function effectively while minimizing the possible burden it may impose on political participation and political privacy").

248. See supra notes 40–46 and accompanying text (discussing serious threat NAACP members would have faced if identities were disclosed in *NAACP v. Alabama*); supra notes 101–105 and accompanying text (discussing Socialist Workers Party's need to avoid compelled disclosure in *Brown v. Socialist Workers '74 Campaign Committee*). McGeveran argues for a more expansive view of privacy and its benefits. See McGeveran, supra note 65, at 861 (arguing law "should recognize a broader range of circumstances where disclosure may discourage political involvement," as well as "personal interests in dignity and autonomy"); id. at 866–67 (contending that focus on serious harassment is problematic because it does not recognize breadth of chilling effect and does not recognize that privacy can be good in and of itself).

249. See Briffault, Two Challenges, supra note 40, at 987 (suggesting "conflict between values of transparency and privacy . . . can be mitigated by a few changes in our disclosure rules, such as raising our disclosure thresholds to target only bigger donors or focusing on demographic aggregates rather than individual donors"); McGeveran, supra note 65, at 883 ("The existing overall disclosure regime simply does not work. It intrusively disseminates vast quantities of information about ordinary individuals' modest activities but allows huge and consequential influence to remain concealed.").

250. See, e.g., Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring in the judgment) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

cases from *Buckley* to *Reed* accords better with this Note's suggested consideration of competing interests.[251] *McIntyre* and *ACLF* should be seen as limited to their narrow facts, and their treatment of the anonymity interest should not be expanded beyond those facts. Moreover, this approach is recommended, if not compelled, by the fact that the Court in *Citizens United* focused on *Buckley* and *McConnell* to the exclusion of *McIntyre* and *ACLF*.[252] *McConnell*, *Citizens United*, and *Reed* have undercut the reasoning in *McIntyre* and *ACLF*, rendering the latter two anomalous given the recent trajectory of Supreme Court jurisprudence.[253] Arguments that *Citizens United* and *Reed* actually support anonymity in certain ways[254] may have some merit, particularly in as-applied challenges, but they fail to overcome those cases' clear and vigorous holdings in defense of disclosure requirements in general.[255] Additionally, reliance on Justice Alito's concurrence in *Reed* arguing that the plaintiffs should win their as-applied challenge on remand is misplaced, given that other Justices came to the opposite conclusion and that, on remand, the district court in that case ultimately denied the as-applied challenge.[256]

There are also good reasons to treat Supreme Court dicta in favor of disclosure with great deference. Aside from the respect that lower courts should generally show to Supreme Court dicta, courts should recognize that the dicta in cases like *Bellotti*, *Berkeley*, and *MCFL* highlight the importance of disclosure in the absence of other campaign finance regulations like the ones struck down in those cases.[257] This is analogous to the situation that confronts courts today, as disclosure is one of the few remaining methods for regulating campaign finance after *Citizens United*'s invalidation of independent expenditure limits for corporations and unions.[258] Moreover, *Citizens United* itself relied on the dicta from these cases as it upheld disclosure requirements while striking down

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251. See supra Part III.A (recommending treatment of interests that gives more weight to informational interest).

252. See supra notes 148–150 and accompanying text (discussing *Citizens United*'s consideration of Supreme Court precedent).

253. See supra notes 123–124, 131, 135–138 and accompanying text (noting reduced force of *McIntyre* and *ACLF*).

254. See supra notes 230–233 and accompanying text (describing Tenth Circuit's use of *Citizens United* and *Reed* to support its arguments against disclosure in *Sampson*).

255. See supra notes 142–144 and accompanying text (summarizing holdings of *Citizens United* and *Reed*).

256. See supra notes 164–166 and accompanying text (describing competing concurrences and outcome on remand). For the same reason, future courts should be careful not to accord too much weight to Justice Alito's more favorable treatment of the anonymity interest than the informational interest. See supra text accompanying note 250 (arguing informational interest should generally take precedence over anonymity interest).

257. See supra Part I.C.1 (outlining dicta in *Bellotti*, *Berkeley*, and *MCFL*).

258. See supra note 162 and accompanying text (noting disclosure remains most viable mode of regulation).

expenditure limits.[259] Given its continued relevance to modern campaign finance doctrine, as well as its consistency with the Court's holdings in *McConnell*, *Citizens United*, and *Reed*, the Court's prodisclosure dicta should still be treated as persuasive by lower courts.

C. *Determination That* Brumsickle *Fits Better with These Suggestions*

Brumsickle ratcheted up the importance of the informational interest in the context of ballot questions, while *Sampson* took the conflicting position that the informational interest is less important when dealing with ballot questions.[260] As Part III.A suggests, *Brumsickle*'s approach, following that of earlier Ninth Circuit cases and in accord with other courts like the First Circuit, is superior. *Brumsickle* would have done better to consider the anonymity interest in more detail and balance it against the informational interest, but *Sampson* overstated the value of anonymity as compared to the value of providing information. While, as a policy matter, disclosure laws should be revamped to set the balance between the two interests more appropriately, until this happens, the balance dictated by the courts should tip in favor of greater voter information and disclosure.[261] Neither *Brumsickle* nor *Sampson* handled this question perfectly, but this Note suggests that *Brumsickle*'s approach to providing voters with information is preferable to *Sampson*'s overreaching protection of anonymity, especially given that the facts in *Sampson* did not demonstrate any particular need for anonymity to overcome threats of harassment.[262]

Brumsickle focused on *Buckley*, *McConnell*, and *Citizens United* and chose not to discuss *McIntyre* or *ACLF*.[263] While a brief consideration of *McIntyre* and *ACLF* would have made the opinion more persuasive, those cases should be limited to their particular facts,[264] and the *Brumsickle* court generally took the stronger approach by relying on the prodisclo-

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259. See Citizens United v. FEC, 130 S. Ct. 876, 915 (2010) (quoting *Bellotti*'s dicta supporting disclosure); id. ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech." (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986))).

260. See supra notes 192–196, 206–212 and accompanying text (contrasting approaches of *Brumsickle* and *Sampson*).

261. See supra Part III.A (asserting importance of informational interest compared to anonymity interest).

262. See Sampson v. Buescher, 625 F.3d 1247, 1261 (10th Cir. 2010) (citing financial burden, not risk of harassment, as contributing to plaintiffs' interest in resisting regulation); supra text accompanying notes 210–215 (noting *Sampson* court's concern with requiring disclosure for relatively low expenditures).

263. See supra Part II.C.1 (discussing *Brumsickle*'s treatment of Supreme Court precedent).

264. See supra text accompanying notes 251–252 (arguing that *McIntyre* and *ACLF* should be read narrowly).

sure holdings of *Citizens United* and its predicate cases.[265] The *Sampson* court, on the other hand, relied too heavily on *McIntyre* and got too creative in trying to tease out antidisclosure principles from *Citizens United* and *Reed*.[266] Finally, *Brumsickle*'s use of Supreme Court dicta is more convincing. It relied on language from the Supreme Court in favor of strong disclosure laws, while *Sampson* dismissed the same language as dicta and conducted its own analysis.[267] But *Sampson*'s antidisclosure analysis did not persuasively overcome the Supreme Court's longstanding, and recently reaffirmed, stance in favor of disclosure.

CONCLUSION

Crossroads GPS,[268] the political advocacy group that relies on anonymous donations that can come from corporations, and Prop 8 Maps, the website that disseminates the names and addresses of donors supporting California's Proposition 8 overlaid on a Google map,[269] represent opposite ends of the spectrum of difficulties related to campaign finance disclosure. Crossroads GPS is emblematic of the problems that arise when gaps remain in disclosure laws, while Prop 8 Maps shows how disclosure can combine with new technology to significantly reduce privacy. The Supreme Court's decision in *Citizens United*, which invalidated bans on independent expenditures by corporations and unions, nevertheless signaled the continuing utility of requiring financial disclosure by such entities. In light of these developments, the stakes for disclosure laws are higher than ever. The courts in *Brumsickle* and *Sampson* demonstrated fundamentally opposing views on how to resolve the questions posed by disclosure cases in the context of ballot issues, disagreeing on how to deal with the relevant interests and what to make of tensions in Supreme Court jurisprudence. An approach that gives more weight to the state's informational interest than individuals' anonymity interest is generally preferable, as is a treatment of Supreme Court doctrine that relies more on *Citizens United* and *Reed* than *McIntyre*. While neither decision is perfect, the Ninth Circuit's opinion in *Brumsickle* adheres more closely to these principles than the Tenth Circuit's decision in *Sampson*.

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265. See supra Part III.B (suggesting greater focus on *Citizens United* and supporting cases rather than *McIntyre*).

266. See supra Part II.C.2 (describing *Sampson*'s treatment of Supreme Court precedent).

267. See supra Part II.D (discussing each court's treatment of Supreme Court dicta).

268. See supra notes 1–4 and accompanying text (discussing controversial activities of groups like Crossroads GPS).

269. See supra notes 5–6 and accompanying text (describing controversy surrounding Prop 8 Maps).

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