

Richard L. Hasen

Executive Summary of Testimony on S.2219,
“The Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012”,
before United States Senate Committee on Rules and Administration,
March 29, 2012

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2219, which would restore an effective set of disclosure tools to federal campaign finance law. I have written extensively about campaign finance law, and in particular about campaign finance disclosure laws and the limits of such laws under the First Amendment. I strongly support the proposed legislation as a way of closing loopholes and requiring the disclosure of information that will deter corruption, provide the public with relevant information, and allow for the enforcement of other laws—such as the bar on foreign money in U.S. elections. The proposed legislation uses high dollar thresholds and enables contributors to tax exempt organizations to shield their identity when making non-election-related contributions. These steps ensure that First Amendment rights of free speech and association are fully protected.

In my testimony I will briefly explain (1) why changes in campaign finance law and practice have made this legislation necessary; (2) the benefits of this bill for American democracy; and (3) the clear constitutionality of the bill in the face of the argument that it will chill speech protected by the First Amendment. Put briefly, the rise of 501(c)(4) and other groups allows donors to shield their donations from public view, depriving the public of valuable information and depriving the government of a valuable anticorruption tool. Full disclosure helps voters make informed decisions, as recent experience with one-sided spending in a California ballot race illustrates. Finally, courts have examined the extent to which campaign finance disclosure can lead to harassment. Courts have found that even in the case of controversial issues such as gay marriage, harassment is rare. Nonetheless, to preserve individuals’ informational privacy, high threshold limits, as set in this bill, are appropriate.

Although members of the Supreme Court divided strongly in *Citizens United* over the constitutionality of limits on corporate *spending* in elections, they voted 8-1 to sustain broad *disclosure* requirements against constitutional challenge. It is my hope that the Senate will once again return to overwhelming bipartisan agreement in favor of campaign finance disclosure.

**United States Senate Committee on Rules and Administration
Hearing on S.2219, “The Democracy is Strengthened by Casting Light
on Spending in Elections Act of 2012” (DISCLOSE Act of 2012),
March 29, 2012**

STATEMENT OF RICHARD L. HASEN

Richard L. Hasen
Chancellor’s Professor of Law and Political Science
UC Irvine School of Law*
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697
(949)824-3072 — voice
(949)824-0495 — fax
rhasen@law.uci.edu
http://law.uci.edu/faculty/page1_r_hasen.html
<http://electionlawblog.org>

***Affiliation for identification purposes only.**

Chairman Schumer, Ranking Member Alexander, and Senators on the Rules and Administration Committee:

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2219, which would restore an effective set of disclosure tools to federal campaign finance law. I have written extensively about campaign finance law, and in particular about campaign finance disclosure laws and the limits of such laws under the First Amendment.¹ I strongly support the proposed legislation as a way of closing loopholes and requiring the disclosure of information that will deter corruption, provide the public with relevant information, and allow for the enforcement of other laws—such as the bar on foreign money in U.S. elections. The proposed legislation uses high dollar thresholds and enables contributors to tax exempt organizations to shield their identity when making non-election-related contributions. These steps ensure that First Amendment rights of free speech and association are fully protected.

In my testimony I will briefly explain (1) why changes in campaign finance law and practice have made this legislation necessary; (2) the benefits of this bill for American democracy; and (3) the clear constitutionality of the bill in the face of the argument that it will chill speech protected by the First Amendment. Although members of the Supreme Court divided strongly in *Citizens United* over the constitutionality of limits on corporate *spending* in elections, they voted 8-1 to sustain broad *disclosure* requirements against constitutional challenge.² It is my hope that the Senate will once again return to overwhelming bipartisan agreement in favor of campaign finance disclosure.

1. Why Changes in Campaign Finance Law Have Made This Legislation Necessary

Congress first enacted meaningful disclosure provisions in 1974, in the wake of Watergate.³ The 1974 Amendments to the Federal Election Campaign Act imposed broad disclosure requirements on candidates, party committees, and political action committees (PACs), and all who would spend money on election-related advertising. In 1976, the Supreme Court in the *Buckley v. Valeo* case⁴ upheld the Act's disclosure requirements, even for very

¹ I have primary responsibility for drafting and updating the campaign finance chapters in DANIEL LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, *ELECTION LAW—CASES AND MATERIALS* (4th ed. 2008 & 2011 Supp.). Chapter 18 covers campaign finance disclosure in depth. My most recent article exploring the Supreme Court's approach to campaign finance regulation is Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICHIGAN LAW REVIEW 581 (2011). I have written the following articles specifically on the topic of campaign finance disclosure: Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure in the Internet Era*, JOURNAL OF LAW AND POLITICS (forthcoming 2012), draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948313 and draft placed on file with this Committee; Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 4 ELECTION LAW JOURNAL 251 (2004); and Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA LAW REVIEW 265 (2000). I have also written articles about campaign finance disclosure for the popular media, most recently, Richard L. Hasen, *Show Me The Donors: What's The Point of Campaign Finance Disclosure? Let's Review*, SLATE, Oct. 14, 2010, http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.html.

² *Citizens United v. FEC*, 130 S.Ct. 876, 914–916 (2006).

³ On the legislative history and the history of the *Buckley* litigation, see Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* ch. 12 (Richard Garnett & Andrew Koppelman eds. 2011).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 65–84 (1976).

modest contributions and spending, against First Amendment challenge, while recognizing that any group which could demonstrate a threat of harassment is constitutionally entitled to an exemption from disclosure. However, the *Buckley* Court found part of the disclosure law to be vague, and it interpreted the law to apply only to what has come to be known as “express advocacy,” advertising such as “Vote for Senator X.” The result of this interpretation was that contributions and spending for many “issue advocacy” ads went unreported.

Congress fixed the vagueness problem in the Bipartisan Campaign Reform Act of 2002, or “BCRA” (commonly known as McCain-Feingold).⁵ Among other things, BCRA requires disclosure of contributions and spending on so-called “electioneering communications,” which are radio and television advertisements featuring a federal candidate and broadcasting to a wide audience close to the election. The Supreme Court upheld the disclosure provisions in the *McConnell v. FEC* case,⁶ and held that the provisions could be applied to a broad array of ads—even those that are not the functional equivalent of express advocacy—in the *Citizens United* case.⁷

Justice Kennedy’s opinion for the Court in *Citizens United* case incorrectly assumed that current federal disclosure laws work effectively. He said that “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today...With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁸

Unfortunately, the world Justice Kennedy imagined has not materialized. The main problem is that many political groups, which used to organize either as PACs or as 527 organizations, are no longer using these organizational forms. PACs and 527 groups must regularly disclose their contributions. Many political groups are now using the 501(c)(4) or other types of organization that require no public disclosure of contributors.⁹ The information is released only to the IRS. A strong argument could be made that some of these groups are violating both the Internal Revenue Code—by not have a primary purpose of “social welfare”—and the Federal Election Campaign Act—by not registering as political committees despite having a major purpose of influencing federal elections. Lack of enforcement by these agencies and uncertainty in the law make new Congressional legislation necessary.

How serious of a problem is secret money? A Center for Responsive Politics study

⁵ Pub. L. 107-155, 116 Stat. 81 (enacted March 27, 2002).

⁶ 540 U.S. 93, 196 (2003).

⁷ *Citizens United*, 130 S.Ct. at 915–16.

⁸ *Id.* at 916.

⁹ On the issue of the relationship between tax law and political activities since *Citizens United*, see the recent symposium in the *Election Law Journal*, “Shadows & Light: Nonprofits and Politics in a Post-*Citizens United* World” featuring Ellen P. Aprill, *Political Speech of Noncharitable Exempt Organizations after Citizens United*, 10 ELECTION LAW JOURNAL 507 (2011); Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION LAW JOURNAL 227 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION LAW JOURNAL 407 (2011); Nancy E. McGlamery & Rosemary E. Fei, *Taxation with Reservations: Taxing Nonprofit Political Expenditures After Citizens United*, 10 ELECTION LAW JOURNAL 449 (2011); and Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION LAW JOURNAL 427 (2011).

found that in 2010 the percentage of “spending coming from groups that did not disclose their donors rose from 1 percent to 47 percent since the 2006 midterm elections,” and “501(c) non-profit spending increased from 0 percent of total spending by outside groups in 2006 to 42 percent in 2010.”¹⁰ This stands to be an even larger problem in 2012.

Furthermore, with the rise of “Super PACs”—political committees that take unlimited contributions from individuals, corporations, and labor unions to spend on independent ads—contributors can more easily shield their identity from the public, hiding behind innocuous names like “Americans for a Strong America.” The public does not get the information on who is funding the ads when it needs it the most—alongside the ad. Even worse, donors can shield their identities by contributing to a 501(c)(4) which in turn donates to a Super PAC—as recently happened when *nearly half* of FreedomWorks’ Super PAC contributions came from its sister 501(c)(4).¹¹ Disclosing that FreedomWorks’ contributions came from a FreedomWorks affiliate is not helpful to voters.

2. The Benefits of the Bill for American Democracy

I turn now to the benefits of a bill providing for enhanced disclosure. In *Buckley v. Valeo*, the Court held that three societal interests justified the disclosure laws.

First, disclosure laws *can prevent corruption* and the appearance of corruption. Having no more paper bags of cash makes it harder to bribe a candidate. There is a serious question whether Justice Kennedy was right in *Citizens United* in stating that independent corporate spending can neither corrupt nor cause the public to lose confidence in the fairness of the electoral process. In a recent article,¹² I explain how outside spending *can* corrupt, both directly through threats against legislators to run large independent efforts against them unless those making the threats get their way, and indirectly, through the fundraising pressures which an outside money campaign brings to bear on legislators. *Citizens United* prevents Congress from reimposing corporate limits on these anticorruption grounds. Disclosure is an important—though second best—alternative to corporate spending limits to help ferret out corruption.

Second, disclosure laws provide *valuable information* to voters. A busy public relies on disclosure information more than ever. This was apparent when California voters recently turned down a ballot proposition that would have benefited Pacific Gas and Electric.¹³ PG&E provided almost all of the \$46 million to the “Yes on 16” campaign, compared with very little spent opposing the measure. Thanks to California’s disclosure laws requiring top contributor names to be on ads, PG&E’s name appeared on every “Yes on 16” ad and the measure narrowly went down to defeat. DISCLOSE has a similar provision for disclosure of the top funders.

¹⁰ Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, Center for Responsive Politics, Open Secrets Blog, May 5, 2011, 11:16 am, <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

¹¹ Robert Maguire and Viveca Novak, *The Freedom Works Network: Many Connections, Little Disclosure*, Open Secrets Blog, March 16, 2012, 2:14 pm, <http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html>.

¹² Richard L. Hasen, *Of Super PACs and Corruption*, POLITICO, March 22, 2012, <http://www.politico.com/news/stories/0312/74336.html>. I have submitted a copy of this article for inclusion in the record.

¹³ See Hasen, *Chill Out*, *supra* note 1 (draft at 16–17).

Voters who know whether the NRA or Sierra Club backs a candidate will have valuable information to make a more informed choice.

Third, disclosure laws *help enforce other campaign finance laws*. Worried about foreign money in elections? Disclosure tells you how much money is coming in and from what source. It will also deter illegal conduit contributions, whereby a contributor tries to launder contributions through the use of one or more sham entities. Disclosure helps ferret out such chicanery.

2. The Constitutionality of the DISCLOSE Act of 2012

I have a high degree of confidence that courts would hold constitutional the Senate's version of the DISCLOSE Act of 2012 if it were challenged on First Amendment grounds. Preliminarily, let me note that I take the constitutional question very seriously, and I do not believe that the constitutional question necessarily lines up with my view of good policy. In 2006, for example, I testified before the Senate Judiciary Committee that certain parts of the Voting Rights Act that I supported were in danger of being struck down as unconstitutional.

The main constitutional claim likely to be made against the DISCLOSE Act of 2012 is that it impermissibly chills the First Amendment rights of speech and association through the requirement of disclosure. To begin with, the Supreme Court has repeatedly stated that groups that can demonstrate a real threat of harassment are entitled to an exemption from disclosure.¹⁴ This provides a safety valve for any disclosure provision. Second, since *Citizens United* the courts have uniformly rejected broad-based attacks on disclosure rules on grounds of chilling effect.¹⁵

In a forthcoming Article in the *Journal of Law and Politics* at the University of Virginia,¹⁶ I closely analyze the claims of harassment that have been made in recent cases surrounding controversial ballot measures concerning gay marriage and gay rights. Two federal courts examined in detail evidence of harassment and found the claims wanting.¹⁷ While some *leaders* of groups faced public protests, as to campaign contributors or signature gatherers, there was nothing beyond the occasional “mooning” of someone collecting ballot signatures. Harassment in this context is just not a common problem. As Justice Scalia explained in a recent case, people participating in the life of democracy ordinarily should have the “civic courage” to stand behind what they say.¹⁸

¹⁴ *Buckley*, 424 U.S. at 74; *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Citizens United*, 130 S.Ct. at 916; *Doe v. Reed*, 130 S.Ct. 2815, 2821 (2010).

¹⁵ See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GEORGIA STATE LAW REVIEW 1057 (2011).

¹⁶ Hasen, *Chill Out*, *supra* note 1.

¹⁷ *Doe v. Reed*, No. C09-5456BHS, --- F.Supp.2d ----, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011); *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DA, --- F.Supp.2d ----, 2011 WL 5507204 (E.D. Cal. Nov. 4, 2011).

¹⁸ *Doe v. Reed*, 130 S.Ct. at 2837 (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. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”).

In this same Article, I also discuss how the rise of the Internet has greatly decreased the costs of obtaining information about even very tiny campaign finance contributions made to controversial causes. While there is little evidence that the availability of such information has led to harassment, I question whether the public gains much from having information about these very small contributions made public. While not of constitutional magnitude, this interest in “informational privacy” justifies having higher thresholds for disclosure of campaign-related contributions. The DISCLOSE Act, with its \$10,000 thresholds, provides that breathing room for informational privacy.

Relatedly, the DISCLOSE Act provisions are ingenious in allowing contributors to non-profits to keep that information private when the money will not be used for election-related purposes. Either the non-profit can set up a separate account for election-related disbursements—and only such information is disclosed to the public—or a contributor to a non-segregated fund of a 501(c) can keep the information private through a written agreement that the contribution should not be used for election-related ads. The DISCLOSE Act sensibly targets the nature of the activity—contributing money for election-related ads—and not the type of organizational form under the Tax Code, as the basis for requiring disclosure of contributor information.

Thank you again for the opportunity to speak. I welcome your questions.

Richard L. Hasen
Biography

Professor Richard L. Hasen is the Chancellor's Professor of Law and Political Science at the University of California, Irvine. Hasen is a nationally-recognized expert in election law and campaign finance regulation, and is co-author of a leading casebook on election law. From 2001-2010, he served (with Dan Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, [Election Law Journal](#). He is the author of more than eighty articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review*, and *Supreme Court Review*. He was elected to the American Law Institute in 2009. His opeds and commentaries have appeared in many publications, including the *New York Times*, *Washington Post*, *Politico*, and *Slate*. Hasen also writes the often-quoted [Election Law Blog](#). His newest book, [The Voting Wars: From Florida 2000 to the Next Election Meltdown](#), will be published in summer 2012 by Yale University Press.

Professor Hasen holds a B.A. degree (with highest honors) from UC Berkeley, and a J.D., M.A., and Ph.D. (Political Science) from UCLA. After law school, Richard Hasen clerked for the Honorable David R. Thompson of the United States Court of Appeals for the Ninth Circuit, and then worked as a civil appellate lawyer at the Encino firm of Horvitz and Levy. From 1994-1997, Hasen taught at the Chicago-Kent College of Law and from 1998-2011 he taught at Loyola Law School, Los Angeles, where he was named the William H. Hannon Distinguished Professor of Law in 2005. He joined the UC Irvine School of Law faculty in July 2011.



SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2011-46

*Chill Out: A Qualified Defense of Campaign Finance
Disclosure Laws in the Internet Age*

Richard L. Hasen

rhasen@law.uci.edu

University of California, Irvine ~ School of Law

The paper can be downloaded free of charge from SSRN at:

CHILL OUT:
A QUALIFIED DEFENSE OF CAMPAIGN FINANCE DISCLOSURE LAWS
IN THE INTERNET AGE

RICHARD L. HASEN^{*}

INTRODUCTION

Everywhere you look, campaign finance disclosure laws are under attack. The National Organization for Marriage (“NOM”), a group opposing marriage equality for gays and lesbians, has filed numerous lawsuits attacking state campaign finance disclosure laws on constitutional grounds.¹ Congress failed to fill the gaping holes in the federal disclosure rules that followed the Supreme Court’s *Citizens United* decision,² freeing corporate and labor union money in the political process.³ Senator and Republican leader Mitch McConnell ardently opposed the DISCLOSE Act, which would have plugged some of those holes, despite his earlier calls for a campaign finance system with no limits but full and instant disclosure.⁴ Republican Commissioners on the Federal Election Commission worsened things by embracing an interpretation of existing federal disclosure law making it child’s play for political groups to

^{*} Professor of Law and Political Science, UC Irvine School of Law. Prepared for presentation at Thomas Jefferson Center for Free Expression conference, “Disclosure, Anonymity, and the First Amendment,” October 29, 2011, University of Virginia. Thanks to conference participants, Bruce Cain, and Lloyd Mayer for useful comments and suggestions, and to Jeremy Hufton for research assistance.

¹ Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, <http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html>.

² *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

³ Dan Eggen, *Senate Democrats Again Fail to Pass Campaign Finance Disclosure*, WASH. POST, Sept. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html>.

⁴ Editorial, *McConnell’s Hypocrisy on Campaign Disclosure*, LEXINGTON HERALD-LEADER, Aug. 1, 2010, <http://www.kentucky.com/2010/08/01/1372068/mcconnells-hypocrisy-on-campaign.html>. Democrats coupled their disclosure proposal with new limits on campaign spending by government contractors, a provision of dubious constitutionality which doomed the chances for the disclosure portions of the bill to attract moderate Republican support. Richard L. Hasen, *Show Me the Donors: What’s the Point of Campaign Finance Disclosure? Let’s Review*, SLATE, Oct. 14, 2010, http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.single.html.

shield the identity of their donors.⁵ The U.S. Chamber of Commerce strongly opposed attempts by the Obama administration to impose disclosure provisions on federal contractors through executive order,⁶ and almost comically raised the specter that major American businesses will suffer government harassment if compelled to disclose their campaign spending.⁷ We face the first presidential election since Watergate with the prospect that a significant portion of the money spent on the election will remain secret to the public, though not necessarily to the beneficiaries of the spending.

But attacks on disclosure have come not only from the right. Members of the academy, and not just the usual suspects who oppose virtually all campaign finance regulation,⁸ have criticized disclosure laws. Bill McGeeveran chides election law scholars for failing to take informational privacy concerns seriously, in the way scholars take such privacy interests seriously in other areas of the law when rethinking the costs of campaign finance disclosure.⁹ Richard Briffault, a longtime supporter of reasonable campaign finance regulation, now believes disclosure is inadequate to deter corruption, and that the potential chill of disclosure in the Internet era warrants raising the threshold for disclosure of campaign contribution information.¹⁰

⁵ Richard L. Hasen, *The FEC is as Good as Dead: The New Republican Commissioners are Gutting Campaign Finance Law*, SLATE, Jan. 25, 2011,

http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html.

⁶ Coalition Letter from the U.S. Chamber of Commerce to President Obama on the Draft Executive Order (May 16, 2011), available at <http://www.uschamber.com/issues/letters/2011/coalition-letter-president-obama-draft-executive-order>.

⁷ Jake Tapper, *Chamber of Commerce: The White House Wants Our Donor Lists So Its Allies Can Intimidate Our Donors*, POL. PUNCH (Oct. 13, 2010, 11:10 AM), <http://abcnews.go.com/blogs/politics/2010/10/chamber-of-commerce-the-white-house-wants-our-donor-lists-so-its-allies-can-intimidate-our-donors/>. The interview quotes Bruce Josten, executive vice president for government affairs for the Chamber as follows: “When some of those corporate names were divulged, not by us, by others, what did they receive? They received protests, they received threats, they were intimidated, they were harassed, they had to hire additional security, they were recipients of a host of proxies leveled at those companies that had nothing to do with the purpose of those companies. So we know what the purpose here is. It's to harass and intimidate.” So far as I can tell, most of these charges were never proven. Others involved economic boycotts which are not harassment but protected First Amendment activity.

⁸ BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 221-23 (2001).

⁹ William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859 (2011).

¹⁰ Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (2010).

Lloyd Mayer dismisses the anticorruption interest for disclosure laws in a single sentence,¹¹ and expresses considerable skepticism that current disclosure laws can serve the important governmental interest of providing valuable information to voters.¹² Bruce Cain believes that many reformers push disclosure to dissuade people from giving money to campaigns, and he has called for treating campaign finance disclosure information as we do sensitive individual level census data—disclosed to the government but not to the public.¹³

In this short essay, I offer a qualified defense of government-mandated disclosure, one which recognizes the concerns of these prominent academics but also sees much of the anti-disclosure rhetoric of the Chamber and others as overblown and unsupported — offered disingenuously with the intention to create a fully deregulated campaign finance system, in which large amounts of secret money flow in an attempt to curry favor with politicians, but avoid public scrutiny. To the contrary, disclosure laws remain one of the few remaining constitutional levers to further the public interest through campaign finance law.

Even in the Internet age, in which the costs of obtaining campaign finance data about small-scale contributions by individual donors often have fallen to near zero, there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak. In the face of evidence of a real threat of serious harassment, courts should freely grant exemptions from campaign finance laws. Even absent proof of harassment, Congress and state legislatures should modify their disclosure laws to protect the informational privacy of those individuals who use modest means to express symbolic support for candidates or ballot measures. But major players in the electoral process

¹¹ Lloyd H. Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010).

¹² *Id.*

¹³ Bruce Cain, Lead Essay, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010, 11:08 AM), <http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/>.

generally should not be able to shield their identities under a pretextual appeal to the prevention of “harassment” because of the important government interests in preventing corruption and providing valuable information to voters which are furthered by mandated disclosure.

It is no surprise that the Internet has been primarily responsible for the loss of informational privacy in the campaign finance disclosure context. Perhaps more surprisingly, the Internet is at least indirectly responsible for strengthening the two primary government interests supporting mandatory disclosure. As I will argue, the rise of the Internet was a prime force in the unraveling of the older campaign finance regime, and the subsequent emergence of new campaign finance organizations such as “Super PACs,” which raise the danger of the corruption of elected officials dramatically. Disclosure laws may not be the best tool to police the potential for corruption from these new or supercharged campaign finance vehicles (limits on corporate and labor union spending, along with limits on contributions to independent expenditure committees, are far better but currently unconstitutional). Nonetheless, disclosure laws are much better than nothing in ferreting out when an elected official might act to benefit her supporters rather than act in the public interest.

As for the information interest, campaign finance data, especially when included on the face of campaign advertising, provides an important heuristic cue helping busy voters decide how to vote. Such data assist voters who face Internet-driven information overload and a variety of potentially misleading campaign ads seeking to mask the identity of those behind campaigns and campaign advertising.

I. CHILL

To listen to some critics of the recent attempts to plug the holes in our federal disclosure laws, harassment of donors is commonplace and severe. In fact, the available evidence is to the

contrary, and the reason for the focus on harassment is to fit challenges to campaign finance disclosure laws into a narrow exception created by Supreme Court. The Supreme Court has repeatedly upheld campaign finance disclosure laws against First Amendment challenge,¹⁴ most recently in the *Citizens United* case, recognizing only an “as applied” exemption for people or groups facing a realistic threat of serious harassment.

Although much of the debate about harassment is empirical (how much harassment is there?), the debate actually begins with a definitional problem about what constitutes “harassment” of campaign contributors or spenders. The Supreme Court has been somewhat unclear on the issue,¹⁵ so perhaps the best place to start is with *Brown v. Socialist Workers ’74 Committee*,¹⁶ the one case in which the Court recognized that the Constitution mandated an exemption based upon harassment for contributors to the Socialist Workers Party (“SWP”).

The harassment of SWP contributors was pervasive and egregious:

Appellees introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring states, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership. Although appellants contend that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court’s conclusion that “private hostility and harassment toward SWP members make it difficult for them to maintain employment.”

The District Court also found a past history of government harassment of the SWP. FBI surveillance of the SWP was “massive” and continued until at least

¹⁴ For the doctrinal history, see Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000). The one major exception to the constitutionality of campaign finance disclosure laws appears is *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995), which recognized a right to anonymous campaign speech in certain circumstances. But as Professor McGeveran explains, that case has been mostly ignored in subsequent Supreme Court cases. McGeveran, *supra* note 9, at 859-60 (“Boy was I wrong [in] suggest[ing] the Supreme Court might find constitutional problems with mandatory disclosure of modest campaign contributions.”).

¹⁵ McGeveran, *supra* note 9, at 868.

¹⁶ 459 U.S. 87 (1982).

1976. The FBI also conducted a counterintelligence program against the SWP and the Young Socialist Alliance (YSA), the SWP's youth organization. One of the aims of the "SWP Disruption Program" was the dissemination of information designed to impair the ability of the SWP and YSA to function. This program included "disclosing to the press the criminal records of SWP candidates, and sending anonymous letters to SWP members, supporters, spouses, and employers." Until at least 1976, the FBI employed various covert techniques to obtain information about the SWP, including information concerning the sources of its funds and the nature of its expenditures. The District Court specifically found that the FBI had conducted surveillance of the Ohio SWP and had interfered with its activities within the State. Government surveillance was not limited to the FBI. The United States Civil Service Commission also gathered information on the SWP, the YSA, and their supporters, and the FBI routinely distributed its reports to Army, Navy and Air Force Intelligence, the United States Secret Service, and the Immigration and Naturalization Service.¹⁷

In determining whether SWP supporters were entitled to a harassment-based exemption from campaign finance laws, the Court took the fact-inquiry regarding harassment seriously. The lesson of the case is that the threat of harassment must be proven, not assumed. And it must be severe, not casual or minor, such as merely being "moonied" or "flipped off" by detractors for engaging in controversial political activity.¹⁸

A majority of the Supreme Court today likely would require proof of a potential for harassment on the scale of what the SWP members faced in order to justify the granting of an applied exemption to an otherwise constitutional disclosure law. In the recent *Doe v. Reed*

¹⁷ *Id.* at 423-24 (footnotes omitted). One of the omitted footnotes, footnote 18, includes the following finding from the district court:

"The Government possesses about 8,000,000 documents relating to the SWP, YSA . . . and their members. . . . Since 1960 the FBI has had about 300 informants who were members of the SWP and/or YSA and 1000 non-member informants. Both the Cleveland and Cincinnati FBI field offices had one or more SWP or YSA member informants. Approximately 2 of the SWP member informants held local branch offices. Three informants even ran for elective office as SWP candidates. The 18 informants whose files were disclosed to Judge Breitel received total payments of \$358,648.38 for their services and expenses."

Id. at 424 n.18.

¹⁸ *Doe v. Reed*, No. C09-5456BHS, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011) (hearing allegations made of signature gatherers for anti-gay rights referendum in Washington State).

case,¹⁹ the Court rejected a constitutional argument against the disclosure of the names of people signing referendum petitions in Washington State, but it remanded the case to the district court to consider whether the signers of a particular anti-gay rights referendum were entitled to an as-applied exemption based upon proof of harassment. Although the Court, in dicta, split in the *Doe* case over the precise standards for the as-applied harassment exemption to be applied on remand, the District Court examining *Doe* on remand concluded that Justice Sotomayor's standard, which mirrors the *Socialist Workers'* standard, had the support of a majority of the Court.²⁰ This standard requires proof of "serious and widespread harassment that the State is unwilling or unable to control."²¹

With *Socialist Workers* likely enshrined as the governing standard, we can turn to the empirical evidence of harassment. Using the *Socialist Workers* standard, evidence of harassment of campaign finance contributors and spenders these days is sparse indeed. Violence, intimidation, and government interference with unpopular groups in this country is currently blessedly rare and even rarer among groups choosing to participate in the political process through campaign contributions and expenditures. Indeed, outside the context of disputes over gay marriage-related measures, it is hard to think of examples of even credible *allegations* of harassment. As a political scientists' amicus brief in the *Doe* case noted, "[w]ith respect to the twenty-eight statewide referenda that have qualified for the ballot [nationwide] between 2000 and 2009, well over a million citizens have signed their names to petitions. Yet petitioners have

¹⁹ 130 S. Ct. 2811 (2010).

²⁰ *Doe v. Reed*, No. C09 5456BHS, 2011 WL 4943952, at *18 (W.D. Wash. Oct. 17, 2011).

²¹ *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring). One open question is whether the exemption is available only to "minor parties" or "fringe groups." See *Doe v. Reed*, No. C09 5456BHS, 2011 WL 4943952, at *5 (W.D. Wash. Oct. 17, 2011).

identified no individual petition signer—not one—who has alleged any instance of harassment or intimidation.”²²

It is worth noting an ideological split on the empirical evidence of harassment. Judged from their recent opinions, conservative Supreme Court Justices Thomas and Alito appear to believe that intimidation of conservatives for their political opinions is commonplace.²³ (I cannot help but believe that the contentious Senate confirmation hearings for these Justices, especially of Justice Thomas, contributed to a feeling of conservatives being under siege.) This concern about leftist harassment appears to be widespread among staunch conservatives. As NOM lawyer Jim Bopp recently put it in a posting to the Election Law listserv, “Blacks, gays and leftist[s] were harassed yesterday; conservatives and Christians are harassed today. And no one is safe from the thugs and bullies tomorrow.”²⁴

But courts looking at the empirical evidence of harassment have concluded otherwise. In the remand in the *Doe* case, the court found virtually no evidence that voters who signed of the anti-gay rights referendum were subject to harassment.²⁵ Nor did financial contributors who supported the referendum face harassment. It was true, and lamentable, that national *public*

²² Brief for Direct Democracy Scholars as Amicus Curiae in Support of Respondents at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1256467 at *12.

²³ *Doe*, 130 S. Ct. at 2822 (Alito, J., concurring); *id.* at 2837 (Thomas, J., dissenting). Justice Thomas also dissented on the disclosure issues in the *Citizens United* case. *Citizens United v. FEC*, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., concurring in part and dissenting in part).

²⁴ Posting of Jim Bopp, JBoppjr@aol.com, to law-election@department-lists.uci.edu (Oct. 17, 2011) (on file with author) (quoted with the permission of the author).

²⁵ *Doe v. Reed*, No. C09 5456BHS, 2011 WL 4943952, at *18 (W.D. Wash. Oct. 17, 2011) (“Applied here, the Court finds that Doe has only supplied evidence that hurts rather than helps its case. Doe has supplied minimal testimony from a few witnesses who, in their respective deposition testimony, stated either that police efforts to mitigate reported incidents was sufficient or unnecessary. Doe has supplied no evidence that police were or are now unable or unwilling to mitigate any claimed harassment or are now unable or unwilling to control the same, should disclosure be made. This is a quite different situation than the progeny of cases providing an as-applied exemption wherein the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented. To that end, the evidence supplied by Doe purporting to be the best set of experiences of threats, harassment, or reprisals suffered or reasonably likely to be suffered by R-71 signers cannot be characterized as ‘serious and widespread.’”).

leaders of anti-gay marriage measures suffered some harassment, but mere petition signers or contributors did not.²⁶

A federal district court judge reached the same conclusion in a challenge to the disclosure of the names of contributors to Proposition 8, California's anti-gay marriage initiative. On the request for a preliminary injunction, the trial judge found a similar lack of evidence of harassment to meet the *Socialist Workers* standard.²⁷ The court recently granted summary judgment for California on the same issue, ending the case.

Part of the rhetorical divide appears to stem from conservatives' adopting a broader definition of harassment than the one allowed by *Socialist Workers*. Most importantly, conservatives seem to count economic boycotts as harassment. But as Elian Dashev argues in an important student note, economic boycotts are themselves protected First Amendment activity which should not be the basis for claiming a harassment exemption.²⁸

The United States Chamber of Commerce has raised its own harassment objection to a proposed Obama administration executive order requiring disclosure of the campaign finance activities of federal contractors.²⁹ The Chamber describes what economists would term a form

²⁶ *Id.* at *19 (Plaintiffs "have developed substantial evidence that the public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy. This should concern every citizen and deserves the full attention of law enforcement when the line gets crossed and an advocate becomes the victim of a crime or is subject to a genuine threat of violence.").

²⁷ *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

²⁸ Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of Doe v. Reed*, 45 LOY. L.A. L. REV. 207 (2011).

²⁹ U.S. Chamber of Commerce, *supra* note 6 ("The proposed order will either encourage covered speakers to refrain from exercising their constitutional speech rights so as to avoid jeopardizing their competitiveness for federal contracts, or it will encourage speakers to alter their political messages in ways perceived to increase their chances of being awarded federal contracts.").

of “rent extraction,” whereby politicians punish companies that do not contribute to the politicians or their party (or who contribute to their rivals).³⁰

But public disclosure actually should minimize, not exacerbate, the dangers of rent extraction. Without public disclosure, politicians would be *the only ones* to know if they are getting campaign finance support from a government contractor, and could shake down those who do not support the candidate or her party. Public disclosure makes such retaliation by politicians much less likely because the public can more easily see patterns of retribution. The Chamber, representing the most powerful corporations in the United States, hardly seems akin to those SWP members who faced violence and intimidation. I am confident that Philip Morris and Exxon Mobil can hold their own in the public square.³¹

The bottom line is that constitutionally significant harassment is extremely rare, and in all but the most hot-button cases (perhaps these days only in the gay marriage cases), we may safely discount the danger of harassment as a reason for opposing generally applicable campaign finance laws. Of course, all such laws should include procedures for receiving an as-applied exemption upon showing the threat of serious and pervasive harassment of the *Socialist Workers* variety. But the granting of exemptions should be rare because harassment is rare.

Despite the lack of evidence of harassment, federal, state, and local governments still should dramatically raise the reporting thresholds for campaign finance contributions. The issue here is not harassment but the informational privacy concern raised by Professor McGeeveran.

³⁰ FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997); see also Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

³¹ Eric Lipton et al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES, Oct. 21, 2010, <http://www.nytimes.com/2010/10/22/us/politics/22chamber.html> (“These large donations [from major corporations] — none of which were publicly disclosed by the chamber, a tax-exempt group that keeps its donors secret, as it is allowed by law — offer a glimpse of the chamber’s money-raising efforts, which it has ramped up recently in an orchestrated campaign to become one of the most well-financed critics of the Obama administration and an influential player in this fall’s Congressional elections.”).

For example, I live in a neighborhood populated by a number of liberals in the entertainment industry. I, or anyone else, can go to the Huffington Post's "fundrace.huffingtonpost.com" website and figure out which of my neighbors gave \$100 to Herman Cain and or conservative candidates. Those conservative neighbors making such donations will not face harassment for making such contributions, but I would guess there would be some whispering among the typical liberal people living in my neighborhood who would think differently about these neighbors if they got this information. Whispering is not harassment, but the entire process is unseemly and unnecessary.

This type of snooping is a new phenomenon facilitated by the Internet. One of the pioneers of the study of money in politics, Professor Louise Overacker, reports how in the 1930s she literally had to go into the men's room at the House of Representatives to retrieve campaign finance records from dusty, unlabeled bundles above some lockers.³² Campaign finance data was hard to come by. In the 1970s, if you wanted campaign finance records, you needed to go down to the Federal Election Commission and peruse the papers organized by campaign, not donor. By the 1990s, enterprising private organizations were digitizing the data for searching. Today, anyone with an Internet connection can have the information about federal (and many state and local) campaign contributions in seconds from either the FEC, private organizations, or good government groups such as the Center for Responsive Politics that maintains the indispensable Open Secrets website and database.

The unseemliness of Fundrace-type snooping would be worth putting up with if disclosure of very small contributions served some important interest. Knowing that one's Hollywood neighbor gave \$100 to Herman Cain or one's Houston neighbor gave \$50 to

³² ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 25-26 (1988).

Elizabeth Warren does not do much to prevent the corruption of these candidates or give voters valuable information about choosing candidates. As Professor Mayer argues, modest contributors are engaging in a symbolic act of support for the candidate. Like voting, such modest action generally should be considered a private matter.

Privacy is also advisable given occasional disturbing instances of serious economic boycotts against those making very small campaign contributions to anti-gay marriage causes. As Dashev describes, the most famous victim was Majorie Christofferson who donated only one hundred dollars in support of Proposition 8. After her donation was publicly disclosed, her family-owned establishment, popular Los Angeles restaurant El Coyote, was besieged.³³ While boycotts are constitutionally protected and do not constitute legal harassment, the state interest in disclosure of modest contributions is weak, and the cost of such disclosure can be more serious.

While the Constitution does not require raising the reporting thresholds, good policy sense does. Only contributors giving over a more significant threshold, say \$1000, should have their names disclosed publicly (though all contributions of any amount should be reported to government agencies to make sure there is no fraud, sham, or conduit contributions taking place in campaigns, and government agencies should regularly audit these campaigns).

II. ANTICORRUPTION

In *Buckley v. Valeo*,³⁴ the Supreme Court rejected a First Amendment challenge to a provision of the Federal Election Campaign Act requiring individuals and groups that expressly advocate the election or defeat of candidates for federal office to file reports detailing contributions and expenditures with the Federal Election Commission. The Court upheld the disclosure requirements because they furthered three “sufficiently important” interests: deterring

³³ Dashev, *supra* note 28, at 248.

³⁴ 424 U.S. 1 (1976).

corruption, by allowing interested parties to look for connections between campaign contributors or spenders and candidates who benefit from those contributions or spending; providing information helpful to voters; and aiding in the enforcement of other campaign finance laws, such as contribution limits.

As Professor Briffault acknowledges, disclosure is not a strong anticorruption tool.³⁵ the most direct way to prevent a candidate from being improperly influenced by money in campaigns is to limit money in campaigns, not merely to shed a light on it. But spending limits are now unconstitutional, even as to corporations and labor unions, and contribution limits are coming under increasing constitutional pressure in the courts. Disclosure sometimes will be the *only* weapon available to the government for combating corruption, aside from the possibility of bribery prosecutions (which are themselves difficult to bring thanks to the Supreme Court's cases in that area). Mandated disclosure may not be a great tool, but it is better than nothing, allowing the press, opposing campaigns, and the public to look for a connection between an elected officials' financial supporters and the actions taken in office by the official.

That need for a "better than nothing" tool has increased exponentially, thanks to post-*Citizen United* developments, especially the rise of so-called Super-PACs. These PACs are political organizations which can accept unlimited sums from individuals, corporations and labor unions to fund election-related ads.³⁶ Holes in disclosure law, and the ability to funnel money through related 501(c)(4) organizations, make it possible to shield the identity of most campaign contributors to independent groups from public scrutiny.³⁷

³⁵ Briffault, *supra* note 10, at 287 ("Nor is it likely that disclosure enables the voters to define and enforce an anti-corruption norm.").

³⁶ See DANIEL H. LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW—CASES AND MATERIALS* 70-72 (Supp. 2011).

³⁷ Kim Barker & Marian Wang, *Super-PACs and Dark Money: Pro Publica's Guide to the New World of Campaign Finance*, PRO PUBLICA (July 11, 2011), <http://www.propublica.org/blog/item/super-pacs-propublicas-guide-to-the-new-world-of-campaign-finance>.

In *Citizens United*, Justice Kennedy, writing for a majority of the Court, appeared to determine as an empirical matter for all cases that spending independent of a candidate cannot corrupt a candidate or be an improper influence on her.³⁸ As I have argued elsewhere,³⁹ this was one of the least persuasive portions of the Court’s controversial opinion. If the Court believes that the government may limit a \$3000 contribution to a candidate because of its corruptive potential, how could it not believe that the government has a similar anticorruption interest in limiting \$3 million contributions to an independent effort to elect that candidate? The government’s anticorruption interest stemming from large contributions to such groups is especially strong because these Super-PACs, while nominally independent, often have close ties to candidates.

It is not even clear that a majority of the Court (or even Justice Kennedy) actually believes Justice Kennedy’s statement that independent spending cannot corrupt. The holding in *Citizens United* was in considerable tension with Justice Kennedy’s opinion from just a year earlier in *Caperton v. Massey*,⁴⁰ recognizing that a \$3 million contribution to an independent group supporting the election of a West Virginia Supreme Court Justice required that the Justice recuse himself from a case involving the independent spender supporting his candidacy. The *Caperton* Court pointed to the “disproportionate” influence of that spending on the race and at least an appearance of impropriety.⁴¹

With so much money sloshing around after *Citizens United* in these nominally independent groups, the country needs mandated disclosure to attempt to ferret out and deter

³⁸ *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

³⁹ Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

⁴⁰ 129 S. Ct. 2252 (2009).

⁴¹ See Hasen, *supra* note 39, at 611-15 (discussing tension between the two cases).

quid pro quo corruption. Without mandated disclosure, it will often be impossible for anyone—rival campaigns, the press, or the public—to connect the dots.

We have already seen the role which the Internet has played on the cost side of mandated disclosure. But the Internet has had a somewhat surprising role in increasing the state interest in disclosure as well. Briefly put, the rise of the Internet has undermined the argument for the “media exemption.”⁴² The media exemption provides that the government may constitutionally limit for-profit corporations’ electoral spending but exempt from those limitations the spending of the institutional corporate press, such as major newspapers and television stations.

In the pre-Internet era, many people (although not all)⁴³ accepted the idea that major newspapers could play an educative and civic role in elections that was different in kind than the role played by for-profit corporations such as General Motors. But the line became harder to defend with the rise of multiple media platforms via the Internet, and now social media. These forces make it much harder to define who “the press” is (or whether it applies to a technology, not an entity⁴⁴), and to draw defensible lines between those corporations entitled to the media exemption and those who are not.

The inconsistency of the media exemption played a prominent role in Justice Kennedy’s opinion in *Citizens United*, and provided a linchpin in the Court’s argument against further limits on independent spending by corporations. After the corporate limit fell, other regulations fell too, collapsing like a house of cards. The rise of unlimited contributions via 501(c)(4)s and Super-PACs followed, dramatically increasing the danger of corruption in campaigns, especially

⁴² Adam Liptak, *In Arguments on Corporate Speech, The Press is a Problem*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/2011/02/08/us/08bar.html>; Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).

⁴³ Contrast the majority opinion and Justice Scalia’s dissenting opinion on this point in *Austin v. Michigan Chamber of Commerce*. Compare 494 U.S. 652 (1990) with *id.* at 679 (Scalia, J., dissenting).

⁴⁴ Eugene Volokh, “*The Freedom . . . of the Press*,” *from 1791 to 1868 to Now — Freedom for the Press as an Industry, or Press as Technology*, 160 U. PA. L. REV. (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802229.

when such spending and contributions remain undisclosed. The anticorruption need for mandated disclosure is currently dire.

III. INFORMATION

Aside from the anticorruption function of campaign finance disclosure laws,⁴⁵ the Supreme Court has recognized an important “information” function. Busy voters rely upon campaign finance information to make decisions about how to vote, especially in initiative campaigns. Campaign finance information provides busy voters with important cues about how to vote:⁴⁶ knowing a candidate is backed by environmental groups or the gun rights lobby may be all you need to know to cast a ballot consistent with your interests.

This benefit of mandated disclosure was apparent when California voters recently turned down a ballot proposition which would have benefited Pacific Gas and Electric (“PG&E”).⁴⁷ PG&E provided almost all of the \$46 million to the “Yes on 16” campaign, compared with very little spent opposing the measure. Thanks to California’s disclosure laws, PG&E’s name appeared on every “Yes on 16” ad and the measure narrowly went down to defeat.

As with the anticorruption interest, the information interest’s benefits can be exaggerated. As Professor Mayer points out, disclosure of campaign finance information may be less useful in the context of partisan general election campaigns, when voters can rely upon partisan labels such as “Democrat” or “Republican.”⁴⁸ Busy voters also may not have time to check campaign finance data themselves, or see what opposing campaigns or the press have come up with out of

⁴⁵ The third interest the Supreme Court recognized in *Buckley*, the “enforcement” interest, is in fact a subset of the anticorruption interest. Disclosure deters people who seek to evade contribution limits through giving in another’s name—supporting the enforcement of the law and the corruption that may follow from its non-enforcement.

⁴⁶ Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005).

⁴⁷ For the relevant links, see Richard L. Hasen, *Show Me the Donors: What’s the Point of Campaign Finance Disclosure? Let’s Review*, SLATE (Oct. 14, 2010), http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.single.html.

⁴⁸ Mayer, *supra* note 11, at 260-71.

the campaign finance data. Mayer acknowledges that disclosure on the face of the advertisement is most helpful to voters in evaluating the messages, as with the PG&E advertisement. Moreover, as Bruce Cain has argued,⁴⁹ it may be better for the government to provide information in the aggregate (e.g., disclosing the amount of contributions from people working for the oil and gas industry) than to provide individual information to voters because of the potential for snooping and harassment.

Still, especially in the Internet era, campaign finance disclosure data can serve an important public function in helping voters make choices consistent with their interests. Voters looking for reliable campaign finance information are faced with information overload; a recent Google search for Mitt Romney returned 189 million results. Campaign finance data are especially reliable evidence as to who backs a candidate. If voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates.

In an era of dirty tricks, disclosure is especially important. Consider in this regard to two incidents. The first involves an advertisement run in the 2010 Nevada U.S. Senate race between the Democratic incumbent, Senate Majority Leader Harry Reid and his Republican challenger, Sharron Angle.⁵⁰ The ad, run by the group called “Latinos for Reform,” was entitled “*¡No Votes!*” (Spanish for “Don’t Vote”). It urged Latinos not to vote in the upcoming election because President Obama and Democrats in Congress had promised a vote on immigration reform and nothing yet had happened.

How should voters evaluate such an ad? Was this ad backed by a group such as MALDEF, which supports comprehensive immigration reform? Thanks to campaign finance

⁴⁹ Cain, *supra* note 13.

⁵⁰ I give the details on this story in RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (forthcoming 2012). The quotations come from sources cited in chapter 5.

disclosure data, we know that Latinos for Reform is actually supported by conservative Republicans. The largest contributor to Latinos for Reform in 2008 was John T. Finn, a pro-life activist in Southern California with no apparent Latino ties. The head of Latinos for Reform, Robert Posada, was a former Republican National Committee chair whose idea of immigration reform is “heightened border security, and drug enforcement; employee verification; and a temporary worker program. ‘No amnesty.’[.]”

Why would this group urge Latinos not to vote? Latinos were a key constituency for Senator Reid, and few supported Angle. Getting Latinos not to vote would help Angle win. Voters knowing this information about who backs Latinos for Reform could help busy voters know how better to evaluate the “*No Votes!*” advertisement.

Second, consider the “fake Tea Party” episode in Michigan. Ruth Johnson, the Republican Secretary of State of Michigan, recently called for increased financial disclosure to expose schemes such as a Democratic scheme to run fake Tea Party candidates in the 2010 elections to siphon off votes from Republican candidates.⁵¹ One of the charged Democrats recently pled no-contest to his participation in the scheme. “The charges relate to a scheme to put two county commission candidates and a state senate candidate on the ballot in November 2010, without the candidates’ knowledge. The two Democrats were charged with forging the supposed candidates’ signatures and falsely swearing under oath to qualify them to enter the race.”⁵² Campaign finance disclosure can help expose such chicanery and help voters make choices consistent with their interests and preferences.

⁵¹ Ruth Johnson, *Election System Reform Essential to Michigan*, DETROIT NEWS, Oct. 20, 2011, <http://www.detnews.com/article/20111020/OPINION01/110200337/1008/opinion01/Election-system-reform-essential-to-Michigan>; Stephanie Condon, *Two Michigan Democrats Indicted in Fake Tea Party Scandal*, CBS NEWS POLITICAL HOT SHEET (Mar. 18, 2011), http://www.cbsnews.com/8301-503544_162-20044674-503544.html.

⁵² Jillian Rayfield, *Michigan Dem Pleads No Contest in Fake Tea Party Scheme*, TPM MUCKRAKER (October 20, 2011), http://tpmmuckraker.talkingpointsmemo.com/2011/10/michigan_dem_pleads_no_contest_in_fake_tea_party_s.php.

IV. CONCLUSION

Forget the hype from NOM and the United States Chamber of Commerce about violence and harassment of campaign contributors being commonplace. We are fortunate to live in a country where such harassment is very rare. Government harassment of unpopular groups, such as members of the SWP, appears to have all but waned. While there are occasional and lamentable private acts of harassment against the leaders of groups with the most controversial causes, such harassment can be dealt with on a case-by-case basis rather than by a wholesale abandonment of campaign finance disclosure laws. Economic boycotts do not count as unconstitutional harassment. Disclosure thresholds should be raised significantly, not because of the danger of harassment, but because disclosure of those making modest contributions interferes with informational privacy while serving no important government interest.

When it comes to more significant funds being spent in the campaign context, however, the calculus is different and mandated disclosure is desirable. In the post-*Citizens United* era, when the country will be increasingly awash in money flowing through various organizations in order to hide its true sources, mandated disclosure can serve the important interest in deterring corruption and providing valuable information to voters. Those who want to significantly influence political decisions in this country should have, in Justice Scalia's words, the "civic courage" to stand up for their political ideas.⁵³ They should not hide behind the false threat of harassment and have their influence hidden behind layers of anonymity, depriving voters of information on who is bankrolling campaigns and, in the worst-case scenario, buying off corrupt politicians.

⁵³ *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.").

POLITICO

Of super PACs and corruption

By: [Richard Hasen](#)

March 22, 2012 06:13 AM EDT

Can [Super PACs](#) and other outside campaign finance groups corrupt?

This question is at the heart of [a case](#) out of Montana which the Supreme Court will [likely decide](#) next term. Corruption is an urgent question for 2012 voters — [as outside spending on federal elections skyrockets](#), and [negative ads](#) (sometimes paid for by [undisclosed donors](#)) flood the airwaves in the wake of the Supreme Court's controversial *Citizens United* decision.

Though I have no confidence that it will — the Supreme Court should reverse course from [Citizens United](#). It should recognize real evidence showing that unlimited spending by these groups can undermine society's interest in preventing corruption and the appearance of corruption. It is time to rein in the Super PACs and the their non-disclosing cousins, political 501c4s.

To understand the importance of the corruption issue — here's a brief campaign finance primer. [Since 1976](#), the Supreme Court has recognized only the government's interest in preventing corruption, or the appearance of corruption, as a justification for limiting money in elections in the face of a First Amendment challenge. It is this anticorruption interest that allows Congress to impose limits on political contributions made directly to candidates.

At the core of Justice Anthony Kennedy's 2010 *Citizens United* ruling [was his conclusion](#) that, in contrast to contributions to candidates, independent spending cannot corrupt. If the spending is independent, Kennedy reasoned, and there is no chance of coordination, there cannot be any quid pro quo.

Kennedy also rejected the idea that the concept of corruption should be read broadly beyond bribery and related conduct to include "ingratiation and access." In any case, he noted, there was "scant evidence" that independent spending can even "ingratiate." Independent spending, he concluded without a shred of evidence, will not cause the public to lose confidence in the electoral process.

Lower courts and the Federal Election Commission [followed up](#) on *Citizens United* with rulings that led to the creation of outside groups — the Super PACs — which can collect unlimited contributions to fund independent expenditure campaigns. They reasoned that if *Citizens United* held that independent spending cannot corrupt, how could contributions to fund such spending corrupt? And it doesn't matter whether the contributor is a real person or an artificial corporation.

So long as the groups do not "coordinate" with candidates, they are free to raise and spend what they wish.

It's time to rethink the whole relationship between independent spending and corruption. Independent spending—and contributions funding independent spending—can indeed spawn corruption both directly and indirectly.

For example, consider evidence described by the late Judge [M. Blane Michael](#) in a [2008 case](#) challenging North Carolina's limit on contributions to what we would now call Super PACs. The evidence submitted by North Carolina demonstrated the tactics of a group called "Farmers for Fairness." As Michael described the actions of "Farmers":

"Farmers created advertisements directly opposing certain legislative candidates. Instead of simply running the advertisements during election time, Farmers scheduled meetings with legislators and screened the advertisements for them in private. Farmers then explained that, unless the legislators supported its positions, it would run the *advertisements that attacked the candidates on positions unrelated to those advocated by Farmers*.... The record reveals that Farmers did not discuss its central issue, deregulation of the hog industry, in its advertisements. Instead, it threatened and coerced candidates to adopt its position, and, if the candidate refused, ran negative advertisements having no connection with the position it advocated."

[A 2011 column](#) by Norm Ornstein, a resident scholar at American Enterprise Institute, shows these same kind of threats are reaching Congress. "As one senator said to me," Ornstein wrote, "We have all had experiences like the following: A lobbyist or interest representative will be in my office. He or she will say, 'You know, Americans for a Better America really, really want this amendment passed. And they have more money than God. I don't know what they will do with their money if they don't get what they want. But they are capable of spending a fortune to make anybody who disappoints them regret it.'" No money has to be spent to get the desired outcome."

Now you might think that such contact with candidates would count as illegal coordination. Unfortunately, this is not the case. In fact, as Stephen Colbert demonstrated with [comedic genius](#), campaigns and Super PACs can cooperate and communicate in numerous ways [without running afoul](#) of the FEC's technical coordination rules. And any attempt to broaden the coordination rules to capture something like the Farmers for Fairness tactics will no doubt be met with vociferous calls from the anti-reform community that tighter coordination rules violate the First Amendment.

Large independent spending can also lead to indirect corruption. Ornstein's column explains that the prospect of a large Super PAC drop against a senator or representative puts pressure on candidates to raise ever more money in \$2,500 chunks (the largest amount allowed for direct individual contributions) and lean on lobbyists for it.

"Ask almost any lobbyist," Ornstein wrote, "I hear the same story there over and over — the lobbyist met with a lawmaker to discuss a matter for a client, and before he gets back to the office, the cell phone rings and the lawmaker is asking for money. The connections between policy actions or inactions and fundraising are no longer indirect or subtle."

Maybe this counts as only "scant evidence" of a danger of corruption, or maybe Kennedy meant to drain the term "corruption" of any meaning short of quid pro quo bribery. But for most people, the potential for this kind of exchange raises troubling issues of corruption.

Even if this is not proof of "corruption" in Kennedy's terms, it is proof of something closely related which should count as much. The Supreme Court has recognized "appearance of corruption" as an alternative basis for limiting campaign finance laws.

This alternative basis has always left me a bit squeamish—laws should be justified based on actual effects, not appearances. But a better way of conceptualizing this issue was

described [many years ago](#) by Daniel Lowenstein, a law professor at University of California, Los Angeles. The problem, Lowenstein wrote, is not an appearance of corruption, but an actuality of a conflict of interest.

The money chase, now with unlimited outside money, creates too many unavoidable conflicts for lawmakers. Lawmakers worried about millions spent against them will bend to either please those outside groups or to curry favor with other groups to fight back. Outside money should be limited to prevent this pervasive conflict of interest which arises between the interests of the big spenders and the public interest.

Finally, to make things worse, we have seen some political organizations [shift from the Super PAC](#) form to an abuse of the 501c4 form of organization. 501c4s are groups organized under the tax code for “social welfare” purposes. But we are, for the first time, seeing these groups [spend big money](#) on election-related advertising. They don’t need to disclose their contributors publicly.

This dark money creates an even greater danger of corruption and conflict of interest. The public won’t be able to see the connections between campaign money and a candidate. But, at the same time, nothing stops contributors to these shadowy groups from contacting Members of Congress and candidates with threats or enticements.

The Internal Revenue Service needs to take away the tax-exempt status of these c4 groups, and the FEC needs to start regulating them as political committees so that we can get adequate disclosure. Congress needs to [amend the disclosure laws](#) as well — to target the nature of the political activity, not how the group is organized under the tax code.

The Supreme Court may not use the Montana case to reopen the evidentiary question about the link between independent spending, Super PACs and corruption.

But if the court is willing to look at the evidence, the truth is inescapable.

Richard L. Hasen is professor of law and political science at University of California, Irvine School of Law and author of the [Election Law Blog](#). His book “[The Voting Wars: From Florida 2000 to the Next Election Meltdown](#)” will be published this summer by Yale University Press.