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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

5. Brown, *supra* note 3.

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

7. *See* § 22-26-112(a)(ix).

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

9. *See generally* § 22-25-106.

10. § 22-25-101(b).

11. § 22-25-106(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. *CREW V. FEDERAL ELECTION COMMISSION*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. § 30101(4)(A).

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

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

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

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

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

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

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

III. *COALITION FOR SECULAR GOVERNMENT V. WILLIAMS*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66. *See infra* Part IV.

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

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

IV. *VAN HOLLEN V. FEDERAL ELECTION COMMISSION*

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

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

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

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

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

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

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

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

73. *Id.* at 488.

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

75. *Van Hollen*, 811 F.3d at 498–99.

76. *Id.* at 499–501.

77. *Id.* at 498.

78. *Id.*

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

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

V. THE COLLISION COURSE AFTER THE 2016 ELECTION

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

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

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

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

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

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

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

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

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

91. *Id.* at 2378.

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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

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

100. *See supra* Parts II–V.

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

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

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

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

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

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

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