NOTES & COMMENTS

STATES MUST PROTECT ISSUE ADVOCACY IN A POST-*CITIZENS UNITED* WORLD

by
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In Citizens United v. Federal Election Commission*, the Supreme Court held that the government may not enact a law that limits political speech on the basis of the speaker's corporate identity unless the law serves to prevent* quid pro quo *corruption. This decision transformed the way corporations spend money to influence elections and triggered nationwide reform of campaign finance laws, which have the potential to chill effective issue advocacy. Although* Citizens United *established greater free speech protections for corporations and nonprofit organizations, nonprofit 501(c)(3) organizations are still prohibited from supporting or opposing a candidate for political office. Because these organizations are distinct from the types of 501(c)(4) nonprofits organizations at issue in*

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Citizens United*, state lawmakers should protect important issue speech by categorically exempting 501(c)(3) organizations from campaign finance regulations.*

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INTRODUCTION

In 2010, the Supreme Court shifted the landscape for nonprofit political advocacy by changing the way that corporations are allowed to spend money to influence elections. In *Citizens United v. Federal Election Commission*, the Supreme Court held that corporations and labor unions have a constitutionally protected right to use their general treasury accounts to fund political speech that supports or opposes a candidate for office.[1] The Court reasoned that, in the political sphere, corporations have First Amendment rights that are on par with those of natural persons.[2] Therefore, the government may not enact laws that suppress political speech on the basis of the speaker's corporate identity without a showing that the law serves to prevent "*quid pro quo* corruption."[3] This controversial proposition in *Citizens United* triggered a renewed focus on campaign finance laws across the country, as state legislatures scramble to update their own laws to comply with the decision while still effectively regulating money in politics.[4] However, without clear legal guidance,

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[1] 558 U.S. 310, 365 (2010) (holding that "*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* 'effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy.'" (quoting Brief of Appellee at 33, n.12, No. 08-205)).

[2] *Id.* at 342–43.

[3] *Id.* at 361.

[4] Chisun Lee et al., Brennan Ctr. for Justice, After *Citizens United*: The Story in the States 5, 22 (2014), http://www.brennancenter.org/publication/after-citizens-united-story-states.

these new reform measures risk infringing on constitutionally protected speech by nonprofit organizations that must continue to advocate for positive social change during election periods.

In our democracy, "[n]onprofits play a central role in public policy debates" at the state and federal level.[5] These nonprofits are often referred to as 501(c)(3)[6] or 501(c)(4)[7] organizations depending on their tax-exempt classification in the Internal Revenue Code.[8] This Article focuses on the effect *Citizens United* had on 501(c)(3) organizations, a nonpartisan vehicle advocates use to address some of society's deep social problems.[9] Many are based in disenfranchised communities across the country and give a voice to community members by advocating for public policy changes at the state and local level.[10] During elections, 501(c)(3) organizations also engage in nonpartisan efforts to register new voters, sponsor candidate forums, and encourage the public to participate in elections.[11] While *Citizens United* provided nonprofits with new free speech protections, they are still subject to restrictions under the Federal Tax Code. For example, under the Tax Code, 501(c)(3) organizations are absolutely prohibited from engaging in activity to support or oppose a candidate or they risk losing their tax-exempt status.[12]

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[5] B. HOLLY SCHADLER, ALL. FOR JUSTICE, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(c)(3)S, 501(c)(4)S AND POLITICAL ORGANIZATIONS, at I (3d ed. 2012), http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf.

[6] I.R.C. § 501(c)(3) (2012) ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.").

[7] I.R.C. § 501(c)(4)(A) ("Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.").

[8] SCHADLER, *supra* note 5, at 1.

[9] *Id.* at I, 1.

[10] GAIL M. HARMON ET AL., ALL. FOR JUSTICE, BEING A PLAYER: A GUIDE TO THE IRS LOBBYING REGULATIONS FOR ADVOCACY CHARITIES, at ii (2011), http://bolderadvocacy.org/wp-content/uploads/2012/10/Being_A_Player_paywall.pdf.

[11] ALL. FOR JUSTICE, THE RULES OF THE GAME: A GUIDE TO ELECTION-RELATED ACTIVITIES FOR 501(C)(3) ORGANIZATIONS 40 (Rosemary E. Fei et al. eds., 2d ed. 2012), http://bolderadvocacy.org/wp-content/uploads/2012/01/Rules-of-the-Game.pdf.

[12] I.R.C. § 501(c)(3).

Prior to *Citizens United*, many campaign finance laws at the federal and state level imposed reasonable limits on corporate electioneering or spending to influence elections.[13] The societal objective was to ensure that corporate speech in elections was transparent and accountable.[14] These limits also applied to nonprofit organizations because they fall into the corporate category. For instance, at least 24 states limited or prohibited corporations (for-profit and nonprofit) and labor unions from making direct expenditures or contributions to influence elections.[15] Similar to federal law,[16] many states only allowed corporations to participate in elections through more transparent vehicles called "segregated funds."[17] A segregated fund is essentially a political committee that is connected to a corporation or union, but the entity is restricted in how it raises political funds and is usually required to file regular reports with election administrators.[18]

Citizens United opened a floodgate for less transparent political spending. The decision removed the government's ability to prohibit a corporation from spending general treasury funds that it amasses in the economic sphere to influence electoral outcomes.[19] Now, a corporation has little incentive to voluntarily establish a segregated fund and subject itself to limits and disclosure requirements. Instead, it can spend an unlimited amount of its corporate funds through less transparent vehicles, like the 501(c)(4) nonprofit organization at issue in *Citizens United*.[20] The concern with 501(c)(4) organizations, or "social welfare" groups, is that under the IRS code these groups can spend a limited amount of money to support or oppose a candidate without disclosing their funders to the public so long as it is not the organizations' primary purpose.[21]

Following *Citizens United*, states have a duty to rise to the occasion to maintain the integrity of our elections by finding ways to improve transparency in elections and effectively regulate money in politics. The federal government's response has been little to none. Modest federal re-

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[13] Brief of the States of Montana et al. as Amici Curiae Addressing June 29, 2009 Order for Supplemental Briefing and Supporting Neither Party at 1–2, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

[14] *Id.* at 1–2.

[15] *Id.*

[16] 2 U.S.C. § 441b(b)(2) (2012).

[17] Brief for the States of Montana et al., *supra* note 13, at 1–2.

[18] *Id.* at 9–12. The Federal Election Commission clarifies the differences between a Separate Segregated Fund and other federal PACs. *See Separate Segregated Funds and Nonconnected PACs*, FED. ELECTION COMM'N, http://fec.gov/pages/brochures/ssfvnonconnected.pdf (last visited Dec. 21, 2016).

[19] Rachel Baye et al., *Non-candidate Spending Increases in State Elections*, CTR. FOR PUB. INTEGRITY (Sept. 23, 2014), http://www.publicintegrity.org/2014/09/24/15551/non-candidate-spending-increases-state-elections (last updated Sept. 27, 2014).

[20] *See* Citizens United v. FEC, 558 U.S. 310, 404 (2010).

[21] I.R.C. § 501(c)(4)(A) (2012).

form proposals to require political organizations to disclose large special interest donors[22] have stalled in a dysfunctional Congress, and, despite some interest, a constitutional amendment that addresses the decision is a long way off.[23] State-level candidates are at risk of being overwhelmed by increased corporate spending in smaller local elections because "most state campaigns are waged with thousands rather than millions of dollars."[24] However, when crafting new campaign finance laws, legislators must be careful to avoid chilling effective issue advocacy by nonprofit organizations that are already prohibited from supporting or opposing candidates during elections.

Citizens United and its progeny severely limited the policy tools that are constitutionally available to lawmakers and campaign finance reform advocates. The Court only allows the government to limit election-related speech through campaign finance laws when those laws aim to prevent corruption or the appearance of corruption.[25] The government may also enact laws that improve transparency in elections because there is a strong interest in ensuring citizens are given the opportunity to make more "informed decisions and give proper weight to different speakers and messages."[26] Many well-intentioned reform advocates have responded by offering a slew of policy recommendations that support these narrowly drawn government interests.[27] These proposals range from requiring outside groups to register as independent political committees that file regular public reports, to requiring organizations to disclose their funding sources when they mention a candidate during an election period.[28] Many of these proposals are commendable and should be fully considered by lawmakers. However, this Article argues that state campaign finance laws should also include a "safe harbor" provision that exempts

[22] *See, e.g.*, Democracy Is Strengthened by Casting Light on Spending in Elections Act, S. 3628, 111th Cong. (2010); Dan Eggen, *Senate Democrats Again Fail to Pass Campaign Disclosure Law*, WASH. POST, (Sept. 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html.

[23] Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 237 (2010); *The Amendment*, FREE SPEECH FOR PEOPLE, http://freespeechforpeople.org (last visited Dec. 21, 2016) (advocating for the "People's Rights Amendment" to overturn *Citizens United*).

[24] Brief for the States of Montana et al., *supra* note 13, at 16.

[25] Buckley v. Valeo, 424 U.S. 1, 23, 25–26, 30, 33 (1976) (per curiam).

[26] Citizens United v. FEC, 558 U.S. 310, 371 (2010).

[27] *Campaign Finance Legislation Database*, NAT'L CONFERENCE OF STATE LEGISLATORS (July 7, 2015), http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-database-2015-onward.aspx; *see also* CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, TRANSPARENT ELECTIONS AFTER *Citizens United* 13–20 (2011), https://www.brennancenter.org/sites/default/files/legacy/Disclosure%20in%20the%20States.pdf.

[28] *Id.*

501(c)(3) organizations from new disclosure mandates because these laws may chill effective nonpolitical speech that is already heavily regulated by the IRS.

Part I of this Article will discuss the Supreme Court's campaign finance jurisprudence leading up to *Citizens United*. To understand the legal ambiguity following the decision, it is necessary to understand how our campaign finance laws have developed over the past 40 years. Part II focuses on the effects of the decision including the increase in corporate political spending and the use of new political vehicles to influence elections. It will also address some of the disclosure reforms that state legislatures are considering in response to *Citizens United* and how 501(c)(3) organizations may be affected. Finally, Part III will consider the value that these organizations bring to our democracy and why it is constitutionally justifiable to categorically exempt 501(c)(3) nonprofits from state campaign finance reforms.

I. THE ROAD TO *CITIZENS UNITED*

This country was founded on principles of democracy. A democracy is defined as "a form of government in which the supreme power is vested in the people and exercised by them indirectly through a system of representation and delegated authority in which the people choose their officials and representatives at periodically held free elections."[29] Free, fair, and competitive elections are at the heart of any truly functional democracy. Through the United States Constitution, the founders established a unique and novel system of democratic institutions and electoral traditions that have evolved into a political structure[30] that supports democratic principles. The Constitution outlines how we conduct our elections and who is eligible to participate.[31] The Bill of Rights tells us who cannot be denied the right to vote.[32] Our nation's campaign finance laws are the tools that our government uses to establish the electoral rules that serve to protect the integrity of our elections.[33]

To be effective, campaign finance laws must ensure that representatives are accountable to the public, that everyone has the opportunity to participate in a meaningful way, and that there is public confidence in

[29] *Democracy*, WEBSTER'S THIRD NEW INT'L DICTIONARY 600 (2002).

[30] U.S. CONST. arts. I, V.

[31] *Id.* art. I.

[32] Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1274–75 (2012) ("Several political rights in the U.S. Constitution reflect the participation principle, including the rights of speech, assembly, and petition as well as the bar on denying the franchise based on race, gender, failure to pay a poll tax or other tax, or age to those who are at least eighteen years old.").

[33] *See generally FEC Mission and History*, FED. ELECTION COMM'N, http://www.fec.gov/info/mission.shtml#search=mission (last visited Nov. 6, 2016).

our electoral system.[34] Legislators must establish proper oversight in elections to ensure that the rules are being enforced and applied consistently.[35] Our laws should encourage a lively marketplace of ideas and provide a real choice among candidates.[36] Citizens should have access to voting and confidence that their votes are being counted. Finally, campaign finance laws must promote transparency in elections and ensure that voters are provided with the information they need to make educated decisions at the ballot box.[37] 501(c)(3) organizations reinforce these principles by informing the public about important public policy issues and encouraging citizens to fully engage in the political process.[38] A combination of strong campaign finance laws and nonpartisan engagement efforts improve our democracy and limit the risk that political influence will be sold to the highest bidder.

Keeping corrupting influences in our government at bay has always been a challenging endeavor, especially as more money is being spent to influence elections.[39] Since the beginning of the 19th century, Congress has passed laws to regulate the disproportionate influence that corporations and wealthy special interests have over elections. In 1907, Congress took its first major action and banned corporations and banks from directly contributing money to federal candidates and political campaigns, a prohibition that survives today.[40] As a result, corporations began to make their own independent expenditures.[41] An independent expenditure is a communication that expressly advocates for the election or defeat of a candidate but that is not coordinated with any candidate or candidate committee.[42] The distinction between independent expenditures and contributions is important because if an expenditure is coordinated with a candidate or a candidate's campaign, the entire expenditure will be counted as an in-kind contribution for the purpose of federal election

[34] Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-*Citizens United *Era*, 40 FORDHAM URB. L.J. 723, 730, 734–35 (2012).

[35] The FEC oversees federal elections, while state agencies are responsible for oversight at the state and local level. *FEC Mission and History*, *supra* note 33; *see also* Benson, *supra* note 34, at 730.

[36] Benson, *supra* note 34, at 730, 734.

[37] *Id.* at 730–31.

[38] *See* SCHADLER, *supra* note 5, at 1; STATE VOICES, http://www.statevoices.org (last visited Nov. 6, 2016).

[39] Benson, *supra* note 34, at 739–40; Udall, *supra* note 23, at 237.

[40] Tillman Act of 1907, ch. 420, Pub. L. No. 59-36, 34 Stat. 864–65 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2012)).

[41] Andrew T. Newcomer, Comment, *The "Crabbed View of Corruption": How the U.S. Supreme Court Has Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf*, 50 WASHBURN L.J. 235, 247–48 (2010).

[42] Douglas M. Spencer & Abby K. Wood, Citizens United, *States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 332 (2014).

law.[43] Congress responded by banning corporate and union expenditures.[44] Since then, the trend in our campaign finance laws has been moving toward setting limits on the amount of money that can be spent to influence elections and requiring political entities that participate in elections to disclose the sources of their funding.[45]

A. *Election Spending is Protected Speech:* Buckley v. Valeo

In 1974, Congress passed the Federal Elections Campaign Act ("FECA")[46] to reconcile piecemeal legislation and provide the country with a comprehensive campaign finance reform system.[47] FECA restricted contributions and expenditures that were made to and by candidates, political action committees (PACs), political parties, corporations and individuals.[48] It also applied mandatory disclosure requirements to organizations that were spending money to "[e]xpress[ly]" advocate for the election or defeat of a candidate.[49] To "[e]xpress[ly]" advocate means that the organization uses language like "vote for" or "vote against" in reference to a particular candidate in its public communications.[50] The FECA provisions were quickly challenged in *Buckley v. Valeo*,[51] which led to the foundation of our campaign finance jurisprudence.

Buckley was the first time the U.S. Supreme Court held that the government burdens speech when it regulates political spending because money is used to facilitate speech.[52] The Court explained, "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[53] To survive a constitutional challenge, laws

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[43] 11 C.F.R. § 109.21(b) (2016); *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMM'N, http://www.fec.gov/pages/brochures/indexp.shtml (last visited Dec. 21, 2016).

[44] Spencer & Wood, *supra* note 42, at 332.

[45] Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2, 4 (2012).

[46] Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 52 U.S.C. §§ 30101–46 (2012 & Supp. II 2015)).

[47] Kang, *supra* note 45, at 2.

[48] *Id.*

[49] *Id.* at 5 n.11.

[50] *Id.*

[51] Buckley v. Valeo, 424 U.S. 1, 6 (1976) (per curiam).

[52] *Id.* at 16 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.").

[53] *Id.*

that burden political speech are subject to strict scrutiny; the government has the burden of proving that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[54]

In *Buckley*, the Court also identified compelling interests sufficient to allow the government to regulate political speech without infringing on First Amendment rights. The Court upheld FECA's limits on direct contributions to candidates because those limits mitigate the risk of corruption or appearance of corruption.[55] The Court also upheld FECA's disclosure requirements after weighing the government's informational interest against the First Amendment harms alleged by the political organizations that brought the challenge.[56] The appellants provided evidence that potential donors refused to make contributions to the organization because of the possibility of disclosure.[57] But those alleged harms were not sufficient to outweigh three primary government interests served by the disclosure requirements.[58] The Court reasoned that disclosure provides the public with information about the source of a candidate's contributions and how the candidate is spending those funds.[59] It deters actual corruption and the appearance of corruption by exposing the source of large contributions.[60] Finally, the recordkeeping and reporting required by disclosure laws allow election administrators to detect campaign finance violations.[61] However, the Court acknowledged that there might be cases where compelled disclosure would infringe on an organization's ability to exercise its First Amendment rights.[62]

Finally, *Buckley* invalidated FECA's restrictions on independent expenditures made by individuals because they do not carry the same risk of *quid pro quo* corruption as direct contributions to candidates.[63] The Court reasoned that when a political expenditure is not coordinated with a candidate, it weakens its value to a candidate and reduces the likelihood that it will be made "as a *quid pro quo* for improper commitments

[54] Citizens United v. FEC, 558 U.S. 310, 340 (2010); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007).

[55] *Buckley*, 424 U.S. at 23, 25–26, 30, 33; Kang, *supra* note 45, at 33 ("A lower level of scrutiny thus has always applied to contribution limits than to expenditure limits, which 'impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.'") (quoting *Buckley*, 424 U.S. at 23).

[56] A disclosure requirement is subject to "exacting scrutiny," which necessitates a "substantial relation[ship]" between the State's interest and the disclosure required. *Buckley*, 424 U.S. at 64.

[57] *Id.* at 72.

[58] *Id.* at 66–68.

[59] *Id.* at 66–67.

[60] *Id.* at 67.

[61] *Id.* at 67–68.

[62] *Id.* at 74.

[63] *Id.* at 47–48.

from the candidate."[64] However, the Court sidestepped the question of how the decision might affect FECA's prohibition on corporate and union independent expenditures.

Since *Buckley*, limits on contributions and enhanced disclosure requirements have served as the pillars of campaign finance reform efforts across the country.[65] However, new challenges surface as political parties and third party groups, or those not affiliated with a candidate's campaign, discovered ways to circumvent the limits and disclosure requirements upheld in *Buckley*.[66] Political parties began shifting money to third party groups that were not required to register or report their activities to election administrators.[67] These third party groups then used those contributions to distribute "sham issue ads" that were designed to look like genuine issue advocacy but were aimed to influence elections.[68] Although the ads referenced public policy issues, they primarily focused on particular candidates and were timed strategically to support or disparage target candidates right before an election.[69]

B. An Effort to Close Loopholes: The Bipartisan Campaign Reform Act

In 2002, Congress passed its second major reform, the Bipartisan Campaign Reform Act ("BCRA").[70] Congress passed this law as a response to third party efforts to circumvent federal election laws. Under BCRA, ads coordinated with candidate campaigns are considered in-kind contributions to those campaigns.[71] To regulate "sham issue ads," the amendments added new restrictions to advertisements that are now referred to as "electioneering communications."[72] "Electioneering communications" are those communications that expressly advocate for the election or defeat of a candidate.[73] They also include broadcast communications that (1) refer to a clearly identified candidate for federal office, (2) are aired 60 days prior to a general election or 30 days prior to a primary election, and (3) are targeted to a relevant audience of at

[64] *Id.* at 47 ("The absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

[65] Kang, *supra* note 45, at 39.

[66] *See* Spencer & Wood, *supra* note 42, at 319.

[67] *See id.*

[68] *Id.*

[69] *See id.*

[70] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 88 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 36 U.S.C., and 47 U.S.C. (2012)).

[71] 2 U.S.C. § 441a(a)(7)(2012); 11 CFR § 109.21 (2016).

[72] 2 U.S.C. § 441b(b)(2)(2012).

[73] *Id.*

least 50,000 viewers or listeners.[74] The law also prohibited corporations from using their general treasury accounts to fund electioneering communications.[75]

C. The Supreme Court Responds: McConnell *and* Wisconsin Right to Life

In *McConnell v. Federal Election Commission*, campaign finance opponents waged a new set of legal attacks against the reform measures in BCRA.[76] The result in *McConnell* appeared to be a win for reform advocates. The Court upheld the amendments that barred money transfers between political parties and third party groups.[77] Contribution limits were left intact.[78] And the Court affirmed the ban on corporate and union electioneering, which had previously been upheld in *Austin v. Michigan Chamber of Commerce*.[79] Under *Austin*, corporations and unions could constitutionally be prohibited from spending on electioneering communications because the government had a compelling interest in preventing the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[80] This compelling interest is referred to as the "anti-distortion interest" and was eventually overturned in *Citizens United*.[81]

Importantly, the Court also upheld BCRA's "electioneering communication" definition, which allows federal regulators to limit communications that do not expressly advocate for the election or defeat of a candidate.[82] This provision is constitutional under the First Amendment because ads that mention a candidate before an election could be the "functional equivalent" of express advocacy.[83] However, *McConnell* was not the final word on the government's ability to regulate advertisements that mention a candidate right before an election.

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[74] *Id.*

[75] *Id.*; Spencer & Wood, *supra* note 42, at 320.

[76] McConnell v. FEC, 540 U.S. 93, 114 (2003).

[77] *Id.* at 142–45 (upholding 2 U.S.C. § 441i(a)(1), which provides that "national committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act").

[78] *Id.* at 141–43.

[79] *Id.* at 205 (citing Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)).

[80] *Austin*, 494 U.S. at 659–60; Kang, *supra* note 45, at 9–13.

[81] Kang, *supra* note 45, at 11.

[82] *McConnell*, 540 U.S. at 194.

[83] *Id.* at 205–06.

In 2007, the Court reviewed the federal "electioneering communications" definition in *Wisconsin Right to Life*.[84] In effect, the Court created a "safe harbor" for issue communications distributed to influence a legislative decision rather than an election. Wisconsin Right to Life ("WRTL"), a 501(c)(4) not-for-profit organization,[85] used its general treasury funds to distribute a series of abortion-related advertisements that mentioned members of Congress 30 days before a primary election.[86] At the time, members of Congress were accused of filibustering President Bush's judicial nominees.[87] The advertisements called on the public to contact those members and ask them to oppose the filibuster.[88] The Court held that applying the federal "electioneering communication" provision to WRTL's communications would violate the organization's First Amendment rights.[89] WRTL's communications were protected issue speech even though they mentioned a candidate within the electioneering window because the Court does not recognize a compelling interest in regulating ads that are neither express advocacy nor the "functional equivalent" of express advocacy.[90]

In *Wisconsin Right to Life*, Justice Roberts expanded on *McConnell* and provided the test for what types of communications can constitutionally be regulated as "the functional equivalent" of express advocacy. Justice Roberts explained that to survive strict scrutiny the "functional equivalent" test must be an objective one that does not turn on the intent of the speaker:[91]

> The test should also "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" . . . Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue.[92]

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84 FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 460, 464 (2007).

85 Wisconsin Right to Life's mission is "to make euthanasia, infanticide, abortion and destruction of human embryos socially, ethically and legally unacceptable solutions to human problems and to promote positive alternatives to each of these acts." *See The Mission and Vision of Wisconsin Right to Life*, WIS. RIGHT TO LIFE, http://wrtl.org/mission/ (last visited Dec. 21, 2016).

86 *Right to Life*, 551 U.S. at 460, 471–72.

87 *Id.* at 458–59.

88 *Id.* at 459.

89 *Id.* at 475–76, 481.

90 *Id.* at 476–78.

91 *Id.* at 467–68.

92 *Id.* at 467–68 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam)).

As a result, the government may only regulate a communication as the "functional equivalent of express advocacy" if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[93]

The Federal Election Commission ("FEC"), the entity responsible for enforcing federal election law, considers no less than 11 subjective factors to determine if a political communication qualifies as the "functional equivalent" of express advocacy.[94] These include a review of the content to determine if it focuses on a legislative, executive or judicial matter and if it takes a position on a candidate's character, qualifications, or fitness for office.[95] The FEC regulation includes a presumption that favors the speaker over government restrictions.[96] However, the Court has admitted that the complexity of the regulation and the deference that the courts show to administrative determinations places speakers in a position where they have to ask a government agency for prior permission to speak to avoid violating the law.[97]

II. PROTECTING CORPORATE SPEECH: *CITIZENS UNITED*

Citizens United was a landmark decision that granted corporations and unions new free speech protections.[98] Citizens United is a not-for-profit 501(c)(4) corporation that sought to broadcast a video-on-demand movie that criticized Senator Hillary Clinton's life and career.[99] The movie was financed using corporate funds, was timed to coincide with the 2008 presidential election, and was to be released in states where Senator Clinton was then a presidential candidate.[100] First, the Court determined that the movie qualified as an "electioneering communication" under § 203 of the federal law because it mentioned a candidate during the designated period before an election and was subject to no other reasonable interpretation than as an appeal to vote against Senator Clinton.[101]

Because Citizens United received corporate funding to help finance the movie, the Supreme Court's review focused on the constitutionality

[93] *Id.* at 469–70; *see also* Daniel E. Chand, *Nonprofit Electioneering Post-*Citizens United*: How Organizations Have Become More Complex*, 13 Election L.J. 243, 244–45 (2014) (noting that a 501(c)(3) organization is subject to a separate IRS inquiry to determine if it has engaged in prohibited political activity).

[94] Citizens United v. FEC, 558 U.S. 310, 368 (2010); *see also* 11 C.F.R. § 114.15 (b)–(c) (2016).

[95] 11 C.F.R. § 114.15 (b)–(c).

[96] 11 C.F.R. § 114.15 (c)(3).

[97] *Citizens United*, 558 U.S. at 329–36.

[98] *Id.* at 342, 365.

[99] *Id.* at 319–21.

[100] *Id.*

[101] *Id.* at 324–26.

of § 203 of the Bipartisan Campaign Reform Act, which prohibited corporations and unions from making "electioneering communications."[102] The Court overturned the federal ban, overruling *Austin* and sections of *McConnell*.[103] The Court reasoned that the Constitution does not allow the government to limit political speech based on the identity of the speaker,[104] and independent expenditures do not give rise to a risk of *quid pro quo* corruption.[105] Therefore, the government does not have a compelling interest sufficient to justify the law's chilling effect on political speech by corporations and nonprofits.[106]

In *Citizens United*, the Court did uphold the federal disclosure provisions in BCRA § 311 and § 201 as a constitutionally acceptable means for providing transparency in elections.[107] However, there is still some ambiguity in its analysis. The Court rejected the appellant's argument that disclosure requirements must be confined to speech that is the "functional equivalent" of express advocacy because disclosure requirements are considered "a less restrictive alternative to more comprehensive regulations of speech."[108] However, the Court also acknowledged that disclosure laws may be a "cause for concern" when they chill donations to organizations.[109] Justice Thomas wrote a dissent to proclaim that he would have overturned the disclosure provisions triggered in § 203 as well, because he believes that the right to anonymous speech outweighs a voter's right to be provided with relevant information.[110]

Prior to *Citizens United* there had been more clarity about the government's authority to regulate in the campaign finance arena. State and federal lawmakers understood that the government had authority to regulate corporate and union participation in elections. Contribution limits are allowed but independent expenditures by individuals cannot be restricted because of the First Amendment.[111] The Court provided a test to determine which types of communications could be regulated as electioneering communications without infringing on protected speech. Es-

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[102] *Id.* at 320–21.

[103] *Id.* at 365.

[104] *Id.* at 327, 329–336; Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 222 (2010).

[105] *Citizens United*, 558 U.S. at 359, 360, 365.

[106] *Id.* at 365.

[107] *Id.* at 367–68. Critics argue that the Court should have also overturned the compelled disclosure provisions. *See id.* at 480 (Thomas, J., dissenting in part); *see also* James Bopp, Jr. & Jared Haynie, *The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn* Citizens United*'s "Disclaimer and Disclosure" Holding*, 16 NEXUS 3, 7 (2010).

[108] *Citizens United*, 558 U.S. at 368–69.

[109] *Id.* at 370.

[110] *Id.* at 480–85 (Thomas, J., dissenting in part).

[111] *See supra* Part I.A.

sentially, the government has constitutional authority to limit political speech that aims to influence an electoral outcome.[112] But the government may not burden effective issue advocacy because the "Constitution embraces at the least the liberty to discuss . . . all matters of public concern without previous restraint or fear of subsequent punishment."[113] In *Citizens United*, the Court upheld FECA's disclosure provision as a constitutionally acceptable means for improving transparency in election spending, but was unclear about where those constitutional lines are drawn.[114]

A. *The Effects of* Citizens United*: New Political Vehicles*

When the Court placed corporate political speech rights on par with individual speech rights, it severely limited the government's ability to effectively regulate money in politics. Following the decision, the amount of money that is being spent to influence elections has skyrocketed and most of that political money is being spent by third party organizations.[115] Because the government cannot prohibit wealthy corporate interests from electioneering, it lost its ability to compel corporations to participate in elections through a separate segregated fund, which is a political entity that files regular campaign finance reports for the public.

Interest groups have also discovered novel ways to circumvent many finance restrictions and disclosure laws. "Super PACs" are a new type of political entity that only make independent expenditures that expressly advocate for the election or defeat of a candidate.[116] These entities are allowed to raise and spend unlimited amounts of money from corporations, unions, and individuals so long as they do not coordinate with the candidate.[117] However, Super PACs are still subject to FEC registration and reporting requirements if their primary purpose is to influence elections. Some creative political consultants have taken it a step further and are funneling political money through nonprofit 501(c)(4) organizations to avoid disclosing wealthy political donors who would prefer to remain anonymous.[118] These 501(c)(4) organizations are attractive vehicles because they can engage in some electioneering and are only required to

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[112] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70, 476–78 (2007).

[113] *Id.* at 469.

[114] *Citizens United*, 558 U.S. at 366–69.

[115] LEE ET AL., *supra* note 4, at 5; Spencer & Wood, *supra* note 42, at 316.

[116] Spencer & Wood, *supra* note 42, at 330; Brent Ferguson, *Candidates & Super Pacs: The New Model in 2016*, BRENNAN CTR. FOR JUST. 1–2 (2016), https://www.brennancenter.org/publication/candidates-super-pacs-new-model-2016.

[117] *See* Letter from Matthew S. Peterson, Chairman, Fed. Election Comm'n, to Carol A. Laham & D. Mark Renaud (July 22, 2010), http://saos.fec.gov/aodocs/AO%202010-09.pdf.

[118] *Political Nonprofits (Dark Money)*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last updated Dec. 21, 2016).

disclose their donors to the IRS, which does not make that information public.[119]

Some scholars and proponents argue that *Citizens United* did not go as far as the media, elected officials, and campaign finance reform advocates have suggested.[120] The most persuasive arguments are that restricting corporate speech in elections cannot be constitutionally sustained because corporate entities like the press could also be subject to these limits.[121] However, the press is expressly exempt from FECA's restrictions.[122] On the other hand, the Court could have sustained the corporate ban based on a constitutionally sufficient interest in preventing corruption or the appearance of corruption.[123] In *Wisconsin Right to Life*, Justice Roberts stated, "it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'"[124] By voting with the majority in *Citizens United*, Justice Roberts appears to have changed his mind.[125] Until the country passes a constitutional amendment that grants Congress and the states expanded authority to regulate election spending, *Citizens United* is the law of the land. Therefore, a proper next step is to ensure that state governments do not overreach in their responses and unconstitutionally hinder 501(c)(3) organizations from being effective advocates for their communities.

B. States Move to Expand Disclosure Laws

Today, campaign finance laws in many states are based on the outdated premise that most election spending is being done by political parties and candidates.[126] Recent data demonstrates otherwise[127] as third party groups spend more to influence elections and become more

[119] *Id.*

[120] *See, e.g.*, James Bopp, Jr. & Kaylan Lytle Phillips, *The Limits of* Citizens United v. Federal Election Commission*: Analytical and Practical Reasons Why the Sky Is Not Falling*, 46 U.S.F. L. REV. 281 (2011); Levitt, *supra* note 104, at 229 ("When equipped with accurate disclosure, voters do not slavishly follow even dominantly loud voices in the marketplace of ideas.").

[121] Michael W. McConnell, *Reconsidering* Citizens United *As a Press Clause Case*, 123 YALE L.J. 412, 416–17 (2013).

[122] 52 U.S.C. § 30101(9)(B)(i) (2012 & Supp. II 2015).

[123] Udall, *supra* note 23, at 238–44.

[124] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 478 (2007) (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976) (per curiam)).

[125] Citizens United v. FEC, 558 U.S. 310, 372 (2010).

[126] TORRES-SPELLISCY, *supra* note 27, at 6.

[127] Spencer & Wood, *supra* note 42, at 316, 361–62. Following *Citizens United*, election spending increased twice as much in states that previously had laws banning corporate expenditures. The increase in spending is driven by nonprofit 501(c) organizations and political committees. *Id.*

sophisticated in navigating what is left of our campaign finance regime. Before *Citizens United*, at least 24 states prohibited or limited corporate expenditures in local races.[128] But, many of those laws were invalidated by the decision. Now, as the laboratories of democracy, states are in the best position to test new disclosure reforms. Oftentimes, states can pass bold measures quickly and adopt flexible language, and may see results in a shorter timeframe.[129] It is unlikely that any state will be able to stop the influence of money in politics,[130] or that lawmakers will discover a silver bullet that will translate across 50 different states. But, there are still many lessons that can be gleaned from analyzing the effect that bold transparency laws have when they are applied to local conditions.

State campaign finance laws generally include two types of disclosure provisions.[131] The first type regulates political entities that are established primarily to influence an election.[132] The second type requires organizations, including nonprofits and businesses that are not incorporated primarily for a political purpose, to disclose their funding sources based on a triggering event.[133] State laws usually require organizations in the first category to register as political committees depending on whether or not they coordinate with a candidate.[134] Organizations in the second category may be required to disclose certain political funders when they make a political expenditure to oppose or support a candidate.[135]

There are two methods to determine if an organization's primary purpose is to influence an election. State regulators could examine the organization's stated organizational purpose or mission. Or, state regulators could compare the organization's electioneering spending with overall spending to determine whether it is spending most of its budget on express advocacy or on making contributions to candidates.[136] If the organization's primary purpose is to influence elections then it may have to register with the state and is usually required to track and report every dollar it raises and spends.

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[128] Brief for the States of Montana et al., *supra* note 13, at 1; TORRES-SPELLISCY, *supra* note 27, at 1, 3.

[129] *See* Frederick A.O. Schwarz, Jr., *States and Cities as Laboratories of Democracy*, 54 REC. ASS'N B. CITY N.Y. 157 (1999).

[130] *See* Thomas E. Mann & Norman J. Ornstein, *Separating Myth from Reality in* McConnell v. FEC, 3 ELECTION L.J. 291, 293–94 (2004); *see also* Kang, *supra* note 45, at 42–44.

[131] TORRES-SPELLISCY, *supra* note 27, at 1–3.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 3, 18.

[135] *Id.*

[136] Colo. Right to Life Comm., Inc. v. Davidson, 395 F. Supp. 2d 1001, 1006 (D. Colo. 2005).

State laws that require a group to register and report as a political entity present constitutional concerns for 501(c)(3) organizations when the statutory language is overly broad. For example, New Mexico's campaign finance statute defines a "political committee" as two or more individuals that operate primarily for a "political purpose."[137] The state requires political committees to appoint a treasurer and file regular reports with the Secretary of State's office.[138] "Political purpose" is defined broadly as "influencing or attempting to influence an election."[139] In an as-applied challenge brought by 501(c)(3) organizations, the Tenth Circuit held New Mexico's political committee definition is an unconstitutional infringement on their First Amendment rights because it subjected the organizations to onerous and burdensome registration and reporting requirements.[140]

State disclosure laws that require groups to disclose funding sources when they mention a candidate before an election may also have a chilling effect on 501(c)(3) organizations. Some states, like Ohio, have adopted the federal definition for what constitutes an "electioneering communication."[141] But, states like South Carolina and Utah regulate further than the federal law.[142] The federal definition, which has been upheld by the Supreme Court, covers those communications that (1) expressly call for the election or defeat of a candidate, or (2) are considered the functional equivalent of express advocacy.[143] To qualify as the functional equivalent, the ad must include a clearly identified candidate for federal office, be distributed 60 days prior to a general election or 30 days prior to a primary election, and be targeted to the relevant electorate. South Carolina expanded its window to cover communications that mention a candidate 45 days before an election.[144] But, states like Utah have expanded their electioneering windows as far as seven months before an election,[145] and the Fourth Circuit Court of Appeals struck down a North Carolina disclosure law that was not restricted to a specific time period.[146] When state legislatures enact expansive electioneering periods there is a higher risk that they may overlap with periods when elected officials are making important public policy decisions. To date, the

[137] N.M. STAT. ANN. § 1-19-26 (L) (1978).

[138] *Id.* § 1-19-26.1A.

[139] *Id.* § 1-19-26M.

[140] N.M. Youth Organized v. Herrera, 611 F.3d 669, 679 (10th Cir. 2010).

[141] TORRES-SPELLISCY, *supra* note 27, at 15.

[142] *Id.* at 17.

[143] *Id.* at 16.

[144] *Id.* at 17.

[145] *Id.* (citing Nat'l Right to Work Legal Def. v. Herbert, 581 F. Supp. 2d 1132, 1150 (D. Utah 2008)).

[146] *Id.* (citing N.C. Right to Life, Inc. v. Leake, 525 F. 3d 274 (4th Cir. 2008)).

government has not articulated a compelling interest sufficient to burden issue advocacy that does not qualify as election speech.[147]

Finally, a nonprofit organization's speech might also be chilled if there is a risk that it would be required to publicly disclose a majority of its donors based on a triggering event. California law requires organizations that spend above a threshold to influence an election to disclose all of its funders who contribute $100 or more.[148] The law presumes that donors know or should have known that their donation would be used for a political purpose.[149] Legislation that is being proposed in states like New Mexico would provide organizations with a choice of going through the burden of establishing a separate bank account to make electioneering communications or risk disclosing all of their donors who contribute above a certain threshold.[150] When these types of expansive disclosure laws are coupled with broad electioneering regulations, the risk may be too high for 501(c)(3) organizations to feel comfortable mentioning a potential candidate who may be making an important public policy decision on an issue they care about.

The federal approach only requires an organization, not regulated as a political committee, to disclose funds that donors have earmarked to be used for a political purpose. However, reform advocates in the states dislike this option because it is easy for nonprofits to circumvent if there is no evidence that a funder requested that his or her contribution be used for electioneering.[151] This is also not a practical option for nonprofit organizations that receive general operating grants because their funding is not restricted to a single project or activity.[152] This Article does not defend the line of reasoning expressed by Justice Thomas in *Citizens United*. In his dissent, he explained that he would have held the federal law's disclosure provisions as unconstitutional under the First Amendment.[153] Disclosure laws are an important policy tool that legislatures should utilize to increase transparency in elections. However, those laws should include appropriate safeguards for genuine issue advocacy.

III. THE CASE FOR A 501(C)(3) EXEMPTION

Nonprofit 501(c)(3) organizations serve a valuable function in our democracy, which may partly explain why the government has granted

[147] *See supra* Part I.C.

[148] CAL. GOV'T CODE §§ 84204.5, 84211 (2012).

[149] *Id.*

[150] S. 15, 51st Leg., 1st Sess. (N.M. 2013).

[151] TORRES-SPELLISCY, *supra* note 27, at 17.

[152] *Financial Sustainability*, GRANTMAKERS FOR EFFECTIVE ORGS., http://www.geofunders.org/smarter-grantmaking/nonprofit-resilience/financial-sustainability (last visited Dec. 21, 2016).

[153] Citizens United v. FEC, 558 U.S. 310, 480 (2010) (Thomas, J., dissenting).

them a special tax-exempt status. In order to qualify for this tax-exempt status an organization must show that its purpose serves the public good and that its activities support that purpose.[154] The IRS is allowed to treat these organizations differently because the organizations are choosing to limit their electoral activities, which would otherwise be legal, in order to receive a government subsidy.[155]

Historically, the popularity of nonprofit organizations has been related to their ability to fill gaps in social welfare programs when the government falls short.[156] Today, 501(c)(3) organizations advocate for positive social change on a variety of important issues ranging from efforts to alleviate poverty to protecting our environment.[157] Many of these organizations work in our most disenfranchised communities and give a collective voice to community members by connecting those voices to policymakers year round. The First Amendment should have enough force to protect these nonpartisan civic engagement efforts.

Some 501(c)(3) organizations participate directly in elections, but are limited to nonpartisan activities to encourage voter participation. The definition of nonpartisan is not completely clear, but regulators generally consider an activity to be nonpartisan if it does not help or hurt one particular candidate or group of candidates.[158] During elections, 501(c)(3) organizations collaborate with government officials to register new voters and encourage disengaged members of our society to participate.[159] They generally focus their efforts on constituencies that are often ignored by political campaigns. Candidate campaigns have limited resources. Therefore, the most successful campaigns hire consultants to calculate exactly how many voters the candidate needs to win an election and with whom he or she should communicate.[160] It is not surprising that many campaigns focus their limited resources on voters who are likely sympathetic to their message.

501(c)(3) organizations are also restricted from consulting partisan data and coordinating with any candidate to plan their voter engagement activities.[161] Some state campaign finance laws provide exemptions for these nonpartisan activities because they recognize their value in elec-

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[154] I.R.C. § 501(c)(3) (2012); *Exemption Requirements-501(c)(3) Organizations*, INTERNAL REVENUE SERV., http://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations (last updated June 28, 2016).

[155] ALL. FOR JUSTICE, *supra* note 11, at 10.

[156] Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 105, https://www.irs.gov/pub/irs-soi/tehistory.pdf.

[157] ALL. FOR JUSTICE, *supra* note 11, at 25.

[158] *Id.* at 17.

[159] *Id.* at 40–42.

[160] *See, e.g.*, WELLSTONE, http://www.wellstone.org/resources.

[161] ALL. FOR JUSTICE, *supra* note 11, at 40–42.

tions. This Article maintains that it is sensible to go a step further and exempt all 501(c)(3) activity because these organizations are already heavily regulated by the IRS and prohibited from engaging in efforts to support or oppose a candidate without risking their tax-exempt status.[162]

When drafting campaign finance legislation, lawmakers should consider the fundamental differences between 501(c)(3) and 501(c)(4) organizations and how the IRS treats each organization. By definition, these tax-exempt organizations are formed to address social causes.[163] 501(c)(3) organizations serve a charitable or educational purpose, and may engage in issue advocacy so long as their activity is nonpartisan. [164] Donations to these organizations are tax deductible and, while they are allowed to engage in a limited amount of lobbying, they are absolutely barred from engaging in any political activity to support or oppose a candidate.[165] On the other hand, 501(c)(4) organizations, or "social welfare" groups like the National Rifle Association or the Human Rights Campaign,[166] are required to operate exclusively to promote the common good.[167] They do not pay taxes on their income but they also cannot offer a tax exemption to a donor,[168] which may make it more challenging to raise funds. Unlike 501(c)(3) organizations, 501(c)(4) organizations can conduct unlimited lobbying and engage in some activity to influence an election so long as it is not the organization's primary purpose.[169] Both

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[162] *Id.* at 18.

[163] RAYMOND CHICK & AMY HENCHEY, INTERNAL REVENUE SERV. , M. POLITICAL ORGANIZATIONS AND IRC 501(C)(4) (1995), http://www.irs.gov/pub/irs-tege/eotopicm95.pdf.

[164] SCHADLER, *supra* note 5, at 3. "In Rev. Rul. 76-456, 1976-2 C.B. 151, the Service approved exemption under IRC 501(c)(3) for an organization formed to elevate the standards of ethics and morality in the conduct of political campaigns. The organization collected, collated, and disseminated, on a non-partisan basis, information concerning general campaign practices, through the press, radio, television, mail, and public speeches. It qualified as an educational organization under IRC 501(c)(3) because it instructed and encouraged the public about political campaigns, a subject useful to the individual and beneficial to the community. A key fact in the Service's decision was that the organization's activities were conducted on a non-partisan basis." CHICK & HENCHEY, *supra* note 163.

[165] I.R.C. § 501(c)(3), (h) (2012); INTERNAL REVENUE SERV., APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS, https://www.irs.gov/pub/irs-pdf/p4220.pdf.

[166] Kang, *supra* note 45, at 34–35; Daniel C. Kirby, *The Legal Quagmire of § 504(c)(4) Organizations and the Consequential Rise of Dark Money in Elections*, 90 CHI.-KENT L. REV. 223, 224 (2015); *Frequently Asked Questions*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/support/frequently-asked-questions (last visited Dec. 21, 2016).

[167] I.R.C. § 501(c)(4)(A).

[168] *Donations to Section 501(c)(4) Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501c4-organizations (last updated Oct. 28, 2016).

[169] I.R.C. § 501(c)(4) provides that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the

types of organizations are required to report the sources of their funding to the IRS, but the IRS does not share that information with the public.[170]

As lawmakers struggle to find ways to increase transparency in elections, it is valid to question the extent of a nonprofit's activity during elections. After all, Citizens United was a 501(c)(4) organization, and, as previously mentioned, there is evidence that these types of nonprofits are spending more money to influence electoral outcomes.[171] Professor Torres-Spelliscy argues, "[O]ne way that for-profit corporations can throw their support behind, or undermine, a particular candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, purchases a political ad."[172] There is also some concern when 501(c)(3) organizations hold elected officials accountable for their official actions in the legislature. An organization may want to publicize its views on an issue by distributing communications praising or criticizing an elected official who took a position on that issue.[173] This aspect of an effective issue campaign is especially controversial when it takes place during an election year. But, the public has a right to know how their elected officials are voting in public office. And, the IRS has a real time process in place to evaluate when these communications cross the line into impermissible electioneering.[174]

The IRS applies a "facts and circumstances" test to 501(c)(3) communications that mention a candidate during an election year and it is arguably stricter than the test imposed by the FEC.[175] The IRS will consider the context or how close the communication was to an election and whether the timing coincided with a policy action; whether the organization has a track record or history of working on the issue; and whether it used partisan criteria when choosing its legislative targets.[176] In reviewing the content, it will also consider if the issue is one that divides candidates and if the design focuses on an official action or the candidate's qualifications and character.[177] These are only a few of the factors that the IRS

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common good and general welfare of the people of the community, i.e., primarily for the purpose of bringing about civic betterment and social improvements. Whether an organization is "primarily" engaged in promoting social welfare is a "facts and circumstances" test. SCHADLER, *supra* note 5, at 14–16.

[170] Cory G. Kalanick, Note, *Blowing up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, 2263, 2280 (2011).

[171] *See supra* Part II.A.

[172] Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS 59, 60 (2010).

[173] ALL. FOR JUSTICE, *supra* note 11, at 27–29.

[174] *Id.* at 26.

[175] Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421–1426.

[176] *Id.* at 1423–24.

[177] *Id.*

takes into account. To enforce the prohibition on 501(c)(3) electoral activity, it may revoke the organization's tax-exempt status.[178] Congress also allows the IRS to tax the 501(c)(3) organization for an impermissible electioneering communication and to tax the managers who approved the communications.[179] Given the high cost of violating IRS regulations, a 501(c)(3) will not usually engage in this activity during an election year unless there is a compelling public policy reason.

Because of the strict IRS limitations and the risks of losing its tax-exempt status, an advocacy group's most important decision is to decide what type of entity it should form to achieve its social mission.[180] For example, a church or a nonpartisan grassroots organization, such as the League of Women Voters, may decide to incorporate as a 501(c)(3) organization because the organization plans to educate the public on issues and advocate for legislation but will not endorse candidates. It is allowed to lobby so long as it is an "insubstantial" part of its activities or it uses less than 20% of its budget to lobby for legislation.[181] However, if an organization decides it would like to spend the majority of its resources advocating for legislation, then it should file as a 501(c)(4) because such an organization can conduct an unlimited amount of lobbying without jeopardizing its tax-exempt status.[182] Some groups elect to create multiple connected tax-exempt groups to increase their advocacy opportunities.[183] They are permitted to do so as long as they maintain the proper separation between the groups and treat them as distinct legal entities.[184]

Planned Parenthood provides a great example of how a nonprofit that engages in issue advocacy may simultaneously be subject to IRS regulations and campaign finance regulations.[185] Planned Parenthood Federation of America, a 501(c)(3) organization, is the leading advocate for reproductive healthcare in the U.S. and is also a major health provider for women across the country, especially poor women.[186] It also has a 501(c)(4) organization called Planned Parenthood Action Fund that engages in education and electoral activity, including legislative advocacy, voter education, and grassroots organizing at the state and federal lev-

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[178] I.R.C. § 503(a)(1) (2012).

[179] I.R.C. § 4955 (2012).

[180] CHICK & HENCHEY, *supra* note 163.

[181] SCHADLER, *supra* note 5, at 3.

[182] *Id.* at 4.

[183] *Id.* at 1.

[184] *Id.*

[185] *About Us*, PLANNED PARENTHOOD ACTION FUND, http://www.plannedparenthoodaction.org/about-us/ (last visited Dec. 21, 2016); *Who We Are*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/who-we-are (last visited Dec. 21, 2016).

[186] *Who We Are*, *supra* note 185.

el.[187] Planned Parenthood has become exceedingly controversial because of its position on topics like access to abortion. Members of Congress have engaged in efforts to block the organization from accessing federal funding that supports its health care services.[188] Under these circumstances, the organization might decide to broadcast a television ad that asks the public to contact elected leaders and ask them to stand up for women's health. If the communication were sent out in close proximity to an election and named a candidate, the FEC may decide to exempt the communication from campaign finance disclosure because its communications are focused on a public policy decision. The IRS may also determine that the ad is a permissible 501(c)(3) activity.

Planned Parenthood also provides an example of how disclosure laws could chill issue-related speech. There is evidence that the public controversy surrounding the organization has become so charged that there have been threats and attacks on the organization's facilities by extremists.[189] Given how charged issues related to abortion are, and the history of attacks on the organization, it may be dangerous to require the organization to disclose its donors for mentioning an incumbent who is also running for office. Disclosed donors may feel vulnerable and discouraged from contributing in the future, which may cause Planned Parenthood to avoid engaging in issue advocacy efforts during election years. This scenario is not as likely at the federal level because the FEC has included a safeguard provision for issue advocacy[190] and Planned Parenthood is a large, sophisticated organization with many lawyers to help it navigate complex tax and election laws. However, state lawmakers must consider how a small, state-based reproductive rights organization might be similarly impacted. Smaller organizations likely face similar threats and have smaller lists of donor targets. Many of these organizations do not have the same capacity to set up and administer multiple organizations, but should still have a right to use every advocacy tool at their disposal to protect women's health.

Many scholars, advocates and regulators have argued that nonprofit organizations that engage in any political activity should be subject to full disclosure.[191] However, that argument is short-sighted because it fails to consider the distinct ways in which different types of nonprofits participate in election or the value that 501(c)(3) nonpartisan activity brings to our democracy. It also fails to consider the constitutional value of ano-

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[187] *About Us*, *supra* note 185.

[188] David M. Herszenhorn, *House Republicans Vote to Stop Funding Planned Parenthood*, N.Y. TIMES (Sept. 18, 2015), http://nyti.ms/1inAeTw.

[189] *FBI Warns of Threat to Reproductive Health Care Facilities*, CBS NEWS (Sept. 19, 2015), http://www.cbsnews.com/news/fbi-warns-of-threat-to-reproductive-health-care-facilities/.

[190] 11 C.F.R. § 114.15(b) (2016).

[191] Kang, *supra* note 45, at 35.

nymity that has been recognized dating back to the Civil Rights Era.[192] The Court has recognized that the right to anonymity might be justified as a means to avoid chilling controversial speech.[193] In our campaign finance jurisprudence, the Court has considered these arguments and has usually sided with the government when there is not a real threat of reprisal and there is a strong informational interest and an interest in preventing corruption.[194] However, a study cited by *amici* in *Citizens United* found that "[e]ven those who strongly support forced disclosure laws will be less likely to contribute to an issue campaign if their contribution and personal information will be made public."[195] Those individuals referred to a desire to participate anonymously but they also cited other concerns about reprisals, such as retaliation or even loss of employment.[196] Policymakers should consider these real concerns and the chilling effect it has on a 501(c)(3) organization's First Amendment rights.

CONCLUSION

Campaign finance reform is difficult because it highlights a clear conflict between two fundamental democratic values. On the one hand, there is a need for free speech in a healthy society, particularly when it comes to promoting an open and robust political discussion that holds our decision makers accountable.[197] For elections to be competitive there must be a vibrant marketplace of ideas and voters must be engaged in the process.[198] That is, individuals should be able to voice their concerns about policies and candidates without fear of reprisal by the government. On the other hand, in order for a democracy to function we must root out corruption in our government. Campaign finance regulations that are designed to promote transparency and accountability in elections provide one step toward that goal. [199] Lawmakers are challenged with figuring out how to protect and foster these cherished values at the same time.

Following *Citizens United*, state lawmakers have a tall order to maintain the integrity of our elections. They should enact robust transparency measures that require organizations to disclose the true source of their

[192] Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of* Citizens United, 120 YALE L.J. 622, 644, 646–47 (2010).

[193] *Id.*

[194] *Id.* at 648.

[195] Brief of the Inst. for Justice as Amicus Curiae in Support of Appellant at 10, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205) (internal citation omitted).

[196] *Id.* at 11–12.

[197] Benson, *supra* note 34, at 730, 753.

[198] *Id.* at 730, 733.

[199] *Id.* at 730, 732.

election spending. However, 501(c)(3) organizations should be categorically exempt from these provisions because they are already prohibited from engaging in the electoral activity that these laws aim to bring to light. Also, the risk that overly broad disclosure provisions will violate their First Amendment rights is high. 501(c)(3) advocacy is an important part of our democracy and has been recognized by the Court as protected speech. Campaign finance laws should not be applied to regulate genuine issue advocacy because, at the very least, the First Amendment should protect our ability to hold our elected officials accountable and freely discuss issues that affect our everyday lives.