

# Sunlight is the Best Disinfectant: Public Disclosure of Electoral Advocacy in Union Member Communications

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*In 1948, the Supreme Court held in *United States v. CIO* that the statutory ban on direct union spending in federal elections could not be applied to electoral advocacy by leaders of an organization directed at the members of that same organization. As a result, federal and state laws now generally exempt such internal communications from the definition of “expenditure” under campaign finance laws. But in its landmark 2010 decision *Citizens United v. FEC*, the Supreme Court declared the ban on direct corporate campaign spending itself unconstitutional. The Federal Election Commission soon thereafter announced that the ruling would also apply to unions. There is now no doubt that an organization such as a union or a corporation may directly spend money on electoral advocacy. Given this framework, this Note argues that internal communications between the leaders of an organization — in particular, a union — and its members that directly advocate for or against the election of a particular candidate can and should be subject to mandated public disclosure.*

## I. INTRODUCTION: INTERNAL COMMUNICATIONS, *UNITED STATES v. CIO* AND *CITIZENS UNITED*

### A. INTERNAL COMMUNICATIONS

An oft-overlooked but potentially powerful area in which campaign finance laws play out is internal communications. Internal

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communications are materials such as publications, newsletters and pamphlets that unions send to their members or corporations to their shareholders. These communications are powerful because of the large memberships unions possess and the influence union leaders have over their members. Union membership is by definition connected to the workplace, and thus workers are usually members of only one union. By contrast shareholders typically have diversified portfolios and are therefore less susceptible to propaganda disseminated through corporate communications. Members of labor unions do not trade their memberships. Moreover, union members are more likely to share certain political views with union leadership by virtue of their common interests, specifically, political support for their particular industry.

The sheer size of union membership makes their political activities particularly important. For example, the National Education Association, America's largest labor union, has 3 million members.<sup>1</sup> AFSCME, the American Federation of State, County and Municipal Employees, has 1.6 million members.<sup>2</sup> And the famous AFL-CIO, an umbrella labor federation, includes more than 12 million members in its 57 unions nationwide.<sup>3</sup>

Until 2010, unions and corporations were barred from making direct expenditures and contributions in federal elections by the Tillman Act of 1907<sup>4</sup> and the Taft–Hartley Act of 1947.<sup>5</sup> They could influence elections only by setting up segregated funds, often called political action committees (PACs), under the framework of the Federal Election Campaign Act of 1971 (FECA).<sup>6</sup> It was within this legal landscape that the Court handed down its major decision analyzing member communications under federal campaign finance law: *United States v. Congress of Industrial Organizations, et al.*<sup>7</sup> In that case, the Court held that member communications need not be publicly disclosed.

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1. *About NEA*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/2580.htm> (last visited Jan. 5, 2014).

2. *We Are AFSCME*, AM. FED'N ST. COUNTY & MUN. EMPS., <http://www.afscme.org/union/about> (last visited Jan. 5, 2014).

3. *About the AFL-CIO*, AM. FED'N ST. COUNTY & MUN. EMPS., <http://www.aflcio.org/about> (last visited Jan. 5, 2014).

4. Tillman Act, ch. 420, 34 Stat. 864 (1907).

5. Labor Management Relations (Taft–Hartley) Act, 61 Stat. 159 (1947), amending Federal Corrupt Practices Act, 2 U.S.C. § 251 (repealed).

6. Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. § 30118 (Supp. II 2014).

7. *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948).

In 2010, however, the Supreme Court struck down the underlying ban on direct campaign contributions by unions and corporate bodies in *Citizens United v. Federal Election Commission (FEC)*.<sup>8</sup> A change in disclosure rules may be in order on the heels of *Citizens United's* push for disclosure in place of contribution and expenditure limitations. A series of post-*Citizens United* circuit court cases have analyzed challenges to disclosure requirements under exacting scrutiny, the intermediate standard for judicial review mandated by the Supreme Court. A possible disclosure requirement for union-wide communications is in line with these cases, and federal, state and local governments should implement such regulations.

### B. *UNITED STATES v. CIO*

In 1948, the Supreme Court examined member communications distributed by part of the Congress of Industrial Organizations (CIO). In *United States v. CIO*, the Court decided that regularly scheduled internal communications that expressly advocate for or against the election of a federal official do not fall within the definition of “expenditures” under the Federal Corrupt Practices Act (FCPA).<sup>9</sup> Thus, the federal ban on union spending did not apply to such communications.<sup>10</sup>

At issue in the case was a regular edition of the CIO’s weekly periodical. The front page included a statement from the union’s president calling for the election of a particular congressional candidate. Justice Stanley Forman Reed, writing for the Court, emphasized the regular nature of the periodical in holding it exempt from the definition of “independent expenditure” in federal campaign finance law.<sup>11</sup> “Members of unions paying dues and stockholders of corporations,” wrote Justice Reed, “know of the practice of their respective organizations in regularly publishing periodicals.”<sup>12</sup> Because members should be on notice that their organizations distribute regular publications, Justice Reed reasoned, those organizations that devote union dues or corporate funds to create said publications have the right to use them as

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8. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

9. *Cong. of Indus. Orgs.*, 335 U.S. at 123–24; Federal Corrupt Practices Act, 2 U.S.C. § 241 (repealed 1972).

10. *Cong. of Indus. Orgs.*, 335 U.S. at 121.

11. *Id.* at 123.

12. *Id.*

they see fit, even if that means directly influencing a federal election.<sup>13</sup> While Justice Reed recognized a difference between a typical union publication, which would merely report on the union's recent activities and efforts, and one that advocates for a particular candidate or measure, he found "the line separating the two classes is not clear."<sup>14</sup> Because of the difficulty of line-drawing in such a scenario and members' notice that unions (and corporations) do spend their money on such periodicals, the Court refused to find a union periodical that called for the election of a particular candidate to be a campaign finance "expenditure."

As discussed below, since 1948, federal law as well as some state and local laws have followed *United States v. CIO* by generally exempting internal or member communications from the definition of "expenditure" under campaign finance laws.<sup>15</sup> However, this result was not explicitly mandated by the 1948 decision. A regime of public disclosure of internal communications would not violate *United States v. CIO* and would serve the interests of not only the organization's members or shareholders but also the public by providing information about which candidates are heavily supported by certain powerful organizations. While organizations' public support reveals the identities of certain candidates' major backers, existing laws have created a gap in knowledge about the extent to which candidates have received support and may reciprocate in office. Because current Supreme Court jurisprudence would allow the government to require disclosure of internal communications, local, state and federal governments should do so.

#### C. THE EFFECT OF *UNITED STATES v. CIO*: LAWS EXEMPTING INTERNAL COMMUNICATIONS FROM THE DEFINITION OF "EXPENDITURE"

A major effect of the 1948 decision is that federal law, as well as some state and local laws, exempt union member communications from the disclosure requirements that would otherwise apply to all independent expenditures (expenditures made by people or organizations not in contact with or connected to a campaign

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13. *Id.*

14. *Id.* at 122.

15. See *infra* Part I.C for examples of how federal, state and local laws currently treat internal communications.

that advocate for or against a certain candidate or ballot proposal).<sup>16</sup> Most notably, FECA exempts from the term “expenditure”

any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed \$2,000 for any election, be reported to the Commission . . . .<sup>17</sup>

To be sure, FECA does require public disclosure of internal communications after a union or corporation surpasses the spending threshold of \$2,000 in an election. But even if the union or corporation spends more than that amount, a loophole remains. So long as the communication is “primarily devoted to other subjects,” it does not fall within the FECA definition of “expenditure,” even if it contains express political advocacy.<sup>18</sup> This exemption covers the type of communication that was the subject of *United States v. CIO*: regularly scheduled newsletters or other publications that include a message advocating for or against a particular candidate.

While the federal law requires public disclosure of internal communications after the organization meets a minimum level of spending, some state and local laws completely exempt such communications from disclosure. For example, New York City, which has a municipal agency devoted solely to implementing its

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16. See, e.g., Federal Election Campaign Act of 1971, 52 U.S.C. § 30101(9)(B)(iii) (Supp. II 2014); CAL. GOV'T CODE § 85312 (West 2012); N.Y.C. Campaign Fin. Board Rule 13-02(b)(2), available at [http://www.nyccfb.info/act-program/rules/index.aspx#13\\_02](http://www.nyccfb.info/act-program/rules/index.aspx#13_02).

17. Federal Election Campaign Act of 1971, 52 U.S.C. § 30101(9)(B)(iii) (Supp. II 2014).

18. *Id.*

campaign finance program, broadly exempts such communications from its independent expenditure reporting rules:

Routine newsletters or periodicals; telephone calls; hand-delivered printed materials prominently marked with the words “for [name of entity] [members/stockholders] only”; and communications relating to the internal deliberations of an entity’s endorsements shall not be required to be reported, provided that the communication is directed solely to and intended to reach only the entity’s own members or stockholders.<sup>19</sup>

Again, this rule mirrors *United States v. CIO*’s exemption of regular member communications, as opposed to special mailers dedicated only to election advocacy. However, this rule goes further and also exempts routine periodicals as well as all telephone calls or hand-delivered materials, so long as they clearly state that they are intended only for members or stockholders.<sup>20</sup> This removes these communications from the reasoning of the 1948 *CIO* case, which rested largely on the idea that union members and corporate stockholders have prior notice that their organization will spend some money on regular member communications.

#### D. *CITIZENS UNITED* AND THE EMERGENCE OF DISCLOSURE AS A REGULATORY REGIME

Sixty-two years after *CIO*, the Supreme Court handed down a decision that reinforced the availability of disclosure as a method for regulating member communications. In 2010, the Court’s decision in *Citizens United v. FEC* ushered in drastic change in campaign finance law. Most famously, Justice Anthony Kennedy’s majority opinion held that the previous ban on corporation and union spending in federal elections was an unconstitutional bar to free speech.<sup>21</sup> The case centered on a nonprofit organization, *Citizens United*, which had produced a 90-minute documen-

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19. N.Y.C. Campaign Fin. Board Rule 13-02(b)(2), available at [http://www.nyccfb.info/act-program/rules/index.aspx#13\\_02](http://www.nyccfb.info/act-program/rules/index.aspx#13_02).

20. Though the language of the rule could be read more narrowly by modifying each phrase with the word “routine,” the New York City Campaign Finance Board interprets it more broadly. Email from Danny Frost, Assoc. Counsel, New York City Campaign Fin. Bd., to the author (Feb. 20, 2014).

21. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010).

tary about then-presidential candidate Hillary Clinton.<sup>22</sup> The documentary was released in theaters and subsequently on DVD and featured heavily negative commentary about Clinton.<sup>23</sup> Citizens United then produced television ads promoting the documentary.<sup>24</sup> These ads were at the center of the controversy in the case because the Bipartisan Campaign Reform Act (“BCRA” or the McCain–Feingold Act) prohibited ads produced by corporations that expressly advocate for or against the election of a candidate within 30 days of a primary election or 60 days of a general election.<sup>25</sup> Citizens United challenged the constitutionality of Section 441b of the BCRA, and the Court found it unconstitutional.<sup>26</sup>

The greatest impact of the Court’s decision came from its determination that corporations, like people, have First Amendment rights that cannot be suppressed simply because of the identity of the speaker. Accordingly, the previous ban on spending that limited corporate speech since the Tillman Act of 1907 was deemed unconstitutional.<sup>27</sup> Following longstanding Supreme Court precedent, *Citizens United* also declared that because the First Amendment applies to the regulation of campaign funds, campaign finance laws would need to withstand heightened levels of scrutiny when facing judicial review.<sup>28</sup> It is a tenet of Supreme Court jurisprudence that laws curtailing the First Amendment are subject to higher scrutiny.<sup>29</sup>

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22. *Id.* at 319–20.

23. *Id.*

24. *Id.*

25. *Id.*; see also Bipartisan Campaign Reform Act of 2002 (BCRA) (McCain–Feingold Act), Pub. L. 107-55, 116 Stat. 81.

26. *Citizens United*, 558 U.S. at 365. That provision prohibited the use of corporate funds for express electoral advocacy. Bipartisan Campaign Reform Act, 2 U.S.C. § 441b, *invalidated by Citizens United*, 558 U.S. 310 (2010).

27. While *Citizens United* does not directly apply to unions, the Federal Election Commission (FEC) announced soon after that ruling that it would no longer enforce the ban on union spending in federal elections. Press Release, Fed. Election Comm’n, FEC Statement on the Supreme Court’s Decision in *Citizens United v. FEC* (Feb. 5, 2010) *available at* <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>. For a discussion of the ways federal law treats unions and corporations differently in campaign finance law, see Benjamin I. Sachs, *Unions, Corporations, and the Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012).

28. As discussed in detail below, the Court has since determined that the appropriate level of scrutiny for disclosure requirements in campaign finance laws — as opposed to contribution or expenditure limits — is exacting scrutiny, an intermediate standard. See *infra* note 40.

29. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

Justice Kennedy's opinion also reinvigorated disclosure as a new framework for campaign finance regulations. In the years leading up to *Citizens United*, disclosure requirements were under constant attack from opponents of campaign finance regulations.<sup>30</sup> However, these cases largely challenged either the definition of a "political action committee" that would be subject to disclosure requirements or contested older laws that required disclosure of any "express advocacy."<sup>31</sup> While these cases typically did not represent direct challenges to the disclosure laws themselves, they did chip away at disclosure as a regulatory regime.

In the Court's majority opinion, Justice Kennedy suggests the best response to concerns about corporate participation in elections is, in fact, disclosure. Specifically, "[d]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."<sup>32</sup> For shareholders, disclosure of corporate spending helps them monitor the use of corporate funds — their own money — as they are spent on electioneering.<sup>33</sup> The public, meanwhile, "can see whether elected officials are 'in the pocket' of so-called moneyed interests."<sup>34</sup>

Disclosure requirements, like contribution and expenditure limits, are subject to heightened scrutiny as a possible violation of the First Amendment.<sup>35</sup> However, the Supreme Court has long held that while compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights,<sup>36</sup> at least three governmental interests are sufficient to overcome this possible constitutional objection. The first is the government's interest in providing the electorate with information about the sources of money in elections and allowing them to effectively evaluate candidates.<sup>37</sup> The second is its interest in preventing actual or perceived corruption in federal elections, and the third

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30. See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure?: Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1060–64 (2011).

31. *Id.*

32. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

33. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 105-06 (2010).

34. *Citizens United*, 558 U.S. at 370.

35. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam) (upholding FECA's limitations on the amounts individuals could contribute to campaigns as well as the reporting and disclosure requirements but striking down the law's expenditure limitations).

36. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

37. *Buckley*, 424 U.S. at 66–67.

is the government's interest in collecting data to detect violations of contribution limits set forth in other federal campaign finance laws.<sup>38</sup> The Court enumerated these interests in *Buckley v. Valeo*, the seminal 1976 case that often serves as the starting point for discussions about modern campaign finance law. The *Buckley* Court, in its per curiam decision, cited Justice Brandeis in its discussion of disclosure requirements: "Publicity is justly commended as a remedy for social and industrial diseases," Justice Brandeis wrote in 1914. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>39</sup>

Writing for the Court in *Citizens United*, Justice Kennedy followed *Buckley*'s lead. He wrote that disclosure rules must withstand only exacting scrutiny, because disclosure requirements are not a limitation on speech.<sup>40</sup> Such rules, while allowing individuals and corporations to speak freely, permit the public to assess those communications by giving it the tools to determine the legitimacy of those speaking and their messages. *Citizens United* thus leaves wide open, and even encourages, the possibility of a system of public disclosure in most areas of campaign finance law. The only qualification to the legality of a comprehensive system of disclosure in the majority opinion is that there must not be evidence of "a reasonable probability" of "threats, harassment, or reprisals" for an organization's members.<sup>41</sup> As discussed below in Part III.B, a court is highly unlikely to find a reasonable probability of threats that stem from the type of mandated disclosure suggested in this Note.

## II. SUBJECTING INTERNAL COMMUNICATIONS TO PUBLIC DISCLOSURE REQUIREMENTS

In *Buckley* and *Citizens United*, the Court intimated that disclosure, rather than outright contribution and expenditure limits,

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38. *Id.* at 67–68.

39. *Id.* (citing LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (National Home Library Foundation ed. 1933)).

40. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010). Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* (citing *Buckley*, 424 U.S. at 64, 66, 96). Where strict scrutiny applies, however, regulations limiting the rights at issue "may be justified only by a 'compelling state interest,' and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155 (1973).

41. *Id.* at 315 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 198 (2003)).

would be the future of campaign finance law. Of course, *CIO* excludes such communications from the definition of “expenditure” in federal campaign finance law. *CIO* never mentions disclosure, however, leaving open the possibility of creating a regime of comprehensive reporting requirements for internal and member communications. Such a regime would arm the electorate with the tools to evaluate candidates properly by providing it with information about the source of money in elections — particularly information about which candidates may be in the pocket of certain interests.<sup>42</sup> It could also lead to self-policing by the organizations that may, for public relations or other reasons, decide it is not in their best interest or the interest of their members to exert too much influence or spend too much money on elections.

The standard of review courts apply to disclosure regulations is exacting scrutiny.<sup>43</sup> The remainder of this Note will lay out the three governmental interests that have been deemed sufficient to satisfy this requirement. It will go on to describe the ways opposing parties can raise both First Amendment and administrative burden arguments against these laws. Circuit courts have recognized both arguments in striking down some disclosure regulations, and this Note will examine circuit court cases that both uphold and strike down such regulations. The cases in which the court strikes down disclosure rules are generally inapplicable to member communications. These communications can survive exacting scrutiny analysis, and local, state and federal governments should consider implementing rules requiring disclosure in this context.

#### A. THE ARGUMENTS FOR SHAREHOLDER/MEMBER DISCLOSURE

There are two main categories of arguments in favor of a system of disclosure requirements. The first is disclosure to the organization’s members or shareholder. The second category is disclosure to the public at large. The subject of this Note is the latter. This Note will first describe the arguments that have been laid out for the former, however, as they have been influential in scholarly circles, if not in policymaking, and serve as a useful

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42. See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010), for a discussion of whether disclosure requirements in campaign finance laws actually lead to a more informed electorate.

43. See *supra* note 40 for a definition of exacting scrutiny.

backdrop for the argument laid out in Part II.B for public disclosure.

Arguments for disclosure to shareholders, of course, center on corporate political spending, rather than union spending. Lucian Bebchuk and Robert Jackson have suggested a series of rules to govern corporate spending on campaigns, one of which is mandatory disclosure to shareholders of both the beneficiaries of such spending and the amounts spent by the corporation.<sup>44</sup> Such rules would align corporate action with shareholder interests<sup>45</sup> — an important, if not the *most* important, goal of American corporate law. As Professors Bebchuk and Jackson argue, it would also protect minority shareholders who prefer the corporation remain apolitical.<sup>46</sup> Otherwise, those shareholders could be forced to associate themselves with political speech with which they do not agree — a possible First Amendment issue.<sup>47</sup> Professors Bebchuk and Jackson, along with eight other prominent law professors, submitted a petition for rulemaking to the Securities and Exchange Commission (SEC) in August 2011 requesting promulgation of an SEC rule that would require such shareholder disclosure.<sup>48</sup> Three full years later, that petition is still pending.<sup>49</sup>

This issue has also been taken up in Congress, where the Shareholder Protection Act of 2013 (SPA) is currently in committee.<sup>50</sup> Introduced by Senator Bob Menéndez (D–NJ), the SPA would require any proxy solicitation to describe any of the corporation's proposed political expenditures for the year that had not been authorized by a shareholder vote and would provide for a separate shareholder vote on each expenditure.<sup>51</sup> However, the government website that tracks bills in the House of Representa-

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44. Bebchuk & Jackson, Jr., *supra* note 33.

45. *Id.* at 97.

46. *Id.* at 111–13.

47. *Id.* at 113. While shareholders could choose to divest from the company instead, investors in mutual funds and those with diverse portfolios may not be aware that their money is being used to support candidates they do not support themselves.

48. LUCIAN A. BEBCHUK ET AL., COMMITTEE ON DISCLOSURE OF CORPORATE POLITICAL SPENDING PETITION FOR RULEMAKING (2011), *available at* <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

49. Michael Kirkland, *Citizen United Rolls, SEC Rule Drifts*, UPI (Feb. 16, 2014, 3:30 AM), [http://www.upi.com/Top\\_News/US/2014/02/16/Citizens-United-rolls-SEC-rule-drifts/UPI-62061392539400/](http://www.upi.com/Top_News/US/2014/02/16/Citizens-United-rolls-SEC-rule-drifts/UPI-62061392539400/).

50. S. 824, 113th Cong. § 1 (2013).

51. CONG. RESEARCH SERV., S. 824: SHAREHOLDER PROTECTION ACT OF 2013 SUMMARY, *available at* <https://www.govtrack.us/congress/bills/113/s824#summary>.

tives and the Senate, GovTrack.us, prescribes a very grim prognosis for this bill: it has a 0% chance of being enacted.<sup>52</sup>

## B. INTERNAL COMMUNICATIONS MAY BE SUBJECT TO PUBLIC DISCLOSURE REQUIREMENTS

Shareholder disclosure, of course, only affects publicly held corporations. Public disclosure regulations, on the other hand, would likely affect unions more than corporations. Corporations' money would not be most effectively spent through communications with their shareholders, who are often a dispersed group with little or no emotional tie to the corporation. In fact, holders of diversified portfolios and those who invest in mutual funds may not even know which corporations' stock they hold. For this reason, this Note focuses on member communications disseminated by unions.

*CIO* and *Citizens United* seem to clear the way for a comprehensive system of disclosure requirements for internal communications by unions. This disclosure would be event-triggered, mandatory only when an organization included electoral advocacy in a member publication. This would distinguish the internal communications disclosure requirements from the much more stringent requirements that apply to PACs.<sup>53</sup>

Despite Justice Kennedy's support for disclosure rules rather than contribution or expenditure limits in *Citizens United*, a potential constitutional objection is that forced disclosure runs afoul of the First Amendment right to association, derived from the rights to assembly, speech and petition.<sup>54</sup> In order to overcome such an objection, the government must have a sufficiently important interest in compelling such disclosure.

### 1. *Standard of Review*

In modern, post-*Buckley* campaign finance jurisprudence, the Court has consistently considered three possible governmental

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52. *Id.*

53. See Torres-Spelliscy, *supra* note 30, at 1058–59, for a discussion of the two types of disclosure.

54. U.S. CONST. amend. I; 20 N.Y. JUR. 2D *Constitutional Law* § 288 (2014) (“Although not specifically enumerated, the freedom of association is a fundamental right implicit in the First Amendment to the Constitution of the United States as applied to the states through the 14th Amendment.”).

interests as possible justifications for campaign finance regulations: preventing corruption or the appearance thereof, leveling the playing field in elections by removing advantages wealthier candidates enjoy, and increasing the number of potential candidates in an election by controlling costs.<sup>55</sup> These justifications apply largely to contribution and expenditure limitations rather than disclosure requirements. Disclosure requirements, like contribution and expenditure limits, could prevent actual or seeming corruption by giving the public a window into the financial interactions between major donors and their campaign beneficiaries. However, disclosure requirements hardly level the playing field between wealthier candidates and those with less cash on hand. They also do nothing to keep election costs down or lower the financial barrier to entry in an election.

Like regulations of contributions or expenditures, the Court in *Buckley* determined that disclosure requirements burden First Amendment interests because “compelled disclosure, in itself, can seriously infringe on privacy of association and belief.”<sup>56</sup> But the *Buckley* Court distinguished such regulations from contribution and expenditure limitations.<sup>57</sup> Disclosure rules “impose no ceiling on campaign-related activities.”<sup>58</sup> In the words of a later Court, such rules “do not prevent anyone from speaking.”<sup>59</sup>

Thus, the *Buckley* Court announced, the appropriate standard of review in such a case was exacting scrutiny. In order to prove a disclosure requirement constitutional, the government would need to prove it had a “sufficiently important” interest that bore a “substantial relation” to the requirement.<sup>60</sup> The *Citizens United* Court explicitly reaffirmed this test, noting that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”<sup>61</sup>

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55. Douglas Chalmers, Jr. & Michael Jablonski, *The Potential Impact on Campaign Finance Regulation of Speechnow.org v. FEC*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 57 (Sept. 2010).

56. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

57. Expenditure and contribution limits are also subject to different standards of review. *See id.*

58. *Id.*

59. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003).

60. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 301, 366–67 (2010) (citing *Buckley*, 424 U.S. at 64, 66).

61. *Id.* at 370 (citing *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 262 (1986)).

## 2. *Nature of the Governmental Interest*

The *Buckley* Court imposed a strict scrutiny standard on campaign finance laws that impose spending limits because, according to the Court, these spending limits constrain political speech.<sup>62</sup> Reporting requirements, meanwhile, are subject to exacting scrutiny, an intermediate standard bearing a lower level of judicial scrutiny. Campaign finance cases dating back to *Buckley* have consistently cited one major justification for disclosure requirements: the government's interest in providing the public with the necessary information to create an informed electorate.<sup>63</sup> As discussed below, this justification has been universally accepted by the circuit courts as substantially important enough to support a disclosure law in the years since *Citizens United*.

Courts and commentators often point to the influence of money — particularly the need to know the identity of a political advertisement's funder to fully understand that advertisement — as the driving force behind this governmental issue.<sup>64</sup> While the government's interest in providing the public with sufficient information to approach an election is the justification most often cited in disclosure cases, it is not the only one that could satisfy exacting scrutiny. The D.C. Circuit has suggested that disclosure requirements can also be justified as an enforcement mechanism because they help deter and expose campaign finance violations by forcing politicians and those making independent expenditures, such as PACs, to report the source of the money.<sup>65</sup>

The government's interest in requiring disclosure of union electoral advocacy in member communications is related to but not identical to that often cited in disclosure cases. Where internal communications are concerned, there is no danger of the general public receiving messages that have been distorted by various interest groups. These communications are targeted at the members of the union and, at most, their family members. However, as discussed below, case law suggests the government can

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62. *Buckley*, 424 U.S. at 22, 25.

63. *Id.* at 3.

64. *See, e.g.*, Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 793 (9th Cir. 2006); DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 18 (2000) (“[A]verage citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-interest.”).

65. SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010).

require that these communications and any associated costs be disclosed to the general public. The government's interest in so requiring, then, is to provide the public with information about how unions use their money to influence elections.

The interest in disclosing union communications must be a weaker interest than providing the public with the right information necessary to cast an informed vote, simply because the public needs this information to parse the messages it is receiving. That does not mean the government has no interest; depending on how much unions actually are spending to push candidates or issues on their members, the public should know about such spending. If a union heavily supports a candidate in its internal communications, members of the public may use that information in voting, knowing that the union may have disproportionate access to the candidate if she takes office.

While a union would likely make its support of a candidate public to encourage non-members to vote the same way, such disclosure may still be necessary. The public could learn not only of the union's support but the monetary value of that part of the support aimed at members, a receptive audience. This would help voters accurately analyze the playing field before voting and, perhaps, before throwing their own money behind a candidate.

### 3. *Constitutional Objections: Freedom of Association, Administrative Burdens*

The prime constitutional objection cited in campaign finance disclosure cases is that such laws interfere with the First Amendment right to association. *Buckley* cites the 1958 case *NAACP v. Alabama* for the proposition that group association is constitutionally protected because it “enhances ‘[e]ffective advocacy.’”<sup>66</sup> In that case, the Court considered an attempt by the state of Alabama to enjoin the NAACP from conducting activities within the state.<sup>67</sup> The Court had found that disclosure of members' identities had “exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>68</sup>

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66. *Buckley*, 424 U.S. at 65 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

67. *NAACP v. Alabama*, 357 U.S. 449 (1958).

68. *Id.* at 462.

However, *Buckley* distinguishes *NAACP*. The *per curiam* opinion affirms the D.C. Circuit's determination that plaintiffs' fears of *NAACP*-style reprisal and "serious infringement on First Amendment rights" are "highly speculative."<sup>69</sup> However, *Buckley* does not rule out the possibility of finding a First Amendment infringement as a result of disclosure requirements. "There could well be a case," the opinion reads, ". . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the [Federal Election Campaign] Act's requirements cannot be constitutionally applied."<sup>70</sup> In particular, the opinion mentions the possible burden to minority parties, where the fears of potential supporters and subsequent decline in contributions could lead to the end of the party or movement.<sup>71</sup> As discussed below in Part III.B., this objection to disclosure requirements is somewhat irrelevant in the context of unions' member communications due to the nature of the disclosure that would be required.

The other major objection that has been raised is an administrative one. Requiring disclosure, the argument goes, may pose an administrative burden so high that individuals or groups will be deterred from speaking.<sup>72</sup> This objection depends on the type and amount of information required by the law, as well as the frequency of the reporting requirements. However, the administrative burden argument also becomes irrelevant in the union context, as unions who spend enough to fall under any type of disclosure requirement are already required by law to keep the kind of records they would need to provide.<sup>73</sup>

#### 4. *Recent Circuit Court Treatment of Disclosure Laws*

In several cases handed down since *Citizens United*, circuit courts have applied exacting scrutiny to state and federal law disclosure requirements and have more often than not upheld disclosure requirements in the face of First Amendment objec-

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69. *Buckley*, 424 U.S. at 70.

70. *Id.* at 71.

71. *Id.*

72. See, e.g., *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

73. See *infra* Part III.B for an in-depth discussion of the reasons why the administrative burden argument should fail in this context.

tions.<sup>74</sup> In cases striking down such requirements, the court's reasoning usually turns on a factual distinction that would be inapplicable to cases discussing member communications.

a. *Cases Upholding Disclosure Requirements*

Famously, in *SpeechNow.org v. FEC*, the D.C. Circuit considered an objection to the organizational and continuous reporting requirements of FECA as a First Amendment violation.<sup>75</sup> The court, applying the exacting scrutiny standard set forth in *Buckley* and reaffirmed in *Citizens United*, found the requirements constitutional.<sup>76</sup> The court identified two governmental interests it found sufficiently important to justify the potential burden on the plaintiff in this case. First, “the public has an interest in knowing who is speaking about a candidate and who is funding that speech,” and second, “requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions.”<sup>77</sup>

The nature of the plaintiff's argument in *SpeechNow.org* distinguishes it from the case of disclosure requirements for organizations distributing member communications. The disclosure requirements to which the plaintiffs objected in *SpeechNow.org* were the additional reporting requirements that FECA imposes on those making independent expenditures who are also registered as PACs. The court's determination was based in large part on the minimal nature of the added burden to the plaintiff, which did not object to the reporting requirements for those making independent expenditures. On the other hand, member communications are typically exempted from the definition of any expenditure, including an independent expenditure, and thus are cur-

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74. There are other circuit-level cases that discuss the exacting scrutiny standard but have ruled against campaign finance and disclosure regulations on grounds other than the burdensomeness of the disclosure. *See, e.g., Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010). Most such cases turn on a law's definition of a “political action committee,” citing *Buckley*'s “major purpose” test. *See New Mexico Youth Organized*, 611 F.3d at 678. This is not the topic of this Note, as regulation of organizations' member communications would fall outside PAC regulation. The unions and corporations that are the subject of this Note would certainly fail *Buckley*'s “major purpose” test and are not PACs.

75. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (2010).

76. In the same case, the court found that a provision of FECA that limits contributions by individuals to PACs only making independent expenditures did violate the First Amendment. *Id.* at 696.

77. *Id.* at 698.

rently not subject to any disclosure requirements. Therefore, the court's analysis of the difference between independent expenditure reporting requirements and PAC reporting requirements may not be dispositive on the issue of member communications.

However, in other post-*Citizens United* cases, various circuits have upheld disclosure regulations based on exacting scrutiny analysis. These cases directly inform the question of requiring disclosure of member communications. *National Organization for Marriage, Inc. v. McKee*,<sup>78</sup> a First Circuit case, provides a helpful case study.<sup>79</sup> In that case, a nonprofit organization challenged a Maine law that required registration and disclosure of any entity that finances election-related advocacy.<sup>80</sup> While that case focused on advocacy related to ballot measures, not candidates, the First Circuit's reasoning is telling. NOM, the plaintiff organization, characterized its argument as one about the Maine law's definition of a PAC — an issue that would be subject to *Buckley's* “major purpose” test.<sup>81</sup> The First Circuit rejected this idea, noting that “[i]t is not the designation as a PAC but rather the obligations that attend PAC designation that matter for purposes of First Amendment review.”<sup>82</sup>

Thus rejecting the idea that the “major purpose” test applied, the court determined that the governmental interest sufficient to overcome the First Amendment claim was “identifying the speakers behind politically oriented messages.”<sup>83</sup> The court went beyond *Buckley* citations to explain the impetus for this governmental interest, namely, that citizens evaluating ballot questions must “rely ever more on a message's source as a proxy for reliability and a barometer of political spin.”<sup>84</sup>

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78. *Nat'l Org. for Marriage, Inc. v. McKee* (NOM II), 669 F.3d 34 (1st Cir. 2012).

79. See *infra* Part III.A for a discussion of another case in which a circuit court upheld a disclosure requirement (the Ninth Circuit upholding a Washington State law).

80. *Nat'l Org. for Marriage*, 669 F.3d at 36–37.

81. That test examines whether an organization is “under the control of a candidate or [has] the major purpose of . . . the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

82. *Nat'l Org. for Marriage*, 669 F.3d at 39 (quoting *Nat'l Org. for Marriage, Inc. v. McKee* (NOM I), 649 F.3d 34, 56 (1st Cir. 2011)).

83. *Id.* at 40 (quoting *Nat'l Org. for Marriage* (NOM I), 649 F.3d at 57).

84. *Id.*

b. *Cases Striking Down Disclosure Requirements*

The exacting scrutiny standard applied in these cases is not a *carte blanche* for the government to pass disclosure regulations. Several circuit court opinions on such laws have gone the other way in recent years, finding that disclosure requirements were not substantially related to a sufficiently important government interest.<sup>85</sup> However, these cases can be distinguished from a hypothetical law requiring disclosure of electoral advocacy in internal communications.<sup>86</sup>

One such case was *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, in which the Eighth Circuit struck down part of Minnesota's independent expenditure law. The law required organizations that did not qualify as PACs but spent more than \$100 on election advocacy to submit to ongoing reporting requirements.<sup>87</sup> The Eighth Circuit's opinion relied on the ongoing nature of the reporting requirements, noting that any government interest at stake can be satisfied through "less problematic measures," such as "requiring reporting whenever money is spent."<sup>88</sup>

The Tenth Circuit also struck down a disclosure requirement, applying exacting scrutiny, in the 2010 case *Sampson v. Buescher*.<sup>89</sup> This opinion also turned on an issue largely inapplicable to internal communications. The court considered a complaint by a Colorado citizen who argued that several of her fellow citizens had failed to register as an issue committee and to comply with Colorado's disclosure laws when they circulated petitions opposing the annexation of Parker North, Colorado into the Town of Parker, Colorado.<sup>90</sup> The Tenth Circuit found for the plaintiffs, holding that the application of Colorado's disclosure law to com-

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85. See, e.g., *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 279 (4th Cir. 2013), *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012), *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

86. See *infra* Part III.A for a discussion of the way these cases differ from the hypothetical law requiring public disclosure of direct electoral advocacy in member communications.

87. *Minnesota Citizens Concerned for Life, Inc.*, 692 F.3d at 876.

88. *Id.* at 876–77 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999)).

89. 625 F.3d 1247 (10th Cir. 2010).

90. *Id.* at 1251–52.

mittees that raised less than \$1,000 unconstitutionally interfered with defendants' right to association.<sup>91</sup>

*Sampson* focused on the grassroots, low-dollar nature of this committee, which raised a grand total of \$782.02 in its effort to oppose the annexation.<sup>92</sup> It cites the Ninth Circuit in ruling that the public interest in information here was minimal because “as a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.”<sup>93</sup> Meanwhile, the court explained, the burden to those making the expenditure in such circumstances is great. The law is complex, and “[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado’s constitution . . . .”<sup>94</sup> Those making small independent expenditures, then, are forced to retain legal services that often cost more than the amount of the campaign expenditure.<sup>95</sup> The Tenth Circuit, in *Sampson*, also noted that such small expenditures “say little about the contributors’ views of their *financial* interest [in the issue].”<sup>96</sup> This decision suggests that the public’s interest in knowing the sources of money in elections turns on the potential for pecuniary gain as a result of those elections.

Finally, in 2013 the Fourth Circuit struck down a West Virginia disclosure requirement as applied to materials “published in any newspaper, magazine or other periodical.”<sup>97</sup> The case ended up turning on the underinclusivity of the statute, which did not define direct mailing, telephone banks or billboard advertising as “electioneering communications” but did include materials “published in any newspaper, magazine or other periodical,” as well as broadcast media. The comparison between a union’s internal newsletter — itself a periodical — and a newspaper or magazine is worth noting.<sup>98</sup> The opinion weighed a party’s First Amend-

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91. *Id.* at 1261.

92. *Id.* at 1252, 1259.

93. *Id.* at 1260 (quoting Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009)).

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

95. *Id.* at 1260.

96. *Id.* at 1261 (emphasis added).

97. *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 279 (4th Cir. 2013).

98. The Fourth Circuit decided to “err on the side of protecting political speech rather than suppressing it” and thus struck materials published in newspapers, magazines and other periodicals from the definition of an “electioneering communication” because doing

ment rights to publish election-related materials in periodicals against the governmental interest in providing the electorate information. In doing so, the case may have raised interesting issues for union- or corporation-published periodicals, but its holding has little bearing on such publications because it turned on the statute's underinclusive definition of "electioneering communications," rather than the propriety of requiring disclosure of such materials.

This Note will next examine why the cases discussed above have no bearing on a possible disclosure requirement for unions' member communications.

### III. INTERNAL COMMUNICATIONS SHOULD BE SUBJECT TO PUBLIC DISCLOSURE REQUIREMENTS

#### A. DISCLOSURE REQUIREMENTS FOR INTERNAL COMMUNICATIONS CAN WITHSTAND EXACTING SCRUTINY

Many circuit court cases that take on disclosure requirements uphold those laws under the exacting scrutiny standard. Those cases typically balance freedom of association and administrative costs against the public's interest in knowing the source of campaign advertising funds. While the governmental interest in providing the public with information about union spending in elections is weaker than its interest in providing the public with information about who has financed public advertisements, the burdens on unions are sufficiently small that such requirements would likely still withstand exacting scrutiny. Further, where such requirements are found unconstitutional, the court's reasoning usually turns on a factual distinction that would not be at issue in a case discussing member communications.

Given the propensity of circuit courts to uphold disclosure requirements in cases factually similar to the internal communications context<sup>99</sup> and those courts' analysis of the changing weight that must be given the government's interest in creating an informed electorate in the face of more private money entering elections, a disclosure requirement that applied to member communications would likely withstand exacting scrutiny.

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so "causes [the campaign finance regime] to burden fewer election-related communications." *Id.* at 285.

99. See *supra* Part II.B for an analysis of such cases.

In *NOM II*, the First Circuit upheld a Maine disclosure requirement.<sup>100</sup> The opinion focuses on ballot initiatives, citing a Ninth Circuit case that in turn cites journalist David S. Broder for the proposition that in initiative campaigns, even more than candidate campaigns, “average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-interest.”<sup>101</sup> However, the opinion’s emphasis on a shift in politics towards a “money game” in which messages received by voters are distorted by the amount of cash the creators of those messages can throw into a campaign speaks directly to the importance of requiring disclosure in the area of internal communications.<sup>102</sup> While in prior election cycles the First Amendment and right to association concerns may have outweighed the importance of public knowledge that a certain union had thrown its weight and money behind a particular candidate, the landscape of elections has changed. While the minimal burden remains the same, the governmental interest in providing the electorate with enough information to be informed voters has escalated in a world where a presidential and congressional election cycle can cost \$6 billion.<sup>103</sup>

The Ninth Circuit went one step further in an analysis of Washington’s Public Disclosure Law in the 2010 case *Human Life of Washington Inc. v. Brumsickle*.<sup>104</sup> In that case, Judge Kim Wardlaw not only ruled that disclosure requirements for campaign spending do not trample First Amendment rights but went further, stating that such laws “advanc[e] the democratic objectives underlying” that amendment because “[p]roviding information to the electorate is vital to the efficient functioning of the

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100. See *supra* text accompanying notes 78–84; *Nat’l Org. for Marriage, Inc. v. McKee* (NOM II), 669 F.3d 34 (1st Cir. 2012).

101. *Nat’l Org. for Marriage, Inc. v. McKee* (NOM I), 699 F.3d 34, 40 (1st Cir. 2011) (citing *Cal-Pro Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105–06 (9th Cir. 2003)).

102. Ideally, the laws suggested by this Note would require both estimates of the monetary value of the communications in question and a description or copy of the communication itself. The latter would be valuable in informing the public of the weight such communications may have. A union member receiving a phone call from the union advocating for a particular candidate — currently exempted from disclosure in New York City — may be more influenced than one who sees a notice in the regular union newsletter.

103. Charles Mahtesian, *2012 Election Price Tag: \$6 Billion*, POLITICO (Aug. 2, 2012, 6:30 AM), <http://www.politico.com/blogs/charlie-mahtesian/2012/08/election-price-tag-billion-130856.html>.

104. 624 F.3d 990 (9th Cir. 2010).

marketplace of ideas.”<sup>105</sup> The opinion cites *Buckley* but emphasizes disclosure regulations as a building block of truly democratic elections in an age where money can distort politics over the *Buckley* balancing act between a potential First Amendment objection and a “sufficiently important” governmental interest.<sup>106</sup> Judge Wardlaw compared this type of regulation to the lobbying industry, an area in which the Supreme Court upheld disclosure requirements as early as 1954.<sup>107</sup> This comparison is notable at a time when Americans consider lobbyists far less trustworthy than bankers, lawyers and even car salespeople.<sup>108</sup> This opinion, then, hints that those making independent expenditures behind closed doors should be viewed with the same suspicion as lobbyists and should be regulated just as heavily.

Further, the cases in which circuit courts struck down disclosure requirements should not be seen as a bar to a disclosure requirement that would apply to member communications. In *Minnesota Citizens Concerned for Life*, for example, the Eighth Circuit’s striking down of Minnesota’s independent expenditure law turned on the fact that the law required ongoing disclosure.<sup>109</sup> Requiring disclosure of electoral advocacy in internal communications, meanwhile, would not require unions (or corporations, where relevant) to register as PACs or submit to ongoing reporting requirements. Rather, this type of disclosure would only be necessary when such internal communications do advocate for a particular candidate. *Minnesota Citizens*, then, does not put a damper on such a law.<sup>110</sup> Similarly, the Tenth Circuit’s main concern in *Sampson v. Buescher* was an issue that simply would not apply in the member communication context: the administrative burden of requiring those making independent ex-

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105. *Id.* at 1005.

106. *Id.* at 1006.

107. *Id.* (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

108. See, e.g., Art Swift, *Honesty and Ethics Rating of Clergy Slides to New Low*, GALLUP (Dec. 16, 2013), <http://www.gallup.com/poll/166298/honesty-ethics-rating-clergy-slides-new-low.aspx> (finding only 6 percent of Americans find lobbyists have “high” or “very high” honesty and ethics ratings, the lowest of any profession).

109. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012).

110. The Eighth Circuit recently made a similar determination in *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013). There, the court upheld a first-time reporting requirement, as applied to a nonprofit organization, but struck down the ongoing reporting requirements of Iowa’s revised election laws. *Id.* at 597–98. The court cites its previous decision in *Minnesota Citizens* repeatedly in this case. *Id.* at 584, 586, 604.

penditures of less than \$1,000 to keep records and disclose their electoral activities.<sup>111</sup> A member communication disclosure requirement could easily negate such concerns by setting a minimum amount that a union would have to spend to be subject to the law.

While the exacting scrutiny standard is by no means a permissive one, circuit courts have suggested in the years since *Citizens United* that the distorting effect big money has on elections must lead courts to favor the governmental interest in providing voters with the ability to make truly informed decisions in elections over the First Amendment concerns related to disclosure.<sup>112</sup> This trend indicates courts would treat event-triggered disclosure requirements similarly when applied to member communications, which, though they raise additional freedom of association concerns, also present a large potential source of dark money in elections.

#### B. INTERNAL COMMUNICATIONS SHOULD BE SUBJECT TO PUBLIC DISCLOSURE REQUIREMENTS

If the trend holds and laws requiring the public disclosure of union member communications can continue to follow the circuit court trend and survive exacting scrutiny, the question remains whether it is worth implementing such laws. In this case, proponents of disclosure regulations face minor constitutional objections because the burden on the regulated organization is not particularly high. While there may not be as much to gain from requiring these disclosures as there is from requiring disclosure of other independent expenditures, the size and reach of unions, particularly in local elections, makes it worthwhile to consider such regulations.

The first possible constitutional objection to any regime requiring disclosure of internal communications is that such regulations may hinder the First Amendment right to freedom of association. Disclosure of members' identities may stunt contributions for fear of retribution or harm. This objection, however, has little merit in the union context. Disclosure required in this case would be about a union's activity as an organization. These laws

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111. *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010).

112. *See, e.g., Human Life of Washington Inc.*, 624 F.3d at 990.

would not require any additional disclosure of individual members' identities, even those who crafted the communication sent to its members.

Union members and leaders could advance the argument that disclosure of even the fact of an amount spent on electoral advocacy in member communications could subject them to reprisal; however, such an argument would be far-fetched. Even if a situation arose in which members of a union feared retribution, finding that such a fear was tied to the fact or amount the union spent on a particular member communication would depend on the union's supporting that candidate only in such private communications and not throwing its money behind a public campaign. The reality, however, is that the bulk of union support for a candidate takes the form of campaign contributions. Between 2005 and 2011, unions spent \$1.1 billion on public campaigns for candidates and ballot measures through PACs.<sup>113</sup>

The second potential objection, that the administrative burdens of reporting requirements would hinder speech in this context, is equally weak. All unions, and particularly the largest ones, keep detailed records. Indeed, unions are legally compelled to do so under the Labor Management Reporting and Disclosure Act (LMRDA), which requires unions to file annual financial reports, constitutions, bylaws and other information with the Department of Labor's Office of Labor-Management Standards.<sup>114</sup>

Because of the extensive recordkeeping requirements mandated by the Department of Labor, the additional burden of providing the necessary information to the FEC or appropriate state organization will not be significant. The D.C. Circuit has recognized as much, noting, "[a] group raising money for political speech will, we presume, always hope to raise enough to make it worthwhile to spend it. Therefore, groups would need to collect and keep the necessary data on contributions even before an expenditure is made . . . ."<sup>115</sup> Additionally, lawmakers can easily respond to any concerns about heavier financial burdens on

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113. Tom McGinty & Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, WALL ST. J. (July 10, 2012, 9:49 AM), <http://online.wsj.com/news/articles/SB10001424052702304782404577488584031850026>.

114. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431 (1959); Office Labor-Mgmt. Standards, *Fact Sheet: LMRDA Recordkeeping Requirements for Unions*, U.S. DEP'T LABOR, <http://www.dol.gov/olms/regs/compliance/lmrdarecordkeeping.htm> (last visited November 9, 2014).

115. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (2010).

smaller organizations by designating a minimum amount that must be spent before the requirement kicks in. This was the Tenth Circuit's solution in *Sampson*; the court decided it would not require disclosure from groups spending less than \$1,000 total on any given election.<sup>116</sup>

While the societal benefits of such requirements are not quite as strong as those often proffered in support of contribution disclosures, they are sufficiently important to make such a change in the law worthwhile. Typically, legislators and courts justify mandated disclosure by appealing to the public's right to have the necessary information to be fully informed about upcoming elections. In particular, it is in the government's interest for voters to understand who is financing the myriad, sometimes jargon-filled ads that lead up to any major election because this information will help voters understand a candidate's views and where her loyalties may lie after she is elected.<sup>117</sup> However, the interest at stake in the context of member communications is different and less significant. Here, the government's interest is providing the public with information about how unions are spending their money on private electoral messages to their own members. There is no danger of the public's misunderstanding the source of a certain ad or message.

But there is a public benefit to requiring such public disclosures. Public disclosure would allow the electorate to infer which candidates strongly support labor rights and which are beholden to unions, or at least more likely to support pro-union legislation. Pro-union voters may be swayed to vote for candidates that unions directly support in their member communications, and anti-union voters may vote against those candidates or, understanding the additional support those candidates are receiving from the union's support, attempt to sway public opinion.

This benefit is significant, particularly in major city elections, where unions play a large role.<sup>118</sup> For example, in the 2013 New York City mayoral race, which featured a crowded Democratic primary, speculation abounded over which candidates the labor

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

117. See, e.g., *SpeechNow.org.*, 599 F.3d at 698.

118. This could require only a change in city regulations, rather than state law. See *supra* Part I.C for New York City's regulation.

unions would support.<sup>119</sup> Political analysts speculated that an organized union, one that could convince its members to vote as a bloc, could determine the outcome of that primary.<sup>120</sup> The numbers speak to the voting power of New York unions. The state of New York has the highest rate of union membership in the nation at 24.4 percent.<sup>121</sup> Approximately 660,000 people voted in the Democratic primary,<sup>122</sup> and the teachers' union alone had a database of 171,000 teachers, retirees and family members.<sup>123</sup> In a primary that included nine candidates, several of whom were considered the frontrunner at some point in the election cycle, a 171,000-person voting bloc could easily be determinative.<sup>124</sup> Thus, a law requiring that organization — or any other union or corporation — to disclose any direct electoral advocacy in a regular member communication could provide a significant benefit to the voting public.

#### IV. CONCLUSION

Since the 1948 case *United States v. CIO*, communications sent by a union to its members that directly advocate for or against a particular candidate have generally been exempted from the definition of “independent expenditures” in campaign

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119. See, e.g., Javier C. Hernández, *Labor Seeks Influence in New York's Mayoral Race*, N.Y. TIMES (June 18, 2013), [http://www.nytimes.com/2013/06/19/nyregion/labor-seeks-influence-in-new-yorks-mayoral-race.html?\\_r=1&](http://www.nytimes.com/2013/06/19/nyregion/labor-seeks-influence-in-new-yorks-mayoral-race.html?_r=1&).

120. *Id.*

121. Press Release, Bureau of Labor Statistics, Department of Labor, Union Members — 2013 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

122. Sam Roberts, *20% Turnout in New York Primaries*, N.Y. TIMES (Sept. 12, 2013), <http://www.nytimes.com/2013/09/13/nyregion/20-turnout-in-new-york-primaries.html>.

123. Hernández, *supra* note 119.

124. *Primary Election Voter Guide 2013*, N.Y.C. CAMPAIGN FIN. BOARD, [http://www.nycfb.info/public/voter-guide/primary\\_2013/intro\\_mayor.aspx](http://www.nycfb.info/public/voter-guide/primary_2013/intro_mayor.aspx) (last visited October 22, 2014) (description of the nine mayoral candidates in the 2013 Democratic primary in New York City); see also Michael M. Grynbaum, *Hints at a Steeper Road to Victory for Perceived Front-Runner in Mayor's Race*, N.Y. TIMES (Dec. 12, 2012), <http://www.nytimes.com/2012/12/13/nyregion/for-quinn-hints-of-a-steeper-road-to-victory-in-mayoral-race.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A17%22%7D>; David W. Chen, *Weiner Gets a Step Ahead of Other Democrats in Poll*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/nyregion/weiner-gets-a-step-ahead-of-other-democrats-in-poll.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A17%22%7D>; David W. Chen, *New Poll Suggests That de Blasio Is Now First Among Voters*, N.Y. TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/nyregion/new-poll-suggests-that-de-blasio-is-now-first-among-voters.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A17%22%7D>.

finance law. This leaves open a significant gap in the information the voting public has when approaching a campaign, particularly a local campaign in which unions can have much sway. *United States v. CIO* does not bar the possibility of requiring that such communications be publicly disclosed. Given the exacting scrutiny standard applied to disclosure requirements and circuit courts' increasing emphasis on the government's interest in creating an informed electorate over the possible objections of burdens to freedom of association and administrative costs, disclosure requirements applied to member communications would likely survive a constitutional challenge. Furthermore, such requirements would provide the significant public benefit of allowing voters to understand more fully which moneyed interests are supporting candidates behind closed doors as well as in the public eye.