

# An Administrative Alternative to the As-Applied Challenge: New York's Public Integrity Reform Act and the Future of Disclosure Statutes

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*In recent years, tax-exempt organizations have become increasingly prominent in political activity of all sorts, including lobbying. In response to the perceived abuses associated with this trend, there have been a number of proposals to disclose the identities of such organizations' donors. This Note focuses on the legislative efforts of one state, New York, to promote transparency in politics through its Public Integrity Reform Act of 2011, a statute that is the first in the nation to require 501(c)(4) organizations that lobby to disclose their donors' identities. First, this Note discusses the developments that precipitated the statute's enactment, the regime it establishes, and recent problems with its implementation. Second, the Note considers the First Amendment implications of the statute's novel requirement. Looking to the judicial treatment of disclosure laws applied to lobbying and other political activity, the Note concludes that statutes of this sort would survive facial challenges. It also suggests that as-applied challenges are unlikely to be a viable protective device for groups harboring well-founded concerns about the consequences of disclosure for their donors. Third, given this inadequacy of the as-applied challenge, the Note argues that future statutory regimes should follow New York's lead (and learn from its lessons) in fashioning an administrative procedural alternative for groups with a legitimate need for exemption. In doing so, the Note considers the feasibility of implementing such a procedure in other jurisdictions and disclosure regimes applicable to other political activity.*

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## I. INTRODUCTION

What do the National Rifle Association, the Sierra Club, and the American Civil Liberties Union have in common? It may sound like a bad joke about the role special interest groups play in politics, but these groups share at least two characteristics: first, they each predominately operate<sup>1</sup> as tax-exempt “social welfare” organizations under Section 501(c)(4) of the Internal Revenue Code;<sup>2</sup> and second, each maintains a robust lobbying presence at both the state and federal level.<sup>3</sup>

Groups like those mentioned above have become a familiar, if not accepted, feature of the political landscape, contributing to the national conversation by pooling their members’ resources and advocating on behalf of their preferred policies. But as the national media’s coverage of the past few election cycles has indicated, high-profile special interest groups are not the only 501(c)(4) social welfare organizations that have come to play a

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1. Each of these organizations operates nationally with an “affiliated structure.” Although classified by the IRS as 501(c)(4) organizations, they maintain 501(c)(3) affiliates as well, allowing them to lobby extensively *and* receive tax-deductible and foundation gifts. See Jeff Krehely, *Maximizing Non-Profit Voices and Mobilizing the Public*, RESPONSIVE PHILANTHROPY, Winter 2005, at 9, 9–10.

2. *Frequently Asked Questions*, THE SIERRA CLUB FOUND., <https://www.sierraclubfoundation.org/faqs> (last visited Jan. 25, 2014); *ACLU vs. ACLU Foundation*, AMERICAN CIVIL LIBERTIES UNION OF PA., <http://www.aclupa.org/abouttheaclu/aclu-vs-aclu-foundation/> (last visited Jan. 25, 2014); *Ring of Freedom: Give Now*, NAT’L RIFLE ASS’N, <https://www.nra.org/rof/give.aspx> (last visited Jan. 25, 2014). Section 501 of the Internal Revenue Code enumerates several types of organizations that are generally exempt from taxation. 26 U.S.C. § 501(c) (2012). Among the tax-exempt entities listed are “organizations not organized for profit but operated exclusively for the promotion of social welfare.” 26 U.S.C. § 501(c)(4) (2012). According to IRS regulations, an organization satisfies this standard “if it is primarily engaged in promoting in some way the common good and general welfare of the community.” 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2014). For guidance on this broad language including additional precedent interpreting it, see JOHN REILLY, CARTER HULL, & BARBARA ALLEN, INTERNAL REVENUE SERVICE, IRC 501(C)(4) ORGANIZATIONS, at I-3-11 (2003).

3. See, e.g., Krehely, *supra* note 1, at 9. In contrast to tax-exempt charitable organizations, which face strict limits on the amount of lobbying and other political activity in which they may engage, see 26 U.S.C. § 501(c)(3), the activities of “social welfare” organizations tax-exempt under § 501(c)(4) are not so circumscribed. See 26 U.S.C. § 501(c)(4). Pursuant to the IRS’s interpretation of the code, a social welfare organization may engage in unlimited lobbying activity, so long as it is germane to its tax-exempt purpose. JOHN REILLY & BARBARA ALLEN, INTERNAL REVENUE SERVICE, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS, at L-2 (2003), available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

role in politics.<sup>4</sup> In the wake of the Supreme Court's controversial decision in *Citizens United v. Federal Election Commission*,<sup>5</sup> this particular variety of tax-exempt entity has become a popular vehicle enabling corporations and individuals to make campaign-related expenditures in a manner that leaves the source of funding virtually "undetectable by the public."<sup>6</sup> With the apparent influence of this undisclosed "dark money" in electoral politics on the rise,<sup>7</sup> scholars have taken note, comprehensively documenting the factors that led to these developments, surveying the current state and federal legal landscape, and proposing reforms to address what many consider a troubling feature of the status quo.<sup>8</sup> Central to many of these reform packages are calls for heightened disclosure of donors to 501(c)(4) organizations active in electoral politics,<sup>9</sup> a strategy that, although successful to varying degrees in state legislatures, has gained limited traction on the federal level.<sup>10</sup> In light of Congress' failed attempts to pass disclosure legislation,<sup>11</sup> the Internal Revenue Service (IRS) has pursued a

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4. See, e.g., Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Business*, N.Y. TIMES, July 8, 2012, at A1.

5. 558 U.S. 310 (2009).

6. See, e.g., 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: CHAP. J. L. & POL'Y 59, 59–60 (2010–2011).

7. See *Political Nonprofits*, CENTER FOR RESPONSIVE POLITICS, [http://www.opensecrets.org/outsidespending/nonprof\\_summ.php](http://www.opensecrets.org/outsidespending/nonprof_summ.php) (last visited Jan. 25, 2014) (providing data on spending by 501(c)(4) organizations over past three election cycles); see also Liz Bartolomeo, *The Political Spending of 501(c)(4) Nonprofits in the 2012 Election*, SUNLIGHT FOUND. (May 21, 2013, 4:18 PM), <http://sunlightfoundation.com/blog/2013/05/21/the-political-spending-of-501c4-nonprofits-in-the-2012-election/> (providing data on outside groups' spending in 2012 election cycle.).

8. See Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after Citizens United*, 10 ELECTION L.J. 363, 403–04 (2011); Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 352–57 (2011); Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337 (2013); Kristy Eagan, *Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending*, 40 FORDHAM URB. L.J. 801 (2012); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427 (2011). As indicated by the representative sample of the literature on the subject, these issues have received comprehensive treatment elsewhere, and are largely beyond the scope of this Note.

9. See, e.g., Lloyd Hitoshi Mayer, *Require Disclosure of their Donors*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/the-irs-fiasco-has-much-to-do-with-disclosure-requirements>.

10. See Briffault, *supra* note 8, at 352–57.

11. The DISCLOSE (Democracy Is Strengthened by Casting Light on Spending in Elections) Act was the core of these efforts. See Briffault, *supra* note 8, at 338. If enacted, the Act would have required tax-exempt organizations and other independent spending

different approach in seeking to rein in these groups' influence on elections.<sup>12</sup> In November 2013, the IRS released a notice of proposed rule-making and draft regulations that would clarify the permissible scope of activities in which social welfare organizations may engage while retaining their tax-exempt status.<sup>13</sup>

In comparison to their election-related activities, the lobbying efforts of 501(c)(4) entities have flown relatively under the radar, despite the fact that lobbying by these groups raises similar transparency-related concerns. These concerns — which the IRS' proposed rules failed to address<sup>14</sup> — have prompted proposals that rely upon the familiar strategy of imposing heightened disclosure requirements on tax-exempt entities, specifically those which would compel such organizations to reveal the identities and other personal information of those contributing to their lobbying efforts.<sup>15</sup> In 2011, New York's efforts in this area culminat-

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groups to disclose the identity of any individual contributing \$10,000 or more for campaign expenditures. Lisa Rosenberg, *What Should You Know about the DISCLOSE ACT Part 1: What is the DISCLOSE Act?*, SUNLIGHT FOUND. (Jul. 12, 2012, 10:13 AM), <https://sunlightfoundation.com/blog/2012/07/12/what-you-should-know-about-the-disclose-act-part-1-what-is-the-disclose-act/>. Though various versions of the Act have been proposed since 2010, *see, e.g.*, H.R. 5175, 111th Cong. (2010), none have managed to obtain the support of both houses. *See* Rosalind S. Helderman, *DISCLOSE Act, New Donor Transparency Law, Blocked in Senate*, WASH. POST (Jul. 16, 2012, 6:45 PM), [http://www.washingtonpost.com/blogs/2chambers/post/disclose-act-new-donor-transparency-law-blocked-in-senate/2012/07/16/gJQAbm7WpW\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/disclose-act-new-donor-transparency-law-blocked-in-senate/2012/07/16/gJQAbm7WpW_blog.html).

12. *E.g.*, Nicholas Confessore, *New Rules Would Rein In Nonprofits' Political Role*, N.Y. TIMES, Nov. 27, 2013, at A1. The IRS' decidedly less formal actions in targeting certain groups applying for tax-exempt status under 501(c)(4), which sparked controversy in the summer of 2013, may have been similarly motivated. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMIN., NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS 5–6 (2013), *available at* <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>; Rachael Bade, *GOP: Emails Show IRS Staff Obsessed with Citizens United*, POLITICO (March 5, 2014), <http://www.politico.com/story/2014/03/lois-lerner-citizens-united-104279.html>.

13. Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 230 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1). The public reaction to the proposed rules was not universally favorable. *See, e.g.*, *Proposed IRS Rules Would Chill Public Advocacy*, CATO INST. (Feb. 26, 2014), <http://www.cato.org/multimedia/daily-podcast/proposed-irs-rules-would-chill-public-advocacy>. Indeed, the IRS received over 150,000 comments on the proposal — the most ever received by Treasury and IRS on a proposed tax regulation. *IRS Update on the Proposed New Regulation of 501(c)(4) Organizations*, INTERNAL REVENUE SERVICE (May 22, 2014), [http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501\(c\)\(4\)-Organizations](http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501(c)(4)-Organizations). In light of this unprecedented volume of comments, the IRS announced its decision in May 2014 to table the original proposal and revise the draft regulations. *Id.* At the time of this writing, the IRS had yet to issue a revised proposal.

14. *See* Guidance for Tax-Exempt Social Welfare Organizations, 78 Fed. Reg. 230 (making no mention of 501(c)(4) lobbying activity).

15. *E.g.*, Aprill, *supra* note 8, at 365, 403–05.

ed in a historic first: with the passage of the Public Integrity Reform Act of 2011 and promulgation of regulations under it, New York became the first state to require 501(c)(4) groups that lobby to disclose their donors.<sup>16</sup>

Notwithstanding the unprecedented nature of the disclosure mandate enacted in New York, legal requirements to publicly disclose information as a condition of exercising one's rights under the First Amendment are by no means a new development.<sup>17</sup> Indeed, courts have long recognized the utility of disclosure requirements as a means of furthering important governmental interests, as well as their preferred status as a method of regulating political speech.<sup>18</sup> Moreover, constituencies other than the courts generally support disclosure in a way that mirrors judicial characterization of such measures as minimally restrictive of First Amendment rights.<sup>19</sup> That is not to say that these laws are costless. As the Supreme Court has recognized, public disclosure of individual group members' personal information may impose such a burden on certain groups that they should be entitled to exemption as a constitutional matter through as-applied challenges.<sup>20</sup> Today, these costs may be amplified by the widespread dissemination of and ease of access to public information.<sup>21</sup> Despite the shield as-applied challenges are meant to provide

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16. Angelle C. Smith, *The Secret's Out — New York Calls for 501(c)(4)s that Lobby to Disclose Donors*, INSIDE POLITICAL LAW, COVINGTON & BURLING LLP (Aug. 2, 2012), <http://www.insidepoliticallaw.com/2012/08/02/the-secrets-out-new-york-calls-for-501c4s-that-lobby-to-disclose-donors/>.

17. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273 (2010) (discussing history of disclosure laws).

18. See *infra* Part III.A.2.

19. Briffault, *Disclosure 2.0*, *supra* note 17, at 274. Professor Briffault notes that disclosure “generally gets high marks from the public, academics, and the courts,” and that even among those academics who are critical of campaign finance reform, there are some who wholeheartedly endorse disclosure requirements. *Id.* at 274. See also Daniel J. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 664 (2012) (“For most of the post-*Buckley* history of campaign finance regulation, reformers and deregulationists alike viewed disclosure as an uncontroversial regulatory technique.”).

20. See *Buckley v. Valeo*, 424 U.S. 1, 71, 74 (1976); see also *infra* Part III.B. Such exemptions rest on the notion that citizens may be deterred from engaging in political activity protected under the First Amendment when faced with mandatory disclosure of personal information — i.e., that the prospect of disclosure will have a “chilling effect” on speech or associational activity. *E.g.*, CNTR. FOR COMPETITIVE POLITICS, CAMPAIGN FINANCE DISCLOSURE: THE DEVIL IS IN THE DETAILS 9 (2013), available at [http://www.campaignfreedom.org/wp-content/uploads/2013/12/2014-08-19\\_Policy-Primer\\_Disclosure.pdf](http://www.campaignfreedom.org/wp-content/uploads/2013/12/2014-08-19_Policy-Primer_Disclosure.pdf).

21. See, e.g., Eric Wang, *Disclosure's Unintended Consequences*, THE HILL (September 19, 2013, 7:00 PM), <http://thehill.com/blogs/congress-blog/technology/323135-disclosures-unintended-consequences->

against threats to freedom of association, however, there is reason to believe that the manner in which courts assess such challenges prevents them from adequately performing their intended function.<sup>22</sup>

In light of the deficient protection as-applied challenges to disclosure laws currently provide, this Note argues that New York's Public Integrity Reform Act of 2011 offers a chance for reflection and a model for future disclosure regimes. While the disclosure mandate the statute applies to 501(c)(4) organizations and other groups engaged in lobbying is novel in and of itself, the administrative regime it establishes also provides an innovative procedure for obtaining exemptions that could prove more effective than as-applied challenges in reducing the toll disclosure can have on constitutionally protected political activity.<sup>23</sup> In combination, these features of the legislation provide an opportunity for critical reexamination of our approach to drafting disclosure laws. As legislatures continue to pursue the goal of transparency in politics with inventive new disclosure requirements, they should bear in mind the consequences disclosure poses for some groups in publicly revealing individual members' personal information and consider alternative methods of providing relief from disclosure — such as that provided by New York — when needed.

This Note proceeds in four parts. Part II provides an overview of New York's Public Integrity Reform Act of 2011 (PIRA), discussing the motivations underlying its passage, the disclosure requirements it implements, and the administrative regime established under it. Part III follows with a discussion of the constitutional implications of requiring groups engaged in lobbying to disclose the identities of individual donors, as well as the limited value of as-applied challenges for protecting First Amendment rights. Part IV discusses how the administrative procedure established under New York's PIRA could — subject to some improvements — be implemented through future legislation to provide a superior alternative to the as-applied challenge for groups seeking exemptions.

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22. See *infra* Part III.B.2.

23. See *infra* Part II; Part IV.

## II. NEW YORK'S PUBLIC INTEGRITY REFORM ACT OF 2011

### A. MOTIVATIONS UNDERLYING PIRA AND ITS CHANGES TO THE PRE-EXISTING REGIME

On August 15, 2011, New York Governor Andrew Cuomo signed PIRA into law, marking the culmination of efforts to initiate meaningful ethics reform in Albany after years of insufficiently transparent state government perceived to be plagued by corruption.<sup>24</sup> Upon its enactment, PIRA was touted by public officials<sup>25</sup> and good-government groups alike as a major improvement on the status quo in promoting ethical state government and transparency in New York politics.<sup>26</sup>

Despite the passage of another piece of ethics reform legislation only four years prior — the Public Employees Ethics Reform Act of 2007 (PEERA)<sup>27</sup> — PIRA was necessitated by deficiencies in the earlier statute, which had failed to curb legislators' unethical behavior. To be sure, PEERA had adopted a number of significant changes to New York's ethics laws, including increased penalties for violations and a reduction in the value of gifts per-

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24. See Press Release, Andrew M. Cuomo, Governor of N.Y., Governor Cuomo Signs Ethics Reform Legislation (Aug. 15, 2011), available at <http://www.governor.ny.gov/press/08152011EthicsReformLegislation>.

25. See *id.* (“[PIRA] establish[es] unprecedented transparency, strict disclosure requirements, and a strong independent monitor with broad oversight of New York State government . . . [thus] bring[ing] an aggressive new approach to returning integrity to the halls of our Capitol.”); Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Speaker Silver Statement on Assembly Passage of Historic Ethics Reform Legislation (June 13, 2011), available at <http://assembly.state.ny.us/Press/20110613/> (“Transparency and accountability are the pillars of good government, and . . . [PIRA] will strengthen our citizens' faith in their elected leaders and hold accountable those who betray the public trust.”); Press Release, N.Y. State Senate, Senate Passes Public Integrity Reform Act of 2011 (June 13, 2011), available at <http://www.nysenate.gov/press-release/senate-passes-public-integrity-reform-act-2011> (characterizing PIRA as “a big step forward to restore the public's trust in state government”).

26. See, e.g., *New York State Leaders Reach Three-Way Ethics Reform Agreement*, BRENNAN CTR. FOR JUSTICE (June 3, 2011), <http://www.brennancenter.org/press-release/new-york-state-leaders-reach-three-way-ethics-reform-agreement>. To be sure, PIRA had its fair share of critics as well. See, e.g., Mark Davies, *New York State Whiffs on Ethics Reform*, 5 ALB. GOV'T L. REV. 710, 711, 726–28 (2012); Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses*, N.Y. TIMES, June 7, 2011, at A24, available at [http://www.nytimes.com/2011/06/07/nyregion/albany-ethics-deal-has-big-changes-and-thorny-issues.html?\\_r=0](http://www.nytimes.com/2011/06/07/nyregion/albany-ethics-deal-has-big-changes-and-thorny-issues.html?_r=0).

27. LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, MEANINGFUL ETHICS REFORM FOR THE “NEW” ALBANY 1 (2011), available at <http://www.brennancenter.org/publication/meaningful-ethics-reform-new-albany>.

mited.<sup>28</sup> However, it also retained a bifurcated system of oversight in which one ethics commission, the New York Commission on Public Integrity (CPI), had jurisdiction over the state executive branch and lobbyists, while another, the Legislative Ethics Commission (LEC), composed of legislators and individuals whom they appointed, exercised exclusive jurisdiction over legislative branch officials.<sup>29</sup> The impotence of this system was highlighted by the LEC's failure to initiate any meaningful enforcement action against a single sitting state legislator over the ensuing four years, despite the conviction or indictment of no fewer than nine such legislators for crimes involving fraud or bribery during that period.<sup>30</sup>

Seeking to address the growing concern that a culture of corruption permeated the New York state legislature, PIRA took a number of steps towards remedying PEERA's flaws. In contrast to PEERA's bifurcated oversight regime that enabled legislators' unethical behavior, PIRA replaced the CPI with the newly established Joint Commission on Public Ethics (JCOPE or "the Commission"), a single ethics board with jurisdiction over all executive and legislative branch officials and employees as well as lobbyists.<sup>31</sup> As provided in PIRA, JCOPE's fourteen members are appointed by an array of state government officials from both the legislative and executive branches<sup>32</sup> and must be bipartisan in composition.<sup>33</sup> In addition to establishing JCOPE, PIRA incorporates other measures intended to target unethical behavior: it requires heightened financial disclosure statements by elected officials, seeks to promote transparency by mandating the posting

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28. *Id.*

29. *Id.* at 2.

30. *Id.* For additional information on these incidents, see *id.* at Table 1 (providing information on legislators indicted, convicted, or who pled guilty to crimes from 2003 to 2011).

31. N.Y. EXEC. LAW § 94(1) (McKinney 2010 & Supp. 2012); see also Press Release, Cuomo, *supra* note 24. Although LEC remains in existence following the passage of PIRA and retains the authority to punish legislators for non-criminal ethics violations, JCOPE is the body now responsible for conducting investigations into any such violations and issuing reports related thereto. See Hakim & Kaplan, *supra* note 26. JCOPE refers findings of criminal activity to law enforcement authorities. *Id.*

32. EXEC. § 94(2) ("[T]hree members shall be appointed by the temporary president of the senate, three . . . by the speaker of the assembly, one . . . by the minority leader of the senate, one . . . by the minority leader of the assembly, and six . . . by the governor and the lieutenant governor.").

33. *Id.* ("Of the members appointed by the governor and the lieutenant governor, at least three members shall be and shall have been for at least three years enrolled members of the major political party in which the governor is not enrolled.").

of those records online, imposes increased penalties for ethics violations, and provides for the possibility of pension forfeiture in the event that a public official is convicted of crimes related to his or her office.<sup>34</sup>

PIRA's provisions were not limited to enhancing the efficacy and enforcement of ethics laws to deter wrongdoing by public officials, however. As a part of its mission to "restor[e] the people's trust in government,"<sup>35</sup> the legislation also contained an overhaul of Article 1-A of New York's Legislative Law and the disclosure of lobbying activity it requires,<sup>36</sup> expanding the definition of "lobbying" and increasing the degree of compulsory disclosure.<sup>37</sup> Following the first of these changes, the statutory definition of "lobbying" or "lobbying activity" now includes "any attempt to influence . . . the passage or defeat of any legislation or resolution by either house of the state legislature including but not limited to the introduction or intended introduction of such legislation or resolution or approval or disapproval of any legislation by the government."<sup>38</sup> Considering the broad swath of activity falling under this definition, as well as the statutory definition of "lobbyist[s]"<sup>39</sup> who must comply with the registration and reporting requirements overseen by JCOPE,<sup>40</sup> the lobbying disclosure regime's coverage of organizations engaged in public advocacy is expansive. Pursuant to the second change, all organizations engaged in lobbying must register with JCOPE and report any related expenditures.<sup>41</sup> Additionally, certain covered organiza-

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34. Press Release, Cuomo, *supra* note 24.

35. *Id.*; see also S.B. 5679-2011, 2011 Leg. (N.Y. 2011), available at <http://open.nysenate.gov/legislation/bill/S5679-2011> (citing the "restor[ation of] public confidence in our government" as PIRA's purpose).

36. See N.Y. LEGIS. LAW § 1-a to -v (McKinney 2010 & Supp. 2012). For the legislature's declaration of purpose for enacting the original lobbying act — i.e., "to preserve and maintain the integrity of the governmental decision-making process in this state" — see LEGIS. § 1-a.

37. See Press Release, Cuomo, *supra* note 24 ("The bill expands lobbying disclosure requirements, including the disclosure by lobbyists of any 'reportable business relationships' of more than \$1,000 with public officials. It also expands the definition of lobbying to include advocacy to affect the 'introduction' of legislation or resolutions, a change that will help to ensure that all relevant lobbying activities are regulated by the new Joint Commission.").

38. N.Y. LEGIS. LAW § 1-c(e)(1) (McKinney 2010 & Supp. 2012).

39. LEGIS. § 1-c(a) ("The term 'lobbyist' shall mean every person or organization retained, employed or designated by any client to engage in lobbying."). "Client" is statutorily defined as "every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client." LEGIS. § 1-c(b).

40. LEGIS. § 1-e.

41. *Id.*

tions<sup>42</sup> must report the identities of individuals who contribute above a threshold dollar amount to them.<sup>43</sup> Whether an organization covered by this disclosure requirement qualifies as a “lobbyist” under the statutory definition by lobbying on its own behalf,<sup>44</sup> or engages in such advocacy indirectly as the “client” of lobbyist,<sup>45</sup> it is obligated to identify each individual source of funding over five thousand dollars in its reports to JCOPE.<sup>46</sup> As is the case with all information submitted to the Commission under the lobbying disclosure regime, the names and addresses of these individual sources of funding are made accessible to the public in both paper and electronic formats.<sup>47</sup>

Despite the primary motivation underlying PIRA — i.e., reducing legislative misconduct<sup>48</sup> — the legislation’s adjustments to the Lobbying Act were perhaps even more significant, especially when considered from a national perspective. At a time when anxieties about anonymous “dark money” in politics abounded,<sup>49</sup> the effect of these changes was to shine a light on 501(c)(4) organizations and other groups engaged in lobbying in New York state by requiring them to reveal their most significant sources of funding.<sup>50</sup> Melissa DeRosa, a spokeswoman for Governor Cuomo, highlighted the national significance of PIRA’s disclosure requirements: “For far too long, the world of tax-exempt groups, operating unregulated as lobbying entities, has been in need of sunshine and reform. . . . Under Governor Cuomo’s leadership, New York is the most progressive state in the nation in that pursuit. . . .”<sup>51</sup> Pursuant to the legislation’s changes, the identities of donors to covered organizations would no longer be shielded from

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42. Covered are those organizations which spend over fifty thousand dollars on lobbying during the applicable reporting period — i.e., the calendar year or the twelve-month period preceding the report filing date — and at least three percent of whose total expenditures during the same period are devoted to lobbying in New York. N.Y. LEGIS. LAW § 1-h(c)(4) (McKinney 2010 & Supp. 2012); N.Y. LEGIS. LAW § 1-j(c)(4) (McKinney 2010 & Supp. 2012).

43. See LEGIS. § 1-h; LEGIS. § 1-j.

44. See LEGIS. § 1-h(a), (c)(4).

45. See LEGIS. § 1-j(a), (c)(4).

46. LEGIS. § 1-h(c)(4); LEGIS. § 1-j(c)(4). See also N.Y. COMP. CODES R. & REGS. tit. 19, § 938.3 (2014).

47. N.Y. LEGIS. LAW § 1-s (McKinney 2010 & Supp. 2012).

48. See Hakim & Kaplan, *supra* note 26.

49. See *supra* Part I.

50. Thomas Kaplan, *Nonprofits Are Balking at Law on Disclosing Political Donors*, N.Y. TIMES, Aug. 21, 2013, at A1, available at <http://www.nytimes.com/2013/08/21/nyregion/citing-safety-nonprofits-balk-at-law-on-disclosing-donors.html?pagewanted=all>.

51. *Id.*

the public eye — if a contributor triggered PIRA’s reporting requirements, his or her name would be included in a disclosure report to JCOPE, then posted on the internet as a matter of public record.<sup>52</sup>

The source-of-funding disclosure requirement for groups engaged in lobbying is subject to an important caveat under PIRA. Under certain conditions, JCOPE may conclude that a reporting client or lobbyist need not disclose the names of individuals who trigger the requirement by contributing the threshold amount.<sup>53</sup> If JCOPE determines, “based upon a review of the relevant facts presented by the reporting client or lobbyist,” that disclosure of a source of funding “may cause harm, threats, harassment or reprisals to the source or to individuals or property affiliated with the source,” the reporting entity or individual “shall not [be] require[d]” to disclose the name of that source.<sup>54</sup> Importantly, the granting of these exemptions is not limited to an individual donor-by-donor inquiry. The statute also expressly exempts from the disclosure requirement any 501(c)(4) entity registered as a charitable organization in New York if its “primary activities concern any area of public concern determined by [JCOPE] to create a substantial likelihood that . . . [disclosure] would lead to harm, threats, harassment, or reprisals to a source of funding or to individuals or property affiliated with [it].”<sup>55</sup> The statute itself does not provide a comprehensive definition of what constitutes an “area of public concern.”<sup>56</sup> Rather, it only explicitly indicates that the term includes, but is not limited to, “civil rights and civil liberties,” and any other “area[s] of public concern” that JCOPE determines by regulation should provide a basis for exemption.<sup>57</sup> However, clarifying what types of organizations would be considered to advocate in the area of “civil rights and civil liberties,” the

52. *See id.*

53. N.Y. LEGIS. LAW § 1-h(c)(4) (McKinney 2010 & Supp. 2012); N.Y. LEGIS. LAW § 1-j(c)(4) (McKinney 2010 & Supp. 2012).

54. LEGIS. § 1-j(c)(4). Section 1-h(c)(4), applicable to those who qualify as “lobbyists” and are required to file bi-monthly reports with JCOPE, includes nearly identical language, the sole exception being its omission of “reporting *clients*” from the discretionary exemption. LEGIS. § 1-h(c)(4) (emphasis added).

55. LEGIS. § 1-h(c)(4); LEGIS. § 1-j(c)(4). Also exempt from this disclosure requirement are corporations registered as charitable organizations in New York that qualify as tax-exempt under § 501(c)(3) of the Internal Revenue Code and governmental entities. *See* LEGIS. § 1-h(c)(4); LEGIS. § 1-j(c)(4).

56. LEGIS. § 1-h(c)(4). Section 1-j(e)(4) includes identical language. LEGIS. § 1-j(c)(4).

57. LEGIS. § 1-h(c)(4). Section 1-j(c)(4) includes identical language. LEGIS. § 1-j(c)(4).

sponsors of the bill did provide some guidance, stating: “Among other issues . . . organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.”<sup>58</sup> These examples suggest that the drafters of PIRA, in balancing the benefits of transparency against the possible risks associated with disclosure of donors’ personal information, envisioned a system in which organizations advocating on behalf of a relatively wide array of causes would be able to obtain an exemption rather than forego engaging in protected advocacy.

In addition to the discretion it may exercise in defining what constitute proper grounds for exemption from source disclosure, JCOPE also has the regulatory authority under PIRA to define the procedure through which exemptions may be obtained.<sup>59</sup> In July 2012, JCOPE released its first draft of regulations giving shape to the exemption administration procedure.<sup>60</sup> Among other things, the regulations set forth the burden a reporting organization would be required to carry to obtain an exemption,<sup>61</sup> as well

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58. N.Y. SEN. DEAN G. SKELOS, MEMORANDUM IN SUPPORT OF S. 5679, 2011 Leg., 234 Reg. Sess., at § 2B, (N.Y. 2011), *available at* <http://open.nysenate.gov/legislation/bill/S5679-2011>.

59. LEGIS. § 1-h(c)(4) (“The joint commission on public ethics shall promulgate regulations to implement these requirements.”); *see also* LEGIS. § 1-j(c)(4) (same).

60. Proposed Source of Funding Regulations, N.Y. COMP. CODES R. & REGS. tit. 19, ch. XX, pt. 938 (proposed July 31, 2012), *available at* <http://www.jcope.ny.gov/2012%2007%2030%20Draft%20Source%20Funding%20Regulations%20for%20Web.pdf>.

61. N.Y. COMP. CODES R. & REGS. tit. 19, § 938.4 (2012). At an April 2013 meeting, JCOPE modified this burden. *See* JOINT COMM’N ON PUB. ETHICS, MINUTES ON THE PUBLIC SESSION OF THE APRIL 30, 2013 MEETING OF THE JOINT COMMISSION ON PUB. ETHICS 6 (2013), *available at* <http://www.jcope.ny.gov/public/minutes/Final%20Public%20Session%20Minutes%204%2030%2013.pdf>. Following JCOPE’s amendments to the regulations, subpart b of § 938.4 provided, in relevant part:

The Commission shall grant an exemption to disclose *all* Sources of Contributions to a Client Filer, if (i) the Client Filer has exempt status under I.R.C. § 501(c)(4); and (ii) the Client Filer shows that its primary activities involve areas of public concern that create a *reasonable probability* that disclosure of its Source(s) will cause harm, threats, harassment or reprisals to the Source(s) or individuals or property affiliated with the Source(s).

N.Y. COMP. CODES R. & REGS. tit. 19, § 938.4(b) (2013) (emphasis added) (amendments effective May 17, 2013); *see also* 35 N.Y. Reg. 20 (June 5, 2013). Similarly, subpart a was amended to provide the possibility of exemption for a single source of a contribution “if the Client Filer show[ed] by *clear and convincing evidence* that disclosure of the Source w[ould] cause a *reasonable probability* of harm, threats, harassment or reprisals to the Source or individuals or property affiliated with the Source.” Tit. 19, § 938.4(a) (emphasis added); *see also* 35 N.Y. Reg. 20 (June 5, 2013).

as several objective evidentiary criteria to guide the Commission in determining whether that burden has been met.<sup>62</sup>

## B. EARLY ADMINISTRATION OF THE EXEMPTION PROCESS

Despite the foresight of PIRA's drafters in providing an affirmative basis for exemption from the law's donor disclosure requirements in certain circumstances, early implementation of the regime established under the law has been marked by some controversy. Indeed, the administration of exemptions itself has been a heated point of contention during JCOPE's infancy as an institution.<sup>63</sup>

In June 2013, the Commission announced the first exemption from the funding-source disclosure requirement: NARAL, a pro-choice advocacy organization that is among the most active lobbying groups in New York, would officially not be required to disclose the names of any individuals who contributed to its lobbying efforts.<sup>64</sup> Based on general evidence of past threats and occasional violence directed at abortion providers,<sup>65</sup> as well as ominous communications NARAL itself had received,<sup>66</sup> the organization was a good candidate for exemption under JCOPE's regulations

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62. Tit. 19, § 938.4. Such factors include, but are not limited to:

- (i) Specific evidence of past or present harm, threats, harassment or reprisals to the Source(s) or Client Filer or individuals or property affiliated with the Source(s) or Client Filer.
- (ii) The severity, number of incidents, and duration of past or present harm, threats, harassment or reprisals of the Source(s) or Client Filer or individuals or property affiliated with the Source(s) or Client Filer.
- (iii) A pattern of threats or manifestations of public hostility against the Source(s) or Client Filer or individuals or property affiliated with the Source(s) or Client Filer.
- (iv) Evidence of harm, threats, harassment or reprisals directed against organizations or individuals holding views similar to those of the Source(s) or Client Filer.
- (v) The impact of disclosure on the ability of the Source(s) or Client Filer to maintain ordinary business operations and the extent of resulting economic harm.

*Id.*

63. See, e.g., Kaplan, *supra* note 50.

64. Rick Karlin, *Pro-Choice Lobbyist Cites Danger to Donors in Winning Exemption*, TIMES UNION (June 26, 2011, 10:56 PM), <http://www.timesunion.com/local/article/Pro-choice-lobbyist-cites-danger-to-donors-in-4624792.php>.

65. *Id.*

66. See Kaplan, *supra* note 50 ("Ms. Miller [president of NARAL Pro-Choice New York] said the group regularly received disturbing handwritten letters, and once had a menacing video posted on its Facebook page by a man who was later convicted of assisting in what he thought was a plot to bomb an abortion clinic.")

as they then stood. Nevertheless, the decision to exempt NARAL prompted two responses almost immediately. First, based on the organization's high-profile support of Governor Cuomo and other Democrats, Republicans alleged political favoritism, calling for a reevaluation of the exemption administration process.<sup>67</sup> For those critical of JCOPE, the fact that its determination had been reached behind closed doors lent further credence to the perception that NARAL's exemption had been the result of inappropriate political considerations, leading them to demand more transparent procedures.<sup>68</sup> The second development was that four more organizations — including two more pro-choice groups, a conservative social issues group, and the New York Civil Liberties Union — filed for exemptions.<sup>69</sup> In light of the controversy now engulfing it, however, JCOPE chose to put its consideration of the applicants on hold, and to cease exempting groups from the donor disclosure requirements until it could undertake a comprehensive review of the application process.<sup>70</sup>

Two months later, JCOPE amended the regulations defining the exemption administration procedure, implementing two significant changes.<sup>71</sup> First, it heightened the burden of proof that groups seeking to shield their donors from disclosure must meet, requiring them to demonstrate a “substantial likelihood” — rather than a “reasonable probability” — that disclosure will lead to the type of “harm, threats, harassment or reprisal” which exemption is meant to prevent.<sup>72</sup> Second, it effectively flipped a re-

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67. *Id.*

68. See Letter from Dean G. Skelos, Republican Conference Leader, N.Y. State Senate, to Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n. on Pub. Ethics (Aug. 1, 2013), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/759464/letter-from-dean-g-skelos-to-the-joint.pdf> (emphasizing the opaque manner in which NARAL's exemption had been granted and the organization's involvement in Democratic political causes). Even members of JCOPE were critical of the lack of transparency associated with the exemption administration process. See Kaplan, *supra* note 50. For example, David Renzi, a Republican appointee to the Commission, argued, “[W]hat we're talking about is potentially tens of millions of dollars to be exempted from review. . . . We should have that debate publicly.” *Id.*

69. See Kaplan, *supra* note 50.

70. Jimmy Vielkind, *Exemption Rules Under Review*, TIMES UNION (July 30, 2013, 9:46 PM), <http://www.timesunion.com/local/article/Exemption-rules-under-review-4696744.php>.

71. James M. Odatto, *JCOPE Disclosure Exemptions Get Clarity*, CAPITOL CONFIDENTIAL (Sept. 24, 2013, 12:02 PM), <http://blog.timesunion.com/capitol/archives/195519/jcope-disclosure-exemptions-get-clarity/>.

72. N.Y. COMP. CODES R. & REGS. tit. 19, § 938.4 (2013) (amendments effective Oct. 8, 2013).

quirement that materials submitted as an application for exemption are kept confidential, transforming it into a presumption that such information will be publicly disclosed<sup>73</sup> except in certain limited cases.<sup>74</sup> JCOPE justified these modifications as needed to clarify the application process for exemptions and to ensure that the proper balance was struck between PIRA's goal of transparency and the preservation of donor privacy and safety.<sup>75</sup> Following these amendments, groups that had previously submitted applications re-applied, some doing so under protest against JCOPE's changes.<sup>76</sup>

On January 28, 2014, after months of delay in reaching a determination on the outstanding applications, JCOPE concluded that none of the groups which applied following NARAL's exemption would be permitted to keep their donors' identities secret.<sup>77</sup> This came as a surprise to many observers, considering two of the four groups, Family Planning Advocates of New York State and the New York Women's Equality Coalition, were pro-choice advo-

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73. Compare N.Y. COMP. CODES R. & REGS. tit. 19, § 938.8 (2012) ("The Commission shall keep confidential all materials submitted by a Client Filer in support of its application for an exemption or in support of its appeal.") with N.Y. COMP. CODES R. & REGS. tit. 19, § 938.8 (2013) (amendments effective Oct. 8, 2013) ("The Commission shall publicly disclose the fact that a Client Filer has submitted one or more applications for an exemption or that one or more of a Client Filer's requests for an exemption has been granted or denied. Information submitted in connection with an application for exemption or in support of an appeal from a denial of an exemption shall be publicly disclosed.")

74. See N.Y. COMP. CODES R. & REGS. tit. 19, § 938.8 (2013) (amendments effective Oct. 8, 2013) ("The Commission may, in its discretion, grant a request from a Client Filer to keep confidential certain exemption-related information when particular circumstances merit confidential treatment of such information, including, but not limited to, an ongoing investigation by a governmental body or an unwarranted invasion of personal privacy.")

75. Joseph Spector, *N.Y. Ethics Panel Toughens Rules To Shield Political Donors*, THE JOURNAL NEWS (Sep. 24, 2013, 9:11 PM), <http://www.lohud.com/article/20130924/NEWS/309240040>. JCOPE board member Ellen Yaroshefsky's statement reflected the Commission's goal of achieving this balancing act: "Presumptively, these should be a matter of public record. There has to be, though, I think, some exception made." *Id.*

76. See Letter from Donna Lieberman, Exec. Dir., N.Y. Civil Liberties Union, to Robert Cohen, Special Counsel and Dir. Of Ethics and Lobbying Compliance, N.Y. Joint Comm'n on Pub. Ethics (Dec. 3, 2013) (on file with author) ("In requesting this exemption from the source-of-funding disclosure provisions, we state our objection to the amended standard by which the Commission will determine eligibility for such an exemption."); Letter from Rev. Jason J. McGuire, Exec. Dir., Albany Update, to N.Y. Joint Comm'n on Pub. Ethics (Oct 23, 2013) ("Because of our concerns about the exemption application process, and because of our continuing objection to the fact that one organization has been granted an exemption under different standards than the standards being applied to us, NYCF respectfully submits this application under protest.")

77. Rick Karlin, *JCOPE Reverses Course on Donor Secrecy*, CAPITOL CONFIDENTIAL (Jan. 28, 2014, 3:16 PM), <http://blog.timesunion.com/capitol/archives/204584/jcope-reverses-course-on-donor-secrecy/>.

cacy organizations that appeared quite similar to NARAL.<sup>78</sup> In addition to rejecting the pending applications, JCOPE announced, the terms of NARAL's exemption had been amended.<sup>79</sup> Daniel Horwitz, Chairman of JCOPE, indicated that in light of the Commission's amendments to its procedures, NARAL's exemption would expire in July 2014, 18 months earlier than previously stipulated, at which time the organization could re-apply.<sup>80</sup> The commissioners were not unanimous in reaching these decisions, however: several members voiced disagreement with the Commission's conclusions, especially with respect to its resolution of the pending applications.<sup>81</sup> Renee Roth, one of the three commissioners who supported granting additional exemptions, expressed her views bluntly, saying, "I don't know what kind of reasons we would give for denying this."<sup>82</sup> The dissenting commissioners' concerns spilled over to JCOPE's next public meeting when the Commission discussed the content of the official rejection notices it would send to the four groups.<sup>83</sup> Again, Commissioner Roth emphasized the need to articulate with precision the grounds on which the exemptions were denied.<sup>84</sup> In response, Chairman Horwitz maintained that the record was sufficient to develop rejection messages, but indicated that he would allow those commissioners who wished to write a dissent for inclusion in the official notice to do so.<sup>85</sup>

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78. *Id.* The other two groups denied exemptions, alluded to above, *see supra* p. 14, were New Yorkers for Constitutional Freedoms, a conservative social issues group, and the New York Civil Liberties Union. *Id.*

79. *Id.*

80. *E.g.*, Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n on Pub. Ethics, Statement Read by Joint Comm'n Chairman Daniel J. Horwitz at the Jan. 28, 2014 Comm'n Meeting (Jan. 28, 2014), <http://www.jcope.ny.gov/public/2014/StatementNaral.pdf>; Casey Seiler, *Source-of-Funding Exemptions Continue to Roil JCOPE*, CAPITOL CONFIDENTIAL (Feb. 18, 2014, 2:34 PM), <http://blog.timesunion.com/capitol/archives/206442/source-of-funding-exemptions-continue-to-roil-jcope/>.

81. Karlin, *supra* note 77. In addition to Roth, Commissioners Paul Casteleiro and Marvin Jacob expressed disagreement with the rest of JCOPE. *Id.*

82. *Id.*

83. Seiler, *supra* note 80.

84. *Id.* ("I think we should have an open discussion and I think we should have, point-by-point, what the organization has said [in its application] and what the statute says. . ."). Not one to mince words, Roth went on to characterize the manner in which the applications had been handled as "an embarrassment to us." *Id.*

85. *Id.* "The law requires that the commission set forth in writing the reasons for denial — it technically doesn't provide for a dissent," Horwitz acknowledged. *Id.* He went on to conclude, however, that "given the discussion that we've had to date on this and the expressed desire by a number of commissioners to write a dissent, I think in the spirit of

Despite this concession by Horwitz, the dissenting commissioners' concerns were ultimately validated, as JCOPE's official rejection notices, circulated in April 2014, did little to clarify the grounds for exemption from PIRA's disclosure requirements. Each notice concluded in a cursory fashion that the evidence presented by the groups was "too remote and speculative to establish [the] substantial likelihood of harm" necessary to warrant exemption, without assessing any of the criteria provided under the regulations for evaluating exemption applications.<sup>86</sup> Undeterred by the denials, each of the four groups appealed the Commission majority's decision<sup>87</sup> in accordance with JCOPE's regulations.<sup>88</sup>

On July 11, 2014, the judicial hearing officer presiding over the appeals issued a final decision for each, reversing all four of the Commission's denials.<sup>89</sup> Judicial Hearing Officer George Pratt held that, "when evaluated realistically," the "uncontroverted and unchallenged" evidence presented by each group<sup>90</sup> sat-

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disclosure and the fullness of the record, that dissent . . . is warranted, if folks would like a dissent." *Id.*

86. Letter from Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n on Pub. Ethics, to Donna Lieberman, Exec. Dir., N.Y. Civil Liberties Union (Apr. 4, 2014) (on file with author); Letter from Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n on Pub. Ethics, to Ronnie Pawelko, Counsel, N.Y. Women's Equality Coal. (Apr. 4, 2014) (on file with author); Letter from Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n on Pub. Ethics, to Rev. Jason McGuire, New Yorkers for Constitutional Freedoms (Apr. 4, 2014) (on file with author); Letter from Daniel J. Horwitz, Chairman, N.Y. Joint Comm'n on Pub. Ethics, to Ronnie Pawelko, Counsel, Family Planning Advocates of N.Y. State (Apr. 4, 2014) (on file with author); see *supra* note 62 (setting forth factors). All correspondence between JCOPE and the parties who sought exemption is accessible through the Commission's online source-of-funding disclosure database. See *Source of Funding Disclosures*, N.Y. JOINT COMM'N ON PUB. ETHICS, [http://www.jcope.ny.gov/source\\_funding/chart.html](http://www.jcope.ny.gov/source_funding/chart.html) (last visited March 10, 2015).

87. Letter from Arthur Eisenberg, Legal Dir., N.Y. Civil Liberties Union, to Rob Cohen, Special Counsel, N.Y. Joint Comm'n on Pub. Ethics (Apr. 24, 2014) (on file with author); Letter from James D. Featherstonhaugh, Featherstonhaugh, Wiley & Clyde, LLP, representing Family Planning Advocates of N.Y. State, to Letizia Tagliafierro, Exec. Dir., N.Y. Joint Comm'n on Pub. Ethics (Apr. 25, 2014) (on file with author); Letter from Rev. Jason J. McGuire, Exec. Dir., New Yorkers for Constitutional Freedoms, to N.Y. Joint Comm'n on Pub. Ethics (Apr. 25, 2014) (on file with author).

88. N.Y. COMP. CODES R. & REGS. tit. 19, § 938.6 (2014).

89. Casey Seiler, *JCOPE Donor-Disclosure Exemption Rejections are Overturned*, CAPITOL CONFIDENTIAL (July 18, 2014, 2:44 PM), <http://blog.timesunion.com/capitol/archives/217080/jcope-donor-disclosure-exemption-rejections-are-overturned/>.

90. In applying for exemption, both pro-choice groups, the New York Women's Equality Commission and Family Planning Advocates of New York State, had relied heavily upon incidents involving threats or violence directed at other organizations and individuals supportive of abortion rights. Family Planning Advocates of N.Y. State, 3-4 (N.Y. Joint Comm'n on Pub. Ethics, July 11, 2014) (Pratt, Judicial Hearing Officer) (on file with author).

isfied the regulations' criteria for exemptions,<sup>91</sup> and demonstrated the requisite "substantial likelihood of harm, threats, harassment [and] reprisals to the [groups] and to individuals and property affiliated with the[m]."<sup>92</sup> Accordingly, Pratt concluded, JCOPE's findings that the applications for exemption "did not present 'sufficient evidence' and that the 'evidence presented was too remote and speculative' were clearly erroneous."<sup>93</sup> In Judicial Hearing Officer Pratt's estimation, this result was not only consistent with the legislature's intent in passing PIRA,<sup>94</sup> but would also accord the proper amount of deference to the First Amendment right of citizens "to express their views on controversial issues by providing financial support to organizations that further their favored causes."<sup>95</sup>

Accepting the determinations of the Judicial Hearing Officer, JCOPE issued letters to each of the four groups on July 29, 2014, confirming their exemptions from the source-of-funding disclosure requirements through the end of the year, and indicating the manner in which they could seek an extension of their exemption for the following year.<sup>96</sup> Less than a month later, the Commis-

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N.Y. Women's Equality Coal., 3-4 (N.Y. Joint Comm'n on Pub. Ethics, July 11, 2014) (Pratt, Judicial Hearing Officer) (on file with author). New Yorkers for Constitutional Freedoms presented some evidence of threats and harassment to its staff, but mainly relied upon incidents of threats or violence directed at organizations and individuals espousing pro-life views or opposition to same-sex marriage. New Yorkers for Constitutional Freedoms, 3-4 (N.Y. Joint Comm'n on Pub. Ethics, July 11, 2014) (Pratt, Judicial Hearing Officer) (on file with author). The New York Civil Liberties Union's application set forth evidence of threats and harassment directed at it and affiliates in other states arising from the type of advocacy they pursue. N.Y. Civil Liberties Union, 3-5 (N.Y. Joint Comm'n on Pub. Ethics, July 11, 2014) (on file with author). These administrative decisions are accessible through the Commission's online source-of-funding disclosure database. See *Source of Funding Disclosures*, N.Y. JOINT COMM'N ON PUB. ETHICS, [http://www.jcope.ny.gov/source\\_funding/chart.html](http://www.jcope.ny.gov/source_funding/chart.html) (last visited March 10, 2015).

91. See *supra* note 62 and accompanying text (providing the exemption criteria). The judicial hearing officer found that three of the groups had met at least two of the criteria, while the fourth had met all four criteria.

92. *Family Planning Advocates of N.Y. State* at 7-8; *N.Y. Civil Liberties Union* at 8-9; *New Yorkers for Constitutional Freedoms* at 7-8; *N.Y. Women's Equality Coal.* at 7-8.

93. *E.g.*, *Family Planning Advocates of N.Y. State* at 8.

94. *E.g.*, *id.* at 8-9.

95. *E.g.*, *id.* at 9.

96. Letter from Letizia Talifierro, Exec. Dir., N.Y. Joint Comm'n on Pub. Ethics, to James D. Featherstonhaugh, Featherstonhaugh, Wiley & Clyne, LLP, representing Family Planning Advocates of N.Y. State (July 29, 2014) (on file with author); Letter from Letizia Talifierro, Exec. Dir., N.Y. Joint Comm'n on Pub. Ethics, to James D. Featherstonhaugh, Featherstonhaugh, Wiley & Clyne, LLP, representing N.Y. Women's Equality Coal. (July 29, 2014) (on file with author); Letter from Letizia Talifierro, Exec. Dir., N.Y. Joint Comm'n on Pub. Ethics, to Donna Lieberman, Exec. Dir., N.Y. Civil Liberties Union (July 29, 2014) (on file with author); Letter from Letizia Talifierro, Exec. Dir., N.Y. Joint

sion granted NARAL's application for an extension of its previously reduced exemption period — as with the other now-exempt groups, NARAL's exemption would continue through the remainder of the calendar year.<sup>97</sup>

While the relatively brief and, to put it mildly, rocky institutional history of JCOPE counsels against making sweeping predictions about the manner in which the Commission will approach future exemption determinations, it provides some insight on the potential value of, and pitfalls associated with, an administrative procedure as an alternative to as-applied challenges to disclosure laws. After considering the constitutional implications of mandating donor disclosure for organizations engaged in lobbying in Part III, Part IV examines the possible benefits of the administrative alternative and how it should be improved before implementation elsewhere.

### III. CONSTITUTIONAL IMPLICATIONS OF LOBBYING DONOR DISCLOSURE

The spectrum of activities that might fall under the term “lobbying” — perhaps broadly defined as direct or indirect advocacy efforts intended to influence public officials in shaping public policy<sup>98</sup> — implicate several fundamental rights protected by the First Amendment, including the freedom of speech, freedom of association, and the right to petition the government.<sup>99</sup> Disclosure requirements of the sort included in PIRA may burden these constitutionally protected rights, even if they are considered a less restrictive means of regulating political speech than other approaches would be. This Part focuses on the constitutional implications of PIRA's source-of-funding disclosure requirement, considering the two routes by which such a mandate could be con-

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Comm'n on Pub. Ethics, to Rev. Jason McGuire, Exec. Dir., New Yorkers for Constitutional Freedoms (July 29, 2014) (on file with author).

97. Letter from Letizia Talifierro, Exec. Dir., N.Y. Joint Comm'n on Pub. Ethics, to Joshua Oppenheimer, Greenberg Traurig LLP, representing NARAL Pro-Choice New York (Aug. 19, 2014) (on file with author).

98. Black's Law Dictionary provides three alternative definitions of the verb, “lobby”: (1) “To talk with or curry favor with a legislator, usu. repeatedly or frequently, in an attempt to influence the legislator's vote”; (2) “To support or oppose (a measure) by working to influence a legislator's vote”; and (3) “To try to influence (a decision-maker).” BLACK'S LAW DICTIONARY 1080 (9th ed. 2009).

99. See, e.g., JACK MASKELL, CONG. RESEARCH SERV., RL33794, GRASSROOTS LOBBYING: CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS 3 n.9 (2008).

tested: through a facial challenge, asserting that the law is unconstitutional in every instance, and through an as-applied challenge, seeking a judicial determination that the law is unconstitutional as applied to a specific group.

## A. FACIAL CHALLENGES

### 1. *Lobbying Disclosure Laws*

Based on the privileged place of lobbying activity under the Bill of Rights,<sup>100</sup> the relative dearth of Supreme Court decisions concerning laws regulating lobbying is perhaps surprising.<sup>101</sup> Although the limited case law that specifically deals with lobbying regulation suggests that laws requiring 501(c)(4) organizations and other groups engaged in lobbying to disclose individual donors' identities would pass constitutional muster, certain features of those decisions — in particular, their characterization of the substantive justifications for lobbying disclosure — might counsel hesitation in considering them dispositive without taking a wider view of the Court's disclosure jurisprudence.<sup>102</sup>

Among the Supreme Court decisions issued over the past century that have dealt with the protection owed to lobbying under the First Amendment,<sup>103</sup> *United States v. Harriss*, a case decided more than sixty years ago, has proven particularly significant in the judicial treatment of lobbying disclosure regimes.<sup>104</sup> In *Harriss*, the Supreme Court considered the constitutionality of the Federal Regulation of Lobbying Act of 1946.<sup>105</sup> Defendants in the

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100. U.S. CONST. amend. I (shielding from government abridgement the right of the people “to petition the Government for a redress of grievances”); BLACK’S LAW DICTIONARY 1523 (9th ed. 2009) (defining “right to petition” as “[t]he constitutional right — guaranteed by the First Amendment — of the people to make formal requests to the government, as by lobbying or writing letters to public officials”).

101. See Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 468 (2012) (“The Supreme Court has not often scrutinized lobbying regulation, although laws governing lobbying practices have come under increased scrutiny in lower courts after *Citizens United*.”).

102. See *infra* pp. 25–28.

103. See, e.g., *United States v. Rumely*, 345 U.S. 41 (1953); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

104. 347 U.S. 612 (1954). *Harriss* has served as the foundation of subsequent decisions upholding the constitutionality of lobbying disclosure laws in general, as well as those specifically intended to regulate “grassroots” lobbying efforts. William R. Maurer, *The Regulation of Grassroots Lobbying*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 73, 74 (2010).

105. *Harriss*, 347 U.S. at 617.

case, who had been hired to influence the passage of legislation that would affect agricultural commodities' prices, were charged with violating the Act's provisions that imposed disclosure requirements on some lobbyists.<sup>106</sup> After narrowly construing the Act's provisions to avoid constitutional infirmities on vagueness grounds, the Court concluded that they did not "violate [any] freedoms guaranteed by the First Amendment."<sup>107</sup> Although it did not explicitly identify the standard of review under which it analyzed the disclosure requirements, the Court stressed the limited scope of the measures<sup>108</sup> and the important goal they sought to further: "maintaining the integrity of a basic governmental process" by ensuring the informed production of legislation.<sup>109</sup> With this implicit application of an unidentified means-ends test to the Act, the Court concluded that any burden on First Amendment rights would "at most be an indirect one resulting from self-censorship . . . too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and . . . designed to safeguard a vital national interest."<sup>110</sup> The Court's assessment of the Act in this deferential manner would foreshadow modern courts' treatment of disclosure laws applicable to other forms of political activity under the First Amendment.<sup>111</sup>

Since *Harriss*, the Supreme Court has not revisited the constitutionality of lobbying disclosure laws, let alone those that might require revealing the identities of individual donors. Within the past five years, however, at least one federal circuit court has provided some direction on how the analysis of such a statute's constitutionality might be conducted. In *National Association of Manufacturers v. Taylor*, the D.C. Circuit considered both facial and as-applied challenges under the First Amendment to Section 207 of the Honest Leadership and Open Government Act (HLOGA),<sup>112</sup> a provision whose purpose and effects are analogous to those of PIRA. According to its sponsors, Section 207 was in-

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106. *Id.* at 614–17.

107. *Id.* at 625.

108. *Id.* ("Toward that end, Congress has *not sought to prohibit these pressures*. It has *merely* provided for a *modicum* of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants *only* to know who is being hired, who is putting up the money, and how much.") (emphasis added).

109. *See id.*

110. *Id.*

111. *See infra* Part III.A.2.

112. 582 F.3d 1 (D.C. Cir. 2009).

tended to “close a loophole that ha[d] allowed so-called ‘stealth coalitions,’ often with innocuous-sounding names, to operate without identifying the interests engaged in the lobbying activities.”<sup>113</sup> HLOGA’s drafters sought to achieve this goal by expanding the scope of the reporting and registration requirements enacted under the Lobbying Disclosure Act of 1995 (LDA),<sup>114</sup> which had already “partially pierce[d] the veil of coalitions and associations that lobb[ie]d Congress on behalf of their members.”<sup>115</sup> By lowering the monetary and level-of participation thresholds necessary to trigger disclosure of organizations other than clients, Section 207 magnified the light shined on coalitions and associations lobbying Congress, revealing the organizations within that sought to shape public policy anonymously.<sup>116</sup> For the National Association of Manufacturers (NAM), whose policy was to keep its membership list of some 11,000 manufacturers nationwide confidential, this expansion proved problematic.<sup>117</sup> Now that the law required disclosure of any organization “that actively participates in the planning, supervision, or control of lobbying activities,” it

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113. 153 Cong. Rec. S10709 (daily ed. Aug. 2, 2007) (statement of Sens. Feinstein, Lieberman, and Reid). See also 153 Cong. Rec. S260 (daily ed. Jan. 9, 2007) (statement of Sen. Lieberman) (“[HLOGA would] remove the cloak obscuring so-called stealth lobbying campaigns which occur when a group of individuals, companies, unions, or associations ban[d] together to form a lobbying coalition. These coalitions frequently have innocent sounding names . . . [.] [b]ut in fact, they lobby on a range of issues that could never be identified by the name of the coalition.”); 153 Cong. Rec. H5743 (daily ed. May 24, 2007) (statement of Rep. Doggett) (stating that a “stealth lobbyist” is a “lobbyist for an unpopular cause” that “instead of indicating who they actually represent, . . . claim they represent a ‘coalition’ . . . and avoid any indication of the true parties in interest”).

114. Under the LDA, covered lobbyists (or their employers) are required to register with the Secretary of the Senate and Clerk of the House, providing, *inter alia*, identifying information on themselves and each of their clients. 2 U.S.C. § 1603(a)(1)–(2), (b)(1)–(2) (2012).

115. *Taylor*, 582 F.3d at 7. Although statutory language codified pursuant to the LDA expressly limits the scope of who qualifies as a reportable “client,” 2 U.S.C. § 1602(2) (2012) (“[I]n the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members.”), the Act also required registrants to disclose the “name, address, and principal place of business of any organization, *other than the client*, that (A) contributes more than \$10,000 toward the lobbying activities of the registrant in a semiannual period . . . ; and (B) in whole or in major part plans, supervises, or controls such lobbying activities.” LDA § 4(b)(3), 109 Stat. at 696 (codified at 2 U.S.C. § 1603(b)(3) (1995)) (emphasis added).

116. Pursuant to HLOGA, 2 U.S.C. § 1603(b) now requires that each registration contain (and that each quarterly report update) “the name, address, and principal place of business of any organization, other than the client, that — (A) contributes more than \$5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and (B) *actively participates* in the planning, supervision, or control of such lobbying activities. . . .” *Id.* (emphasis added).

117. *Taylor*, 582 F.3d at 8.

would be obligated to reveal many of its members.<sup>118</sup> NAM sued to enjoin enforcement of the law, asserting, *inter alia*, that the effect of HLOGA's provisions would be to "compromise [its members'] First Amendment right to express their opinions in the legislative process."<sup>119</sup>

With respect to NAM's facial challenge, the D.C. Circuit concluded that HLOGA's strengthening of the LDA's coalition disclosure provision did not violate the First Amendment.<sup>120</sup> Applying the first element of strict scrutiny analysis,<sup>121</sup> the D.C. Circuit concluded that the government's interest proffered in support of Section 207 could properly be characterized as "compelling."<sup>122</sup> Taking into account statutorily enacted congressional findings, the "vital national interest" the Supreme Court had identified in *Harriss* half a century earlier, and subsequent landmark decisions concerning disclosure laws applicable to other forms of political speech,<sup>123</sup> the court found that the informational interest furthered by the government withstood strict scrutiny.<sup>124</sup> Turning to whether the statute "effectively advanced" and was "narrowly tailored" to the governmental interest asserted, the court concluded that Section 207 was constitutionally satisfactory.<sup>125</sup> Noting that "neither a perfect nor even the best available fit between means and ends is required," the court disposed of NAM's arguments that HLOGA's provisions were both under-inclusive and over-inclusive.<sup>126</sup> Considering Congress' choice to forward its informational interest through disclosure, a far less restrictive

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118. *Id.*

119. Press Release, Nat'l Assn. of Mfrs., NAM Challenges Constitutionality of Member Disclosure Law (Feb. 6, 2008), available at <http://www.nam.org/Communications/Articles/2008/02/NAMChallengesConstitutionalityofMemberDisclosureLaw.aspx>.

120. *Taylor*, 582 F.3d at 20.

121. Although the applicable standard of review was a significant point of disagreement between the parties, the court began its analysis of Section 207 by indicating that whether strict scrutiny or some "lesser-but-still-heightened form of scrutiny" applied in this case was beside the point: since the statute satisfied the requirements of strict scrutiny, there was "no need to decide the issue of which test to apply." *Id.* at 10–11 (quoting *Blount v. SEC*, 61 F.3d 938, 943 (D.C. Cir. 1995) (internal quotations omitted)).

122. *Id.* at 16.

123. *See id.* at 13 (citing *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976)).

124. *Id.* at 12–16. The court cited language from *Harriss* in formulating the scope of this interest: "[I]t is plain that the government has a compelling interest in providing the public and its elected representatives with information regarding 'who is being hired, who is putting up the money, and how much' they are spending to influence public officials." *Id.* at 15 (quoting *United States v. Harriss*, 347 U.S. 612, 625 (1954)) (emphasis added).

125. *Id.* at 18–20.

126. *Id.* at 18.

means than “direct regulation of lobbying,” the court likewise determined that Section 207 satisfied the narrow-tailoring requirement.<sup>127</sup>

Though the Supreme Court’s decision in *Harriss* and the D.C. Circuit’s in *Taylor* shed some light on the likely result of a facial challenge to a law requiring groups engaged in lobbying to disclose the identities of individual donors, certain aspects of each opinion’s analysis suggest that they would not necessarily be dispositive on the issue.<sup>128</sup> In particular, the opinions’ characterization of the substantive justifications for lobbying disclosure would complicate their application. Broadly speaking, the government interest supporting the disclosure mandates in each case was based upon the informational benefits of such requirements.<sup>129</sup> However, there are at least three distinct informational benefits that might justify lobbying disclosure, distinguishable on the basis of the disclosed information’s intended audience.<sup>130</sup>

While donor disclosure requirements could be justified on the basis of the information they provide to competing groups or the public at large — two of the potential audiences — and the bene-

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127. *Id.* at 19.

128. This is not to say that a court assessing such a requirement would not take *Harriss* or *Taylor* into account in its analysis. Based on the relatively limited Supreme Court precedent on lobbying disclosure requirements, the author suspects that they would. Cf. Elizabeth Garrett, Ronald M. Levin, & Theodore Ruger, *Constitutional Issues Raised by the Lobbying Disclosure Act*, in THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 198 (4th ed. 2009) (“Although a half-century old, *Harriss* would still be important to any evaluation of the constitutionality of the LDA.”). Indeed, the Supreme Court’s continued willingness to cite the *Harriss* decision indicates that it is still considered persuasive precedent on disclosure issues in general. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010) (“The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . [For example,] the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.”) (citing *Harriss*, 347 U.S. at 625). That does not mean, however, that *Harriss* would control a court’s analysis without a more expansive consideration of precedent on disclosure laws in other contexts. See Garrett, Levin, & Ruger, *supra*, at 198 (suggesting that *Harriss* would not entirely control analysis of the federal Lobbying Disclosure Act’s provisions because of its “dated” reasoning). My discussion of *Harriss* and *Taylor* here is merely intended to sketch out why a court considering donor disclosure requirements to lobbying organizations would be well advised to examine judicial treatment of disclosure mandates in other contexts, discussed in Part III.A.2 *infra*.

129. See *Harriss*, 347 U.S. at 625–26; *Taylor*, 582 F.3d at 15.

130. Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 116–17 (2008) (“Disclosure of the amount of money spent on lobbying, the sources of a lobbyist’s funds, and the issues lobbied can inform three groups: the legislators lobbied, competing interest groups, and the general public.”).

fits derived therefrom,<sup>131</sup> the government interest *Harriss* identified to uphold the Federal Regulation of Lobbying Act's disclosure provisions was limited to informational benefits that inure to legislators — the third potential audience — as a result of disclosure.<sup>132</sup> Thus, while a law resembling New York's PIRA could conceivably benefit legislators by providing them with information on “who is being hired, who is putting up the money, and how much,”<sup>133</sup> the government would have to articulate its justification for the statute on that ground for *Harriss* to truly control. Most modern lobbying disclosure statutes are not justified in this manner, however; instead, they are predominately founded upon the distinct government interest in informing the general public.<sup>134</sup> The D.C. Circuit may have been correct in concluding in *Taylor* that “nothing has transpired in the last half century to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court

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131. By informing various interest groups, lobbying disclosure may “promote the goal of fair competition . . . in the familiar Madisonian fashion of allowing factions to check factions in the service of the public good.” *Id.* at 117 (citing Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 543 (2007)) (internal quotation marks omitted). In providing the general public with valuable information, lobbying disclosure may “enhance public understanding of how government works and what factors affect government decisions in general, as well as provide an awareness of which groups are engaged in influencing particular policies and which policies are being pushed.” *Id.* at 118. Requiring disclosure of the identities of significant donors to organizations engaged in lobbying would seem to further either of these interests effectively.

132. See *Harriss*, 347 U.S. at 625 (discussing the informational benefits of lobbying disclosure exclusively from the legislator's perspective, and concluding that striking such measures down as unconstitutional would be to deny Congress “the power of self-protection”); Garrett, Levin, & Ruger, *supra* note 128, at 198.

133. *Harriss*, 347 U.S. at 625; see also Briffault, *supra* note 130, at 117 (“While it seems implausible that in many cases elected officials would not know which interests a lobbyist is representing when she makes arguments for or against a particular bill or amendment, disclosure can give legislators a better sense of the scope of the interests implicated by a particular measure, the positions of the contending groups, and the extent and intensity of the lobbying effort.”).

134. Garrett, Levin, & Ruger, *supra* note 128, at 198; see, e.g., 2 U.S.C. § 1601 (2012) (Congressional findings in support of the federal Lobbying Disclosure Act) (“[R]esponsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government”; “[E]ffective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government”). The legislative introduction for PIRA alludes to the governmental interest in informing the public. 2011 Sess. Law News of N.Y. Ch. 399 (S. 5679) (McKinney's), available at <http://open.nysenate.gov/legislation/bill/S5679-2011> (citing the “restor[ation of] public confidence in our government” as PIRA's purpose).

first considered the issue [in *Harriss*].”<sup>135</sup> But it is important to recognize that the “vital national interest” *Harriss* actually endorsed was narrower than the interest in informing the public which *Taylor* found HLOGA’s coalition disclosure provisions to further.<sup>136</sup> Indeed, the court in *Taylor* itself seemed to recognize the limitations of *Harriss* in analyzing the government interest supporting lobbying disclosure: only after invoking precedent upholding disclosure provisions applicable to other forms of political speech<sup>137</sup> could it comfortably conclude the government had a sufficient interest “in providing the public *and* its elected representatives with information.”<sup>138</sup> Although *Taylor* may provide a model for analysis of the public-informing justification most often given for lobbying disclosure today, it also affirms the need to look beyond *Harriss* where the government’s interest in mandating such disclosure is distinct from the narrow one of providing legislators with information. To be sure, the preceding discussion is not to suggest that *Harriss* and *Taylor* are anything but endorsements of the constitutionality of lobbying disclosure. Without taking a broader view of the Supreme Court’s disclosure jurisprudence, however, constitutional analysis of a donor-disclosure law such as PIRA would be incomplete.

## 2. *Disclosure Laws Applicable to Other Political Activity*

If *Harriss* and *Taylor* can be fairly read to support donor disclosure in the context of lobbying, First Amendment jurisprudence related to disclosure laws applicable to other political activity only provides additional cause to believe lobbying donor disclosure passes constitutional muster. Although the relationship between lobbying and other forms of political speech — and the legal regimes applicable to them — has not been the subject of

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135. Nat’l Ass’n of Mfrs. v. Taylor, 582 F.3d 1, 6 (D.C. Cir. 2009).

136. Compare *Harriss*, 347 U.S. at 625 (discussing legislature-informing interest) with *Taylor*, 582 F.3d at 13 (“[T]he purpose of the challenged [disclosure] provision [is] to serve Congress’ underlying goal of increasing public awareness of the efforts of paid lobbyists to influence the public decisionmaking process.”) (internal quotation marks omitted).

137. *Taylor*, 582 F.3d at 14 (“Two decades [after *Harriss*], in *Buckley v. Valeo*, a landmark case regarding campaign finance disclosure, the Court held that information about efforts to influence the political system is not only important to government officials (or candidates for office), but is also important for the public at large.”).

138. *Id.* at 15 (emphasis added).

extensive scholarly examination,<sup>139</sup> recent judicial treatment of disclosure regimes in other contexts suggests that facial challenges to laws incorporating PIRA's requirements would be unavailing. Based on the standard of review applied to analogous disclosure laws in other contexts and the similarity of government interests asserted on their behalf, carefully drafted statutes requiring the disclosure of individual contributors' identities would likely be upheld against facial challenge.

Despite the somewhat ambiguous position of lobbying disclosure laws under Supreme Court precedent,<sup>140</sup> the Court has long exhibited deference toward disclosure mandates in the electoral context. Though the Court has recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment,"<sup>141</sup> it has also acknowledged that disclosure imposes a lesser burden than that implicated by direct limitations on speech.<sup>142</sup> The Court's approach to evaluating disclosure laws has reflected the relative weight of the burden they impose: rather than subjecting disclosure statutes to the rigorous requirements of strict scrutiny, it has applied "exacting scrutiny."<sup>143</sup> Under this standard of review, the Court requires that the disclosures mandated bear a "substantial relation" to a "sufficiently important governmental inter-

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139. For an exception, see Briffault, *supra* note 130, at 106 (noting the dearth of literature on the relationship between lobbying and campaign finance regulation).

140. In addition to the disconnect between the justifications often cited for modern lobbying disclosure laws and that which the Supreme Court actually endorsed in *Harriss*, see discussion in Part III.A.1 *supra*, the Court has never resolved the precise issue of what standard of review should be applied to lobbying disclosure laws. See *Taylor*, 582 F.3d at 10–11 (discussing what level of scrutiny should be applied). While the analysis in *Harriss* suggests a deferential approach to lobbying disclosure, see *supra* notes 108–11 and accompanying text, the decision predated the formulation of different standards of review for statutes implicating First Amendment rights. *Taylor*, 582 F.3d at 14.

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

142. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003) (agreeing with District Court that the Federal Election Campaign Acts' amended disclosure requirements were constitutional because they "d[o] not prevent anyone from speaking"); *Buckley*, 424 U.S. at 64, 82 (concluding that campaign finance disclosure requirements of the Federal Election Campaign Act, which "impose[d] no ceiling on campaign-related activities," were a "reasonable and minimally restrictive method of furthering First Amendment values").

143. *Doe #1 v. Reed*, 561 U.S. 186, 196 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010); *Buckley*, 424 U.S. at 64.

est,”<sup>144</sup> a less demanding means-ends test than applied under strict scrutiny.<sup>145</sup>

As commentators have noted, two recent Supreme Court decisions, both issued in 2010, can be viewed as strongly affirming the constitutionality of disclosure laws in the electoral context: *Citizens United v. Federal Election Commission* and *John Doe #1 v. Reed*.<sup>146</sup> Since both decisions upheld laws mandating the disclosure of individuals’ names and other personal information, they provide a foundation for analyzing similar disclosure requirements in the context of lobbying.

Although better known for its controversial holding regarding independent expenditure limits for corporations and unions,<sup>147</sup> the Court’s decision in *Citizens United* also included an important endorsement of disclosure laws. In this relatively overlooked portion of the opinion,<sup>148</sup> the Court upheld the Bipartisan Campaign Reform Act’s (BCRA) provisions requiring: (1) that any electioneering communication not funded by a candidate include a disclaimer identifying its source, and (2) that any individual or group spending more than \$10,000 on electioneering communications in a calendar year file a disclosure report with the FEC including, *inter alia*, the names and addresses of individuals contributing \$1,000 or more.<sup>149</sup> Justice Kennedy’s majority opinion emphasized that disclosure laws could be justified based on the government’s interest in “providing the electorate with information about the sources of election-related spending.”<sup>150</sup> In fact,

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144. See, e.g., *Citizens United*, 558 U.S. at 366–367 (quoting *Buckley*, 424 U.S. at 64, 66, 96).

145. See Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 425 (2012) (characterizing the exacting scrutiny applied to the disclosure statutes in these cases as falling in “the gray area between strict scrutiny and deference under rational basis review”).

146. Richard Briffault, *Disclosure 2.0*, *supra* note 17, 274 (2010); 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, 1059 (2011); Sean McMahon, Note, *Deregulate But Still Disclose?: Disclosure Requirements for Ballot Question Advocacy after Citizens United v. FEC and Doe v. Reed*, 113 COLUM. L. REV. 733, 735 (2013).

147. E.g., McMahon, *supra* note 146, at 755–56.

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

149. 52 U.S.C.A. § 30120(d)(2) (West 2014) (formerly codified as 2 U.S.C. § 441d(d)(2)) (requiring disclaimer for electioneering communications); 52 U.S.C.A. § 30104(f)(1) (West 2014) (formerly codified as 2 U.S.C. § 434(f)(1)) (requiring disclosure statement by person spending \$10,000 on electioneering communications).

150. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)) (internal quotation marks omitted).

the Court considered this informational interest — as well as a number of benefits derived from it<sup>151</sup> — sufficiently important to justify the BCRA’s disclosure provisions without considering any of the government’s other asserted interests.<sup>152</sup> While the current structure of campaign finance law has enabled corporations to avoid the transparency sought by the BCRA’s provisions — by, for example, donating to intermediary organizations such as those that are tax-exempt under section 501(c)(4) of the Internal Revenue Code<sup>153</sup> — *Citizens United* confirmed that requiring the disclosure of major donors to entities engaged in independent electoral spending is constitutionally permissible.<sup>154</sup>

Six months after issuing its decision in *Citizens United*, the Court provided another endorsement of disclosure’s constitutionality in *Doe v. Reed*.<sup>155</sup> At issue in the case was Washington State’s Public Records Act (PRA), which mandated the disclosure of the names and addresses of individuals who signed a petition to initiate a voter referendum.<sup>156</sup> The plaintiffs in *Doe v. Reed*, who had supported a campaign in favor of subjecting a law expanding same-sex couples’ benefits to voter referendum, sued to prevent such disclosure after pro-marriage equality groups announced their intention to publicly reveal the identities of those who had signed the referendum petitions.<sup>157</sup> Due to the procedural posture of the case,<sup>158</sup> the scope of the Court’s decision was limited to the plaintiffs’ facial challenge to the PRA’s application: i.e., whether, as a general matter, disclosure of referendum petitions and the identifying information contained therein would violate the First Amendment.<sup>159</sup> Answering this question in the

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151. Including “insuring that voters are fully informed,” enabling the people “to evaluate the arguments to which they are being subjected,” and “avoiding confusion.” *Id.* at 368.

152. *Id.* at 368–69.

153. The IRS’ 2013 proposed regulations were designed to mitigate the impact of this exact type of activity. See discussion *supra* Part I.

154. Richard Briffault, *Two Challenges for Campaign Finance Disclosure after Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 984–85 (2011).

155. *Doe #1 v. Reed*, 561 U.S. 186 (2010).

156. *Id.* at 190–91.

157. *Id.* at 191.

158. *Doe #1 v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wa. 2009). In granting a preliminary injunction based on likelihood that plaintiffs would succeed on their facial challenge of the law’s application, the District Court did not reach their as-applied challenge. *Id.*

159. *Doe v. Reed*, 561 U.S. at 191. As the discussion in Part III.B.1 *infra* indicates, the case’s posture did not prevent several of the justices from voicing their opinions on how the plaintiffs’ as-applied challenge should be resolved.

negative, Chief Justice Roberts' majority opinion confirmed the deference owed to laws requiring disclosure rather than limiting protected speech, providing clarity on the constitutionality of disclosure mandates outside the realm of campaign finance law.<sup>160</sup>

Although, broadly speaking, the issue in *Doe v. Reed* was within "the electoral context,"<sup>161</sup> it was not a campaign finance case.<sup>162</sup> By drawing upon campaign finance precedent to apply exacting — rather than strict — scrutiny, however, the Court signaled that its deferential approach to disclosure was equally applicable in the context of other forms of political speech.<sup>163</sup> In addition, the majority's opinion contained guidance on the important governmental interests disclosure might serve.<sup>164</sup> Though the Court purported to limit its discussion to the state's asserted interest in "preserving the integrity of the electoral process" — not touching on the state's interest in "providing information to the electorate about who supports the petition"<sup>165</sup>— it also noted that disclosure promotes "transparency and accountability . . . to an extent other measures cannot."<sup>166</sup> In doing so, the majority implicitly appealed to the informational benefits of disclosure, while only explicitly discussing the integrity-preserving interest.<sup>167</sup>

Considering the recent trajectory of the Supreme Court's disclosure-related jurisprudence, it is likely that individual donor disclosure requirements of the sort included in New York's PIRA would withstand facial challenges.<sup>168</sup> The Court's decisions in

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160. See Briffault, *supra* note 154, at 996.

161. *Doe v. Reed*, 561 U.S. at 195.

162. Briffault, *supra* note 154, at 996.

163. See *id.* Professor Briffault notes that the Court in *Doe v. Reed* "relied heavily on campaign finance precedents" and "reemphasized two central themes of campaign finance doctrine," namely that: (1) disclosure requirements are not a prohibition of speech since they do not prevent anyone from speaking and (2) such requirements are subject only to "exacting scrutiny," not strict scrutiny. *Id.*

164. *Doe v. Reed*, 561 U.S. at 198–99.

165. *Id.* at 197.

166. *Id.* at 199.

167. See Briffault, *supra* note 154, at 997 ("Chief Justice Roberts's opinion effectively linked up electoral integrity and voter information by suggesting an overarching public interest in being able to monitor and understand the workings of the political process.")

168. See Aprill, *supra* note 8, at 404 (suggesting that "disclosure for lobbying tax exempt organizations would seem to pass constitutional muster" based on decisions in *Citizens United*, *Harriss*, and *Taylor*). It should be noted that a court analyzing such a donor disclosure requirement might also take into account decisions upholding similar laws applicable to ballot proposition committees. See, e.g., *Nat'l Org. for Marriage v. McKee*, 649 F. 3d 34 (1st Cir. 2011); *Family PAC v. McKenna*, 685 F. 3d 800 (9th Cir. 2011); *Human Life of Washington v. Brumsickle*, 624 F. 3d 990 (9th Cir. 2010). The analogy between disclosure of contributors to organizations engaged in lobbying and those who give

*Citizens United* and *Doe v. Reed* together confirm that exacting scrutiny is applied to disclosure laws both within and beyond the purview of campaign finance regulation. Accordingly, any facial challenge asserted against a lobbying donor disclosure law on First Amendment grounds would likely be approached with the kind of deference customarily reserved for disclosure laws in the context of political speech.<sup>169</sup> Moreover, the Court's continued acknowledgement that disclosure's informational benefits amount to a sufficiently important government interest suggests that satisfying the first prong of exacting scrutiny analysis would not pose a serious issue. While the disclosure of individuals' identities and personal information may serve different purposes in the regulation of lobbying versus other forms of political speech,<sup>170</sup> the Court continues to uphold disclosure requirements based on the underlying premise that they are an effective means of disseminating information to the general public. If it is indeed the case that the government has a sufficiently important interest in "providing the public and its elected representatives with information regarding who is being hired, who is putting up the money, and how much they are spending to influence public officials,"<sup>171</sup> requiring disclosure of the identities of those who contribute to organizations engaged in lobbying is a constitutionally permissible means of furthering that interest.

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to ballot proposition committees is a strong one in that both types of groups make expenditures intending to influence actions that have legislative effect. However, while the Supreme Court has suggested the manner in which it might assess a donor disclosure mandate for ballot proposition committees, *see, e.g.*, Briffault, *supra* note 17, at 281 n.68, the extent to which a law may require such disclosure remains an issue that the Court has not addressed directly. On that basis, the author has omitted an extensive discussion of ballot committee disclosure precedents; analysis of the federal circuit courts' treatment of such laws in light of *Citizens United* and *Doe v. Reed* can be found elsewhere, though. *See generally* McMahon, *supra* note 146.

169. Although some have suggested that *Nat'l Ass'n of Mfrs. v. Taylor*, discussed in Part III.A.1 *infra*, "provides a foundation for strict scrutiny analysis" of laws regulating lobbying, Brian W. Schoeneman, *The Scarlet L: Have Recent Developments in Lobbying Regulation Gone Too Far?*, 60 CATH. U. L. REV. 505, 526 (2011), it can hardly be seen as an endorsement of applying strict scrutiny to disclosure laws in the lobbying context. Based on the Court's decisions in the context of disclosure regimes applicable to other forms of political activity, there is reason to believe that "exacting scrutiny" would be applied.

170. *See* Briffault, *supra* note 130, at 115–19 (contrasting difference between "voter information justification" behind campaign finance disclosure, and the three distinct informational benefits to "legislators lobbied, competing interest groups, and the general public" that lobbying disclosure provides).

171. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 15 (D.C. Cir. 2009).

## B. AS-APPLIED CHALLENGES

Although generally considered minimally restrictive, and preferred as a means of regulating lobbying and other political activity, disclosure requirements may nonetheless impose heavy burdens on First Amendment rights in certain cases. To address the potentially unconstitutional chilling effect that disclosure requirements may have on speech in specific cases, the Supreme Court has acknowledged the availability of as-applied exemptions from such requirements as a constitutional matter.<sup>172</sup> Such exemptions may be granted when an individual or group can demonstrate “a reasonable probability that the compelled disclosure of [personal information] will subject them [or their members] to threats, harassment, or reprisals from either Government officials or private parties.”<sup>173</sup> Following a consideration of the origins and historical development of the as-applied exemption in Part III.B.1, Part III.B.2 discusses a number of issues that have arisen with respect to its administration, rendering its protections largely ineffective. Despite these identifiable deficiencies, which lead to judicial assessment of as-applied challenges in an overly restrictive manner, Part III.B.2 also suggests that judicial expansion of the as-applied challenge would be problematic as a remedy.

### 1. *Origins and Development*

The Supreme Court first set forth the contours of the as-applied exemption from disclosure laws in its landmark 1976 decision, *Buckley v. Valeo*.<sup>174</sup> While the Court in *Buckley* upheld the Federal Election Campaign Act’s (FECA) recordkeeping, reporting, and disclosure provisions, it also acknowledged that there could be cases where “the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act’s requirements cannot constitutionally be applied.”<sup>175</sup> Though the Court in *Buckley* did not

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172. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

173. *Id.*

174. *Id.*; William McGeeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 862 (2011).

175. *Buckley*, 424 U.S. at 71. Providing illustrative examples, the Court cited *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960), Civil Rights-era cases in which the Court overruled state courts’ decisions to penalize the

conclude that a flat exemption for any “minor party” was crucial to the constitutionality of FECA’s disclosure provisions, it held that such groups could, on a case-by-case basis, be granted an exemption if they proffered evidence demonstrating “only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”<sup>176</sup>

Despite establishing a foundation for as-applied exemptions from disclosure in *Buckley*, the Court’s subsequent decisions have failed to clarify the requirements for obtaining an exemption. Since *Buckley*, the Court has granted such an exemption only once<sup>177</sup>: to the Ohio affiliate of the Socialist Workers Party in *Brown v. Socialist Workers ‘74 Campaign Committee*.<sup>178</sup> In *Brown*, the Court held that an Ohio statute requiring every political party to report the identities and addresses of its contributors as well as recipients of campaign expenditures was unconstitutional as applied to the Socialist Workers Party (SWP).<sup>179</sup> Although it has been characterized as the case in which the Supreme Court “operationalized” the exemption provided for in *Buckley*,<sup>180</sup> *Brown* did little to elucidate how lower courts should consider future as-applied challenges. Since the SWP was both a “minor political party” — in terms of membership and influence on the political process<sup>181</sup> — and able to provide plentiful evidence of governmental and private hostility toward and harassment of its members,<sup>182</sup> the Court’s decision was based on a relatively straightforward application of the *Buckley* standard. As a result, it did not reveal much about borderline cases that might arise in the future.<sup>183</sup>

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NAACP for failure to disclose its membership, as well as *Doe v. Martin*, 404 F. Supp. 753 (D.C. 1975), a then-recent D.C. District Court decision sustaining the local Socialist Workers Party’s claim that District of Columbia registration and disclosure requirements were unconstitutional as applied to its records. *Id.* at 71 & n.87.

176. *Buckley*, 424 U.S. at 74.

177. Torres-Spelliscy, *supra* note 146, at 1096.

178. 459 U.S. 87, 88 (1982).

179. *Id.*

180. Briffault, *supra* note 154, at 991.

181. *Brown v. Socialist Workers*, 459 U.S. at 88 (discussing membership numbers, minimal success at the polls, and funds raised).

182. *Id.* at 98–101 (describing history of private and governmental hostility, including specific instances of harassment in Ohio and elsewhere); McGeeveran, *supra* note 174, at 868.

183. *Cf.* McGeeveran, *supra* note 174, at 868 (“Demonstrating possible injury from disclosure has not always been so easy. The Socialist Workers Party [in *Brown*] secured an

Subsequent Supreme Court decisions have, similarly, done little to clarify the scope of the as-applied exemption. To be sure, the majority opinions in *Citizens United* and *Doe v. Reed* both acknowledged the continued possibility that a party might be able to secure such an exemption.<sup>184</sup> Moreover, *Doe v. Reed* tacitly confirmed the application of its as-applied jurisprudence, largely based on campaign finance precedent, to the context of other political activity.<sup>185</sup> However, neither case provided an opportunity to improve on the hazy standard set forth in *Buckley*.<sup>186</sup> In *Citizens United*, the Court gave short shrift to the plaintiffs' claims that disclosure might expose its donors to retaliation since the organization had been disclosing its own donors for years,<sup>187</sup> and the procedural posture of *Doe v. Reed* precluded any definitive resolution of the as-applied challenge plaintiffs had asserted in the District Court below.<sup>188</sup>

The divergent concurring opinions in *Doe v. Reed*, most of which expressed some view as to how the as-applied challenge should be resolved on remand, illustrate the opportunity the Court narrowly missed to refine its as-applied jurisprudence, as well as the continued ambiguity of *Buckley*'s standard. In three separate concurring opinions, five justices subscribed to distinct rationales for why plaintiffs' as-applied challenge should fail on remand,<sup>189</sup> while in a fourth, Justice Alito argued that the plaintiffs should succeed.<sup>190</sup> Refraining from citing *Buckley* itself, Justice Sotomayor relied on *NAACP v. Alabama* in arguing that exemptions should be limited to those "rare circumstance[s] in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to

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as-applied exemption . . . [but] was able to present plentiful specific evidence of severe government and private retribution aimed directly at the organization and its members."); McMahon, *supra* note 146, at 750 n.106 ("The Court's allowance of an exemption from disclosure laws [in *Brown*] specifically based on evidence of harassment was unique.").

184. *Doe #1 v. Reed*, 561 U.S. 186, 200 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010).

185. *See Doe v. Reed*, 561 U.S. at 200. Lower courts have similarly applied the as-applied challenge framework to lobbying disclosure laws. *E.g.*, *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 20–22 (D.C. Cir. 2009).

186. *See McGeveran, supra* note 174, at 868.

187. 558 U.S. at 370.

188. 561 U.S. at 200.

189. *Id.* at 212 (Sotomayor, J., concurring) (joined by Justices Stevens and Ginsburg); *id.* at 215–16 (Stevens, J., concurring) (joined by Justice Breyer); *id.* at 219 (Scalia, J., concurring).

190. *Id.* at 202 (Alito, J., concurring).

control.”<sup>191</sup> Justice Stevens took a similar hardline approach, indicating that an exemption would be warranted only where the threats of harassment resulting from disclosure were so severe that they “[could not] be mitigated by law enforcement measures,” and where “strong evidence” supported the conclusion “that an indirect and speculative chain of events imposes a substantial burden on speech.”<sup>192</sup>

Taking a different tack from Justices Stevens and Sotomayor, Justice Scalia argued that the First Amendment does not protect a right to anonymously sign a referendum petition at all, based on the “governmental effect” of the act and “[o]ur Nation’s longstanding tradition of legislation and voting in public.”<sup>193</sup> Thus, Justice Scalia concluded, the Constitution does not require an as-applied exemption against the disclosure of referendum petition signatures either.<sup>194</sup> Indeed, Justice Scalia suggested, an across-the-board denial of exemptions might promote valuable ends, in that “[r]equiring people to stand up in public for their political acts foster[s] civic courage, without which democracy is doomed.”<sup>195</sup>

While these concurrences endorsed a particularly stringent approach to the availability of as-applied challenges, the analysis of each was colored by the particular political act subject to disclosure in *Doe v. Reed*, the signature of a referendum petition.<sup>196</sup> Justice Sotomayor’s concurrence is illustrative with its suggestion that plaintiffs would bear an especially heavy burden in seeking an exemption from disclosure due to the “inherently public” nature of legislating by referendum.<sup>197</sup>

191. *Id.* at 215 (Sotomayor, J., concurring).

192. *Id.* at 218 (Stevens, J., concurring). Also like Justice Sotomayor, Justice Stevens’ concurrence omitted any discussion of *Buckley*’s standard.

193. *Id.* at 221 (Scalia, J., concurring).

194. *Id.* at 228 (Scalia, J., concurring).

195. *Id.*

196. *See id.* at 218 (Stevens, J., concurring) (suggesting that an as-applied challenge would be particularly unlikely to succeed against a “law such as the PRA”); *id.* at 221, 226–27 (Scalia, J. concurring) (emphasizing the legislative effect of signing a referendum petition); Briffault, *supra* note 154, at 998 (“To some extent, these concurring opinions in *Doe* reflected the fact that the case involved signatures on referendum petitions, rather than the disclosure of campaign donors.”).

197. *Doe v. Reed*, 561 U.S. at 214 (Sotomayor, J., concurring) (“Given the relative weight of the interests at stake and the traditionally public nature of initiative and referendum processes, the Court rightly rejects petitioners’ constitutional challenge to the State of Washington’s petition disclosure regulations. These same considerations also mean that any party attempting to challenge particular applications of the State’s regulations will bear a heavy burden.”)

In sharp contrast to the other concurring justices, Justice Alito argued that *Buckley* required a more liberal approach to as-applied challenges.<sup>198</sup> Emphasizing the need for groups to obtain exemptions quickly and without facing an unnecessarily high evidentiary burden, Justice Alito concluded that the evidence plaintiffs had presented, as well as evidence from the Proposition 8 campaign in California,<sup>199</sup> provided a “strong argument” in favor of exemption under *Buckley*’s standard.<sup>200</sup>

While the *Doe v. Reed* concurring opinions may provide guidance on how future courts will frame their interpretation of *Buckley* and its criteria for exemption from disclosure,<sup>201</sup> the sharply diverging standards they endorsed did little to cut through the fog enveloping as-applied challenges.<sup>202</sup> Without the benefit of three sitting justices’ views on the issue,<sup>203</sup> *Buckley*’s standard for as-applied exemptions under the First Amendment remains hazy after *Doe v. Reed*.

## 2. *Current Issues with the Administration of As-Applied Exemptions*

Although the Supreme Court continues to recognize that individual groups may obtain exemptions from disclosure laws as a constitutional matter,<sup>204</sup> recent court decisions evaluating as-applied challenges, as well as commentary on the subject, reveal several troubling features of the manner in which courts evaluate such claims. These features raise doubts as to whether the as-

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198. See Steve Simpson, *Doe v. Reed and the Future of Disclosure Requirements*, 2010 CATO SUP. CT. REV. 139, 157 (2009–2010) (discussing Justice Alito’s concurrence); Briffault, *supra* note 154, at 998–99.

199. See *infra* Part III.B.2 for further discussion of Proposition 8 and the disclosure related litigation that arose from it.

200. *Doe v. Reed*, 561 U.S. at 204–07 (Alito, J., concurring).

201. Briffault, *supra* note 154, at 997.

202. Further mitigating any clarifying effect of the concurrences is their emphasis of the distinct legislative or public character of signing a referendum, in contrast to the more expressive character of contributing money to a political candidate or non-profit organization that engages in lobbying. Cf. *Doe v. Reed*, 561 U.S. at 212–14 (Sotomayor, J., concurring) (“When it comes to initiatives and referenda, the impact of public disclosure on expressive interests is even more attenuated. While campaign-finance disclosure injects the government into what would otherwise have been private political activity, the process of legislating by referendum is inherently public.”).

203. Chief Justice Roberts, the author of the majority opinion, and Justice Kennedy refrained from signing onto any of the concurring opinions, and Justice Kagan joined the Court after the decision. Briffault, *supra* note 154, at 999.

204. See *supra* notes 184–185 and accompanying text.

applied challenge lives up to its intended role as a protective mechanism for First Amendment associational rights. Traceable to the combined effect of the continued ambiguity of *Buckley*'s standard and the historical origins of the as-applied challenge, these features include: (1) a narrow view of the harm disclosure must pose for a group to qualify for an exemption, (2) the uneasy status of non-minority groups, and (3) an unduly high evidentiary burden placed on groups seeking exemptions.<sup>205</sup> In light of these features, the as-applied challenge may be an inadequate vehicle for protecting some groups' First Amendment rights against the risks associated with disclosure.

In *Buckley*, the Court indicated that the existence of the as-applied exemption reflects the fact that in some cases, the threat disclosure poses to a group's First Amendment rights is so serious, and the state interest furthered by disclosure so insubstantial, that disclosure cannot constitutionally be required.<sup>206</sup> However, despite the attempt in *Buckley* to set forth a standard for determining when the burden on First Amendment rights is such that an exemption is in order, the manner in which courts evaluate as-applied challenges to disclosure laws does not always match the Supreme Court's stated test.<sup>207</sup> Due to the historical origins of the as-applied exemption, as well as the Court's continued failure to clarify *Buckley*'s standard, courts tend to assess as-applied challenge has become deficient, such that its protections may be unavailable for deserving groups.

The first of the as-applied challenge's deficiencies is associated with the courts' conception of the risk disclosure must pose in

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205. For an argument that the courts' treatment of the as-applied challenge reflects an undervaluation of political privacy interests by (1) construing privacy harms too narrowly, (2) adhering to an inflexible view that divides all information into "public" and "private" categories, and (3) an unwillingness to provide help in the form of exemptions to those with compelling privacy interests, see McGeeveran, *supra* note 174, at 865.

206. *Buckley v. Valeo*, 424 U.S. 1, 71 (1976). Put differently, "the strength of the governmental interest [furthered by disclosure] must reflect the seriousness of the actual burden [imposed] on First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008). Where this reflection does not exist — e.g., where there is a reasonable probability that disclosure will subject an organization's members to threats, harassment, or reprisals — an as-applied exemption is appropriate as a means of ensuring that activity protected under the First Amendment is not impermissibly chilled. See *Doe v. Reed*, 561 U.S. at 200 (using *Buckley* framework for as-applied exemption to determine whether the reflection *Davis* requires exists).

207. See Brian J. Levy, Note, *Who Wants to Know — And Why?: The Supreme Court's Secret Purposivist Test for Exemptions from Association Membership Disclosure Laws*, 87 N.Y.U. L. REV. 473, 474–75 (2012).

order to unconstitutionally chill activity protected under the First Amendment. Considering the absence of direction provided by *Buckley*, as well as the lack of subsequent decisions clarifying its standard,<sup>208</sup> it is perhaps unsurprising that the courts have hesitated to stray from the historical origins of the exemption in assessing the merits of as-applied challenges. This tendency is reflected in judges' general unwillingness to expand beyond the Supreme Court's few explicit examples of groups for whom an exemption would be appropriate: namely, the NAACP in the segregated South and the Socialist Workers Party.<sup>209</sup> As Professor William McGeeveran has suggested, the very language of the *Buckley* test — "threats, harassment, or reprisals" — has come to be associated with the unusual circumstances involved in those cases, and the particularly dramatic risks disclosure there posed.<sup>210</sup>

Commentators have adopted a similarly narrow view of the harm necessary to warrant an exemption, emphasizing the limited examples provided by the Court as the gold standard against which all as-applied challenges must be measured.<sup>211</sup> By requiring "blacklists or burning crosses before recognizing any potential chilling effect," however, "[c]ourts and policymakers ignore reality."<sup>212</sup> While circumstances indicating the potential for hostility or violence of the sort faced by historically persecuted groups should be sufficient to obtain an as-applied exemption, it does not follow that such circumstances should be required. For some groups, the consequences of disclosure may fall short of perva-

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208. See *supra* Part III.B.1.

209. See, e.g., *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009) ("Plaintiffs do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP. . . . The Court is at a loss to find any principled analogy between two such greatly diverging sets of circumstances.").

210. See McGeeveran, *supra* note 174, at 866 ("[T]he standard limits privacy costs to dramatic physical or economic attacks by one's opponents. The formulaic words most often repeated in the major Supreme Court decisions . . . [call] to mind violent hatred directed toward civil rights activists in the segregated South or McCarthy Era blacklists.").

211. See, e.g., Press Release, Democracy 21, Watchdogs Reiterate to FEC Before Vote that Tea Party Group Does Not Qualify for Disclosure Exemption Originating with NAACP in Jim Crow South (Nov. 20, 2013), available at <http://www.democracy21.org/inside-the-courts/press-releases-inside-the-courts/watchdogs-reiterate-to-fec-before-vote-that-tea-party-group-does-not-qualify-for-disclosure-exemption-originating-with-naacp-in-jim-crow-south/>.

212. See McGeeveran, *supra* note 174, at 867.

sive, state-endorsed discrimination and violence, but nonetheless pose serious risks of chilling constitutionally protected activity in an unacceptable manner.<sup>213</sup>

It is important to note that the potential for mildly unpleasant consequences should not warrant exemption from disclosure if it does not pose the kind of chilling effect *Buckley's* standard was intended to prevent. The District Court's decision in *Doe v. Reed* on remand from the Supreme Court provides an illustrative example.<sup>214</sup> Despite their lawyers' access to the names and addresses of petition signatories, and ample opportunities to gather evidence in the course of litigation, the "harassment" plaintiffs alleged in support of their claim for as-applied exemption was "unimpressive."<sup>215</sup> Among the more serious forms of harassment plaintiffs claimed to have experienced were "being flipped off,"<sup>216</sup> having "Post-It notes containing vulgar language" placed on their cars,<sup>217</sup> and being "mooned."<sup>218</sup> In light of the relatively juvenile forms of harassment plaintiffs faced, which would not take much of Justice Scalia's "civic courage" to withstand,<sup>219</sup> the District Court correctly concluded that an as-applied exemption was not warranted.<sup>220</sup>

While *Doe v. Reed* provides an easy example of an instance in which disclosure did not pose the requisite level of "threats, harassment, and reprisals," there is an entire spectrum of potentially chilling activity that falls between such cases and, for example, *NAACP v. Alabama*, where the severity requirement clearly was satisfied. Thus, to the extent that a comparison of any given group to the NAACP in the Jim Crow South — as opposed to a

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213. Cf. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 22 (D.C. Cir. 2009) ("To its credit, NAM does not suggest that its [members] . . . are as vulnerable to retaliation as were the individuals who joined the Alabama NAACP in the 1950s. It must at least show, however, that they are more at risk than the contributors to minor parties and independent candidates whose challenge the Court rejected in *Buckley*.").

214. *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wa. 2011).

215. Dale Carpenter, "Harassment" of SSM Opponents in Washington State, VOLOKH CONSPIRACY (Oct. 29, 2011 12:45 AM), <http://www.volokh.com/2011/10/19/intimidation-of-ssm-opponents-in-washington-state/>; see also Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 714–15 (2012) (summarizing evidence).

216. *Doe v. Reed*, 823 F. Supp. 2d at 1205–06.

217. *Id.* at 1206.

218. *Id.* at 1205, 1207. For the District Court's complete summary of the evidence produced by the plaintiffs, see *id.* at 1205–10.

219. Briffault, *supra* note 215, at 715 (quoting *Doe #1 v. Reed*, 561 U.S. 186, 228 (2010)).

220. *Doe v. Reed*, 823 F. Supp. 2d 1195, 1212 (W.D. Wa. 2011).

critical assessment of the risks disclosure poses to them — is the decisive factor in determining whether an as-applied challenge has merit, courts overlook groups whose speech will be unconstitutionally chilled without an exemption from disclosure.

Related to the courts' narrow conception of the risk of harm required to warrant an exemption is the uneasy status of, for lack of a better term, non-minority parties. Again, the limited clarity provided by the court in *Buckley* and subsequent decisions has been a significant cause of this deficiency; these cases have left unclear what groups qualify as "minority parties" and whether a group's status as a minority party is required for obtaining an exemption.<sup>221</sup> In *Buckley*, the Court declined to define "minority party," indicating that although criteria "such as current political strength (measured by polls or petition), age, or degree of organization" could be used, "[t]he difficulty with these suggestions is that they reflect only a party's past or present political strength and that is only one of the factors that must be considered."<sup>222</sup> To make things murkier, the Court went on to indicate that the major deficiency with these criteria was that none were "precisely related to the other critical factor that must be considered, the possibility that disclosure will impinge upon protected associational activity,"<sup>223</sup> leaving unclear the relative importance of "minority status" so long as a groups' protected activity is sufficiently chilled.<sup>224</sup> The problem with this ambiguity is that it leads to situations in which disclosure most certainly poses the type of risks the as-applied challenge is meant to curtail, but because a group is not what a court deems to be a "minor party," it does not qualify for exemption. This was precisely the scenario in *ProtectMarriage.com v. Bowen*, a case in which the District Court for the Eastern District of California denied the supporters of Proposition 8, a ballot measure that amended the California Constitution to limit the definition of marriage to a relationship "between a man and a woman," injunctive relief against disclosure of their

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221. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Buckley v. Valeo*, 424 U.S. 1, 72–73 (1976).

222. *Buckley*, 424 U.S. at 72–73.

223. *Id.* at 73.

224. To be sure, the lower courts that have addressed the issue generally emphasize the group seeking exemption's "minor party" status in analyzing the as-applied challenge. See, e.g., *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F. 2d 416, 420 (2d Cir. 1982). However, the Supreme Court itself has not done much in the way of clearly defining the importance of that factor vis-à-vis the chilling effect disclosure may pose through prospective threats, harassment, or reprisals.

identities and addresses.<sup>225</sup> Despite specific evidence of death threats, physical violence, and threats of violence directed at Proposition 8 supporters,<sup>226</sup> the court relied heavily on the success of the ballot initiative in rejecting its supporters' as-applied challenge.<sup>227</sup> "[M]inor status is a necessary element of a successful as-applied claim," the court concluded, an element which Proposition 8's supporters, who raised \$30 million in support of their cause and persuaded over seven million California voters, could not satisfy.<sup>228</sup>

A third manner in which as-applied challenges may fail to provide the protection intended is by imposing an unnecessarily high evidentiary burden on groups seeking exemption. In setting forth the test for obtaining an exemption, the Court in *Buckley* recognized the "heavy burden" that strict requirements of proof might impose, and accordingly, provided a flexible standard for establishing evidence of prospective injury.<sup>229</sup> In his concurring opinion in *Doe v. Reed*, Justice Alito echoed this sentiment, emphasizing that to ensure sufficient protection of their First Amendment rights, groups must be "able to obtain an as-applied exemption without clearing a high evidentiary hurdle."<sup>230</sup> Relying on *Buckley*'s description of "the wide array of evidence" that might be sufficient to demonstrate "a reasonable probability that disclosure will lead to threats, harassment, or reprisals,"<sup>231</sup> Justice Alito concluded that "[f]rom its inception . . . the as-applied exemption has not imposed onerous burdens of proof on speakers who fear that disclosure might lead to harassment or intimidation."<sup>232</sup>

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225. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

226. *Id.* at 1200–04 (describing evidence of threats).

227. *Id.* at 1214; McGeveran, *supra* note 174, at 869.

228. *ProtectMarriage.com*, 599 F. Supp. 2d at 1215.

229. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) ("Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.")

230. *Doe #1 v. Reed*, 561 U.S. 186, 204–05 (2010) (Alito, J., concurring).

231. *Id.* at 204 (citing *Buckley* language provided in note 229, *supra*).

232. *Id.*

As Prof. William McGeeveran has suggested, however, “[d]emonstrating possible injury from disclosure has not always been so easy.”<sup>233</sup> As indicated above, the plentiful evidence of both government and private harassment in cases involving the NAACP and the Socialist Workers Party made them relatively straightforward cases in terms of proving the injury that would arise from disclosure, providing little guidance on the evidentiary threshold parties must meet to obtain an exemption.<sup>234</sup> In the absence of clarifying precedent, courts have measured the burden of proof required to mount an as-applied challenge against the examples of the NAACP and the Socialist Workers Party.<sup>235</sup> Again, the example of *ProtectMarriage.com* is illustrative.<sup>236</sup> Despite the specific anecdotal evidence that supporters of Proposition 8 presented, the District Court characterized these incidents as “relatively minimal occurrences of threats, harassment, and reprisals.”<sup>237</sup> Unlike the cases in which exemptions had been warranted previously, Judge England concluded, “only random acts of violence directed at a very small segment of the supporters of the initiative [we]re [here] alleged.”<sup>238</sup> To be sure, even those who advocate for a more protective as-applied challenge agree that claims of threatened harm based on nothing more than “rank conjecture and speculation” should not satisfy the necessary evidentiary burden.<sup>239</sup> Claims for exemptions based on such limited evidence have been and should continue to be found insufficient.<sup>240</sup> However, as-applied challenges can be assessed in a

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233. McGeeveran, *supra* note 174, at 868.

234. *See supra* Part III.B.1.

235. *See, e.g.*, *ProtectMarriage.com v. Bowen*, 599 F. Supp.2d 1197, 1216–17 (E.D. Cal. 2009) (“This Court is cognizant of the relaxed nature of proof required by the Supreme Court in such circumstances. Nevertheless, the Court cannot say that the threats and harassment here rise to the level previously sought.”).

236. *Id.*

237. *Id.* at 1216.

238. *Id.* at 1217. *But see Doe #1 v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring) (“[I]f the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.”).

239. McGeeveran, *supra* note 174, at 868 (citing *Doe v. Mortham*, 708 So. 2d 929, 935 (Fla. 1998)).

240. *See, e.g.*, *Nat’l Assn. of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 61 (D.C. Cir. 2008) (“[Plaintiff] proffers no evidence of any past incidents suggesting that public affiliation with the NAM leads to a substantial risk of “threats, harassment, or reprisals from either Government officials or private parties.”); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1211 (W.D. Wa. 2011).

manner that is more consistent with the “flexibility” of proof *Buckley* allows,<sup>241</sup> without opening the door to exemptions for groups that have only presented minimal evidence.

Despite these identifiable deficiencies, judicial expansion of the as-applied challenge as a constitutional matter and the liberal granting of exemptions are not ideal solutions. Even those who argue that the as-applied challenge as it currently stands fails to take full account of the costs of disclosure acknowledge that there are important factors counseling against such expansion.<sup>242</sup> As noted above, disclosure is generally considered to be an acceptable means of regulating speech in pursuit of important governmental interests.<sup>243</sup> But as Professor Michael Kang has persuasively argued, “intrusive judicial oversight” of disclosure regimes in the form of generously granted as-applied exemptions “would threaten to flip the presumption of constitutionality” of this preferred method of promoting transparency.<sup>244</sup> Moreover, such a development could lead to courts usurping a role properly reserved to legislators and administrators in determining the proper scope of disclosure, a task that entails “the type of policy fine tuning courts typically have shunned in campaign finance law.”<sup>245</sup> A predicament thus arises for those who acknowledge the need for a shield against disclosure more protective than the “hollow assurance” provided by the as-applied challenge<sup>246</sup>: how to provide additional protection without overly constitutionalizing the issue?

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241. See *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

242. See McGeeveran, *supra* note 174, at 865 (“There are sound reasons for courts to limit constitutional requirements and defer to the political branches and to the states in the particular design of electoral structures. . . . I am not arguing for a sweeping constitutional right of anonymity in political activity.”). See generally Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

243. See *supra* Part III.A.2.

244. Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1725 (2013).

245. *Id.*

246. *Doe #1 v. Reed*, 561 U.S. 186, 241 (2010) (Thomas, J., dissenting) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 484 (2010) (Thomas, J., concurring in part and dissenting in part)).

#### IV. NEW YORK'S ADMINISTRATIVE ALTERNATIVE TO THE AS-APPLIED CHALLENGE

The question raised at the end of Part III poses a challenge: how to provide an alternative to the as-applied challenge that is more protective of groups' associational rights, but which does not undermine the benefits of disclosure or limit legislative discretion to implement such requirements. Such an alternative might already exist. The administrative regime established under New York's PIRA, and the associated regulatory procedures for groups to obtain exemptions,<sup>247</sup> holds promise as an alternative to the as-applied challenge, subject to some modification. Potentially more protective than the as-applied challenge in its current state, and yet unaccompanied by the concerns associated with expanding judicial exemptions as a constitutional matter, such an administrative procedure provides an attractive middle course.

Before proceeding, there are a couple of things worth noting. First, there is nothing stopping legislators or administrators in charge of overseeing disclosure regimes from providing greater protection to groups than the minimal amount courts deem constitutionally required.<sup>248</sup> They have just generally chosen not to do so.<sup>249</sup> Second, there is at least one other solution that legislators could pursue as an alternative to the administrative procedure discussed below: they could draft legislation enacting disclosure regimes with additional care so as to minimize the harmful risks posed by disclosure.<sup>250</sup> No matter how cleverly drafted, however, there would presumably still be instances where certain groups would need an as-applied exemption to avoid the prospect of harm befalling donors whose information is disclosed.<sup>251</sup> Due to this inevitability, providing an alternative to the as-applied challenge itself would be preferable.

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247. See *supra* Part II.

248. McGeveran, *supra* note 174, at 865; see Briffault *supra* note 19, at 295 (“[E]ven if the constitutional doctrine governing disclosure does not change, policymakers and lawmakers might want to reconsider the laws concerning the extent and manner of disclosure.”).

249. McGeveran, *supra* note 174, at 865.

250. For a number of thoughtful proposals on how this might be approached, see Jacob Gardener, *Sunlight Without Sunburns: Balancing Public Access and Privacy in Ballot Measure Disclosure Laws*, 18 B.U. J. SCI. & TECH. L. 262, 293–301 (2012).

251. *Id.* at 296.

### A. ADDRESSING THE AS-APPLIED CHALLENGE'S THREE DEFICIENCIES

The administrative procedures through which 501(c)(4) organizations may obtain exemptions from New York's lobbying disclosure requirements show promise as an alternative to the as-applied challenge in that they do not exhibit the same three problematic features that judicial decision-making in this context has.<sup>252</sup> To be sure, the manner in which PIRA and its administrative alternative improve upon the courts' restrictive approach to evaluating as-applied challenges is not purely procedural: the interpretive guidance PIRA's drafters provided reflects their understanding that exemptions would be more widely available under the statute than the courts have allowed in applying *Buckley's* test.<sup>253</sup> Reinforcing this substantive understanding of which groups would be entitled to exemptions, however, PIRA and JCOPE's implementing regulations take a distinctively procedural approach, addressing the as-applied challenge's three primary deficiencies by adopting an administrative procedure that is not affected by those deficiencies' two underlying sources.<sup>254</sup>

Though established upon the same principles as the Supreme Court's as-applied jurisprudence originating in *Buckley*, PIRA and JCOPE's regulations set forth relatively objective criteria for administering exemptions,<sup>255</sup> providing a greater degree of clarity than *Buckley's* still-ambiguous standard. Furthermore, the regulations and the criteria they provide are divorced from the courts' strict adherence to historical examples in approaching as-applied challenges.<sup>256</sup> By addressing these two sources of the as-applied challenge's impotence as a protective vehicle,<sup>257</sup> PIRA and the regulations established under it allow JCOPE to provide an administrative alternative that: (1) takes a less stringent view of the harm necessary to qualify for an exemption, (2) does not dwell on whether a group is a minor party, and (3) requires a less demanding — though still significant — burden of proof for groups seeking exemptions. Accordingly, the administrative alternative

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252. See *supra* Part III.B.2.

253. See *supra* note 58 and accompanying text.

254. See *supra* Part III.B.2 (discussing deficiencies and underlying causes).

255. See *supra* note 62 and accompanying text.

256. See *supra* notes 55–58, 62 and accompanying text.

257. See *supra* Part III.B.2.

directly addresses the as-applied challenge's three problematic features so as to provide a more effective shield for organizations against the chilling effects of disclosure.

Illustrative of the manner in which PIRA's administrative alternative addresses the as-applied challenge's three primary deficiencies is the experience of NARAL, the first 501(c)(4) exempted from PIRA's source-of-funding disclosure requirements, and an organization that would likely not qualify for exemption under the as-applied challenge.<sup>258</sup> With respect to the nature of the threats, harassments, or reprisals NARAL's donors might face as a result of disclosure, there was evidence suggesting some probability of serious risks,<sup>259</sup> including death threats.<sup>260</sup> Based on the courts' interpretation of the ambiguous *Buckley* test in light of the examples the Supreme Court has provided, however, the prospect of harm to NARAL's donors would likely not be deemed sufficient to warrant exemption.<sup>261</sup> To be sure, there have been instances of violence arising out of the heated debate over a woman's right to choose.<sup>262</sup> But is the risk of violence against pro-choice advocates resulting from disclosure similar in kind to that faced by civil rights advocates in the segregated South? And more to the point, would a court deem the prospect of harm to be similar enough? Rather than attempting to answer these difficult questions as a constitutional matter, the administrative alternative provided by JCOPE avoids them. By providing objective criteria to guide the analysis of whether a group has demonstrated a substantial likelihood that disclosure will lead to threats, harassment or reprisals,<sup>263</sup> the regulations ensure that administrators will not be left to reason by analogy to the NAACP or Socialist Workers Party.

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258. See *supra* Part II; Part III.B.2. Of course, this assumes that NARAL's exemption is reflective of the manner in which the JCOPE will interpret and apply its administrative procedures moving forward. Given Judicial Hearing Officer George Pratt's recent reversal of JCOPE's denial of four other groups' applications for exemption and the Commission's subsequent acceptance of those decisions, as well as JCOPE's renewal of NARAL's exemption in August 2014, see *supra* Part II, this is not an unrealistic assumption.

259. See *supra* Part II.

260. See *supra* Part II.

261. See *supra* Part III.B.2.

262. See generally NARAL PRO-CHOICE AMERICA, ANTI-CHOICE VIOLENCE AND INTIMIDATION (2014), available at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-anti-choice-violence.pdf>.

263. N.Y. COMP. CODES R. & REGS. tit. 19, § 938.4 (2012). For the relevant text of the regulations setting forth these criteria, see *supra* note 62.

Further complicating NARAL's hypothetical claim for an exemption under the as-applied challenge would be the question of whether it qualifies as a "minor party."<sup>264</sup> If a court answering this question followed an approach similar to Judge England's in *ProtectMarriage.com*, the answer would most assuredly be "no."<sup>265</sup> As an organization that has found success in its legislative advocacy efforts,<sup>266</sup> it is unlikely that NARAL would be considered a "minor party" entitled to an exemption under the *Buckley* test as many courts apply it. By not requiring that a 501(c)(4) be a "minor party" to obtain an exemption, however, PIRA's administrative alternative provides more complete protection against the chilling effect disclosure poses for some groups, regardless of the success of their efforts.

Lastly, the evidence presented by NARAL might not satisfy the high evidentiary burden often demanded by courts in considering as-applied challenges.<sup>267</sup> Despite *Buckley's* emphasis on "flexibility" of proof,<sup>268</sup> the few threatening communications the organization itself received and anecdotal evidence of violence targeted at abortion providers elsewhere would likely not be sufficient.<sup>269</sup> However, with the clarity JCOPE's regulations provide through objective criteria for assessing groups' applications for exemptions,<sup>270</sup> an evidentiary standard resembling that which the Court set out in *Buckley* might actually be used. Notwithstanding JCOPE's amendments to the source-of-funding disclosure regulations, which raised the burden of proof groups must carry in order to obtain an exemption,<sup>271</sup> the administrative alternative still appears to be more protective of groups than as-applied challenges. As suggested by the Commission's perfunctory renewal of NARAL's exemption in August 2014, the "substantial likelihood" of threats, harassment, and reprisals that now must be shown<sup>272</sup> seems not to signify any heavier of a burden

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264. See *supra* Part III.B.2.

265. See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216–17 (E.D. Cal. 2009). For discussion of the case, see *supra* Part III.B.2.

266. See *supra* note 64.

267. See *supra* Part III.B.2.

268. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); see *supra* note 229 and accompanying text.

269. See *supra* Part III.B.2.

270. See *supra* note 62 and accompanying text.

271. See *supra* notes 71–72 and accompanying text (discussing amendments).

272. N.Y. COMP. CODES R. & REGS. tit. 19, § 938.4 (2013); see *supra* note 72 and accompanying text.

than the “reasonable probability” of such harms under the *Buckley* test as the courts have applied it.<sup>273</sup> Indeed, considering the absence of a “minor party” requirement and a broader view of the harms that might warrant an exemption, PIRA’s administrative alternative should continue to be more protective than the as-applied challenge, notwithstanding the nominally higher evidentiary burden under JCOPE’s regulations.

## B. IMPROVING THE ADMINISTRATIVE ALTERNATIVE

While the administrative procedure PIRA provides for groups seeking exemptions from its funding-source disclosure requirements is an attractive alternative to the as-applied challenge, it is by no means perfect. As the controversy which embroiled JCOPE when it first granted NARAL’s exemption suggests,<sup>274</sup> there may be some inherent difficulties that accompany using an administrative agency to determine whether an organization should be exempt from a law — like one imposing lobbying disclosure rules — that is so intertwined with politics. Investing a special agency with the discretion to determine whose political activity will be subject to legal constraints is a controversial proposition — one likely to lead to popular pushback if it so much as appears to be exercised in a selective, unequal manner on the basis of political considerations.<sup>275</sup> Indeed, this type of negative public response may limit the agency’s ability to carry out its exemption-administering duties in the manner the legislature originally intended.<sup>276</sup> Despite the potential for these pitfalls, however, there are ways in which they may be guarded against so as to ensure the intended benefits of the administrative alternative are realized. If future disclosure regimes were to incorporate a simi-

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273. See *supra* Part III.B.2.

274. See *supra* Part II.

275. See, e.g., *supra* notes 66–68 and accompanying text. The scandal that engulfed the IRS in the summer of 2013 following revelations that it targeted conservative groups applying for 501(c)(4) status for extra scrutiny provides another illustrative example. See, e.g., Ezra Klein, *The IRS Scandal is About Targeting Conservatives, Not Scrutinizing 501(c)(4)s*, WASH. POST (May 29, 2013, 3:45 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/29/the-irs-scandal-is-about-targeting-not-scrutiny/>.

276. The regulatory amendments JCOPE implemented after NARAL’s exemption — which were a direct response to the public outcry that had resulted — may well have caused the Commission to evaluate the four other applications in a manner that was inconsistent with PIRA’s drafters’ understanding of how the exemption process would be administered, as evidenced by the groups they believed would qualify for exemption. See *supra* Part II.

lar apparatus for groups to obtain exemptions, those drafting the procedures should, with this goal in mind, consider improving upon New York's example in several ways.

The first improvement, and perhaps the more difficult to achieve, would be to guard against politicization of the ethics board administering exemptions, and in turn, prevent the use of impermissible political considerations as the basis for granting exemptions. One method of achieving this goal would be structural. Mark Davies, Executive Director of the New York City Conflicts of Interest Board, has argued that the composition of JCOPE's membership and the method in which its commissioners are appointed "virtually guarantees" that it will be factionalized and politicized.<sup>277</sup> By establishing a significantly smaller ethics board — in contrast to JCOPE's "unwieldy" fourteen members<sup>278</sup> — and adopting an alternative appointment process,<sup>279</sup> however, it may be possible to curb these negative outcomes in other jurisdictions. Changes such as these could not only reduce the likelihood that politicization would befall the exempting agency and taint its determinations, but moreover could enhance the appearance of propriety in its actions, maximizing public confidence in the board as a neutral overseer of the disclosure regime. Improving the public's view of the agency in this manner could reduce the risk of popular controversy and allow the exemption procedure to fulfill its protective purpose.

The second improvement that should be made to the administrative alternative is to impose heightened transparency requirements on the administrative process itself. Two possible transparency-related measures include imposing requirements to disclose applications for exemption publicly, and holding applica-

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277. Davies, *supra* note 26, at 726.

278. *Id.* at 727.

279. *Id.* at 730–731. Davies suggests two possible alternative nomination processes: (1) have all commissioners "appointed by the governor with the advice and consent of the legislature, without regard to political party affiliation," or (2) require the governor to choose from among candidates nominated by a nominating panel, (again without regard to political party affiliation), whose independent, non-partisan (not bi-partisan), non-political members are specified in the law — for example, the Chief Judge of the State of New York, the President of the New York State Bar Association, the chair of one or more designated civic groups, and the like. But any group, such as unions, active in partisan political matters must be excluded from the nominating panel.

*Id.*

tion evaluation hearings open to the public.<sup>280</sup> As with structural measures taken to reduce the potential for politicization, these requirements would serve the related goals of minimizing the influence of improper political considerations on the granting of exemptions, and reducing the appearance of such behavior. Allowing the public to monitor these processes would provide an independent check on the administrative agency, ensuring that their determinations are made in accordance with their own objective criteria. Moreover, greater transparency surrounding the procedures could contribute to public confidence in the neutrality of the commission's decision-making, preventing the type of consequences that befell JCOPE as a result of its conducting exemption evaluations behind closed doors.<sup>281</sup>

Although JCOPE has taken a step in the right direction by making groups' applications for exemption publicly available,<sup>282</sup> heightened transparency surrounding the criteria used for granting exemptions and the process through which a determination is reached would have been advisable from the beginning. If the Commission had had the foresight to include such requirements in their initial implementing regulations, they may have alleviated some of the suspicion of political favoritism surrounding NARAL's exemption in the first place, thus diminishing the probability of public backlash. It is also worth noting that these transparency-related measures could serve the additional purpose of allowing groups to more fully understand the process and evaluate their own chances of success before deciding to seek exemptions.

### C. FEASIBILITY OF IMPLEMENTATION ELSEWHERE

Despite the advantages of an administrative procedure such as that established under New York's PIRA, implementation of the administrative alternative would face hurdles even with the adoption of the improvements suggested. The most significant barrier facing implementation is that it would require recognition

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280. Such measures would not defeat the privacy interests of donors to organizations seeking exemptions. Pending the administrative board's final determination on whether to grant an exemption and any appeals available thereafter, all donor information would remain exempt from otherwise applicable donor disclosure requirements.

281. See *supra* notes 67–68, 70 and accompanying text.

282. See N.Y. COMP. CODES R. & REGS. tit. 19, § 938.8 (2013); *supra* notes 73–74 and accompanying text.

on the part of legislators and those administering the law that the cost-benefit calculus associated with disclosure has changed such that additional protection for certain groups is desirable.<sup>283</sup> As suggested above, this would entail a significant departure from past practice, in that legislators and administrators have generally not found it necessary to provide any more protection for groups against the potential chilling effect disclosure poses than that which courts deem constitutionally required.<sup>284</sup>

Assuming this need is recognized, however, jurisdictions other than New York could feasibly establish disclosure regimes incorporating the administrative alternative's procedures. If a state were to pass a law which, like PIRA, mandated disclosure of donors to organizations engaged in lobbying, most would already have an administrative body in place to oversee the exemption issuance process.<sup>285</sup> Although there is significant variation among the states, forty-one provide external oversight of their ethics laws through an ethics commission,<sup>286</sup> thirty of which have jurisdiction over lobbying regulation.<sup>287</sup> Thus, while the administrative alternative to the as-applied exemption would mark a departure from the status quo, and implementation might require that changes be made to existing ethics oversight regimes, it would not be a radical deviation from the administrative structures already in place in a majority of the states.

Moreover, the utility of an administrative procedure for obtaining exemptions modeled on that provided in New York would not be limited to the context of lobbying disclosure regimes alone. As indicated above, disclosure has long been accepted as a fa-

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283. See Briffault, *Disclosure 2.0*, *supra* note 17, at 295 ("Justice Scalia may be right that democracy is not for the faint of heart and that the Constitution may very well permit Congress and the states to require citizens to demonstrate a certain amount of 'civic courage' when they make campaign contributions. But we should give greater consideration to when and why such 'courage' is necessary and whether requiring courage, even when constitutionally permissible, is counterproductive.")

284. See *supra* notes 248–249 and accompanying text.

285. See *Ethics: State Ethics Commissions*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx> (last updated Dec. 2014) (providing fifty-state survey of manner in which ethics laws are overseen, whether through commission or otherwise); *State Ethics Commissions: Jurisdiction*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/ethics/50-state-chart-state-ethics-commissions-jurisdic.aspx> (last updated Nov. 2013) (providing fifty-state survey of state ethics commissions' jurisdiction).

286. *Ethics: State Ethics Commissions*, *supra* note 285 (providing fifty-state survey of manner in which ethics laws are overseen, whether through commission or otherwise).

287. *State Ethics Commissions: Jurisdiction*, *supra* note 285 (providing fifty-state survey of state ethics commissions' jurisdiction).

vored means of regulating all forms of political speech in the United States; whether in the context of campaign finance, ballot issue advocacy, or lobbying, disclosure requirements have wide applicability and may serve any number of important information-related government interests.<sup>288</sup> No matter the context, however, there may be groups for whom disclosure will pose an unacceptable risk of burdening activity protected under the First Amendment. As long as the as-applied challenge provides an inadequate shield for constitutionally protected fundamental rights, an administrative process for obtaining exemptions holds promise as an alternative.

## V. CONCLUSION

A pioneering piece of legislation in several respects, the Public Integrity Reform Act of 2011 can be seen as a bold experiment. It made New York the first state to require 501(c)(4) organizations engaged in lobbying to disclose their donors, and it provided an innovative procedural approach to ensure that the negative effects of disclosure are minimized. In light of these features, PIRA also provides an opportunity for reflection on our approach to drafting disclosure legislation. To be sure, the Supreme Court's treatment of disclosure laws applicable to lobbying and other political activity suggests that donor disclosure laws of the sort adopted in New York would be upheld if subject to facial challenge. Based upon the problematic manner in which courts evaluate as-applied challenges, however, PIRA's administrative procedure for obtaining exemptions may provide an attractive alternative. While the administrative alternative can certainly be improved, it has the potential to address the as-applied challenge's primary deficiencies, and to provide a more effective protective vehicle against the chilling effects disclosure may pose to core political speech protected under the First Amendment.

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288. See *Doe #1 v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *United States v. Harriss*, 347 U.S. 612 (1954).