

**INDEPENDENCE INSTITUTE V.
WILLIAMS: THE TENTH CIRCUIT'S
PROPER RULING OF COLORADO'S
DISCLOSURE LAW AND
INCREASED FLEXIBILITY IN STATE
DISCLOSURE LAW**

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ABSTRACT:

The Citizens United v. FEC decision generated immense doubt about the future of state campaign finance regulation. Since the Citizens United v. FEC decision, opponents of campaign finance reform are becoming increasingly successful in challenging state regulations. Among campaign finance regulations, disclosure requirements have traditionally found the most support among the courts. Even though disclosure requirements were upheld in Citizens United v. FEC, they have been placed under pressure by federal district and appeals courts. Indeed, the Eighth Circuit has used Citizens United v. FEC to strike down state disclosure requirements. It does not appear, however, that these decisions are a part of a broader trend. This Article reviews Independence Institute v. Williams, where state disclosure requirements were strongly upheld by the Tenth Circuit under the review standards set in Citizens United v. FEC. The Tenth Circuit reiterated the strong support Citizens United v. FEC gave to disclosure requirements under the exacting scrutiny test, which has been a source of ambiguity in other disclosure decisions. Further, the court signaled that states have leeway in their ability to set campaign finance disclosure laws that match the cost of campaigning in their state.

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I. INTRODUCTION

States have regulated campaign contributions to remove corruption from the political process since the late 1800s.¹ These regulations took the form of campaign contribution limits, expenditure limits, public financing, and disclosure.² Of course, public financing, expenditure limits, and campaign contribution limits attempt to directly remove money in politics by statutorily barring donations.³ On the other hand, disclosure laws “require electoral actors (candidates, political committees, political parties, and others) to report campaign funds, both raised and spent, to a government agency.”⁴ Ultimately, disclosure requirements attempt to provide information to voters about the relationship between donors and political campaigns rather than specifically barring the flow of money to candidates.

In part, because disclosure requirements do not directly stop contributions and other campaign related activity, they have enjoyed a unique place among the four campaign finance regulations.⁵ Unlike various forms of campaign contribution limits,⁶ public financing,⁷ and expenditure limits,⁸ disclosure requirements have been routinely upheld by the United States Supreme Court.⁹ Indeed, in the highly-debated *Citizens United v. FEC*,¹⁰ disclosure requirements were provided strong support in the majority opinion, even though the case put all other forms of campaign finance regulations in an exceptionally precarious position.¹¹ Because of this, disclosure requirements

1. BENJAMIN T. BRICKNER & NAOMI MUELLER, CLEAN ELECTIONS: PUBLIC FINANCING IN SIX STATES INCLUDING NEW JERSEYS PILOT PROJECTS (2016), <http://www.eagleton.rutgers.edu/research/newjersey/documents/CE-PublicFinancinginSixStates09-08.pdf>.

2. Christopher F. Kulesza, Michael G. Miller & Christopher Witko, *State Responses to U.S. Supreme Court Campaign Finance Decisions*, 47 PUBLIUS 467 (2017).

3. See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, THE (NON-)EFFECTS OF CAMPAIGN FINANCE SPENDING BANS ON MACRO POLITICAL OUTCOMES: EVIDENCE FROM THE STATES (2014), http://people.umass.edu/schaffne/laraja_schaffner_spendingbans.pdf (discussing the effects of these mechanisms, specifically spending bans).

4. Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 433 (2016).

5. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (“Unlike the over-all limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

6. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014); *Randall v. Sorrell*, 548 U.S. 230, 247 (2006).

7. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

8. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 454, 476-81 (2007).

9. Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000).

10. 558 U.S. 310 (2010).

11. See *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010) (“The Court has explained that disclosure is a less restrictive alternative to more comprehensive regula-

have oftentimes been considered the most defensible among campaign finance regulations.

In recent decades, tides were turning against disclosure regulations quite quickly in federal district and appellate courts.¹² Most recently, the number of challenges to state disclosure requirements dramatically increased.¹³ Federal courts increasingly met state disclosure requirements with skepticism.¹⁴ Disclosure requirements in *Galassini v. Town of Fountain Hills*¹⁵ and *South Carolina Citizens for Life v. Krawcheck*¹⁶ were struck down largely due to the overbreadth in how the term “political committee” was defined.¹⁷ Of these, *Iowa Right to Life Committee, Inc. v. Tooker*¹⁸ and *Minnesota Citizens Concerned for Life, Inc. v. Swanson*¹⁹ are of most interest to this analysis. In these cases, both state disclosure requirements were struck down, even while *Citizens United* provided strong support to these regulations.²⁰ These cases left unanswered the question of whether *Citizens United* could be used to strike down disclosure requirements in future decisions.

Recent cases at the federal district and appellate levels signal that the courts are still struggling with how to properly apply *Citizens United* to disclosure requirements.²¹ Indeed, *Citizens United* may continue to be troublesome for state disclosure law in future cases. Scholars have been exceptionally concerned²² about the decisions in *Tooker* and *Swanson*.²³ The fallout from both cases, however, may be

tions of speech.”); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (rejecting *Citizens United*’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy).

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

13. See CAMPAIGN LEGAL CTR. DATABASE, <http://www.campaignlegalcenter.org> (last visited Mar. 18, 2018).

14. See, e.g., *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2015); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012); *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. 2014); *S.C. Citizens for Life v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010).

15. No. CV-11-02097-PHX-JAT, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. 2014).

16. 759 F. Supp. 2d 708 (D.S.C. 2010).

17. See *Galassini*, 2014 U.S. Dist. LEXIS 168772, at *17; see also *S.C. Citizens for Life v. Kenneth C. Krawcheck et. al.*, 759 F. Supp. 2d 708 (D.S.C. 2010).

18. 717 F.3d 576 (8th Cir. 2013).

19. 741 F. Supp. 2d 1115, 1122-23 (D. Minn. 2010).

20. See Asher R. Ball, Note, *Minnesota Citizens Concerned for Life, Inc. v. Swanson and Disclosure Burdens: Does Getting Corporations to Talk Suppress Their Speech*, 91 NEB. L. REV. 706, 732 (2013); see also David J. Sund, *Iowa Right to Life Committee, Inc. v. Tooker: The Eighth Circuit Ignores Citizens United by Striking Down an Iowa Campaign Finance Disclosure Requirement*, 48 CREIGHTON L. REV. 659 (2015).

21. Sund, *supra* note 20.

22. *Id.*; Ball, *supra* note 20.

23. *Swanson*, 741 F. Supp. 2d at 1122-23.

quite limited if the current trend continues. Indeed, both cases were decided by the United States Court of Appeals for the Eighth Circuit and do not seem to be a part of a larger nationwide trend. Even though federal courts beyond the Eighth Circuit have ruled state disclosure requirements are unconstitutional, other courts, such as the court in *Independence Institute v. Williams*,²⁴ are upholding the requirements under the reasoning of *Citizens United*.²⁵

This Article will discuss the challenge to Colorado's disclosure regulation in *Williams* in four parts. First, this Article will provide a brief history of state campaign finance disclosure law.²⁶ Second, this Article will discuss the central legal standards that have been used by courts to analyze state campaign finance disclosure law.²⁷ Third, this Article will provide the facts of *Williams*.²⁸ Fourth, this Article will provide an analysis on how the court properly applied precedent on campaign finance regulation and how it may allow states to broaden their disclosure requirements.²⁹

II. A BRIEF HISTORY OF STATE CAMPAIGN DISCLOSURE LAW

Disclosure requirements in the states predate federal regulations.³⁰ In 1890, New York was the first state to enact disclosure requirements.³¹ This initial law required candidates to itemize their campaign expenditures, but not their campaign contributions.³² Colorado and Michigan both passed very similar laws in 1891.³³ Unfortunately for state reformers, these laws were largely unenforceable and plagued with significant loopholes.³⁴ Further, these statutes lacked severe punishments for those who did not properly report their campaign expenditures.³⁵

24. 812 F.3d 787 (10th Cir. 2016).

25. See *Citizens United*, 558 U.S. at 371 (finding the disclosure requirements constitutional); see also *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016).

26. See *infra* notes 30-62 and accompanying text.

27. See *infra* notes 63-93 and accompanying text.

28. See *infra* notes 94-107 accompanying text.

29. See *infra* notes 108-160 accompanying text.

30. See *infra* notes 32 and 49 and accompanying text.

31. BENJAMIN T. BRICKNER, IN DIRTY DEALS? AN ENCYCLOPEDIA OF LOBBYING, POLITICAL INFLUENCE, AND CORRUPTION 179-201 (3d ed. 2014).

32. PERRY BELMONT, RETURN TO SECRET PARTY FUNDS: VALUE OF REED COMMITTEE 128 (1st ed. 1927).

33. PETER H. ARGERSINGER, STRUCTURE, PROCESS, AND PARTY 64 (1st ed. 1992).

34. Comment, *Editors Loophole Legislation-State Campaign Finance Laws*, 115 U. PA. L. REV. 983 (1967).

35. BELMONT, *supra* note 32, at 26.

By the turn of the twentieth century, eighteen states enacted disclosure requirements, but three statutes were quickly repealed.³⁶ The first enforceable state campaign finance disclosure law was the California Purity of Election Act of 1893.³⁷ In contrast to the Michigan, Colorado, and New York statutes, the California act severely punished those who did not comply with the law.³⁸

However, the California law was not long lived. California state officials attempted to enforce the act across both primary and general elections. The statute was challenged in the California Supreme Court in 1896 because it did not apply to primary elections, an argument that would be used against federal laws in future court cases.³⁹ In response, the legislature passed the Purity of Primary Elections Law in 1897. However, the law was constitutionally flawed. The law required individuals to take an oath that their vote in the primary would directly translate to support in the upcoming general election.⁴⁰ The statute was immediately challenged in *Spier v. Baker*,⁴¹ and the California Supreme Court nullified the law soon after.⁴²

In 1907, the California state legislature repealed the Purity of Elections Act of 1893 and replaced it with a significantly weaker law. Although the new statute still required expenses to be reported after an election, it no longer provided stiff punishments for candidates who violated the law. The new statute lacked the original public office forfeiture requirement and made failure to report campaign contributions a misdemeanor.⁴³ For the next forty years, the law was further amended to include primary elections and to bar any candidate from receiving a certificate of nomination until he or she disclosed campaign expenses. The law was still not effective, however, after the amendments were enacted. By the 1950s, only one individual had been prosecuted for election code violations.⁴⁴

Campaign finance reform was relatively delayed at the federal level. Serious federal efforts to regulate campaign finance began nearly twenty years after the first statutes were adopted in the states, coinciding with the advent of the Progressive Era. Unlike the states,

36. ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 17 (2014).

37. Bruce A. Thompson, *Campaign Contributions and Expenditures in California*, 41 CAL. L. REV. 303 (1953).

38. *Id.* at 303-04.

39. *Id.*

40. *Id.*

41. 120 Cal. 370 (1898).

42. Leonard M. Friedman, *Reflections Upon the Law of Political Parties*, 44 CAL. L. REV. 65 (1956).

43. *Id.*

44. Bruce A. Thompson, *Campaign Contributions and Expenditures in California*, 41 CAL. L. REV. 300 (1953).

the federal government began first experimenting with campaign contribution limits, not disclosure requirements. The 1904 presidential election cycle generated controversy when it was revealed that President Theodore Roosevelt accepted campaign contributions from corporations.⁴⁵ Facing significant criticism, President Theodore Roosevelt called for prohibitions against union and corporate contributions in 1905.⁴⁶ Congress responded by passing the Tillman Act,⁴⁷ which was signed by President Roosevelt in 1907. Like state campaign finance regulations, the Tillman Act was nearly impossible to enforce.⁴⁸ The Tillman Act, however, was the first major step to regulate campaign contributions at the federal level.

The Federal Corrupt Practices Act⁴⁹ (“FCPA”) introduced federal disclosure requirements for United States House of Representatives campaigns three years later.⁵⁰ The original legislation was rife with loopholes and weaknesses.⁵¹ The FCPA required political parties to disclose their campaign spending, not individual candidates. Further, only single-state parties and candidate committees were subject to the disclosure requirements. United States Senate campaigns were added a year later in 1911 to make way for the Seventeenth Amendment. Most controversially, the amendments also placed expenditure limits on House and Senate campaigns at \$5000 and \$10,000, respectively.⁵²

The FCPA directly produced three landmark United States Supreme Court decisions that arguably set the stage for all future challenges to campaign finance regulations. Only one of these, however, dealt with disclosure requirements. *Newberry v. United States*⁵³ was the first Court challenge to the FCPA. The case centered around the 1918 Michigan Republican Senate primary race between automotive industrialist Henry Ford and Truman H. Newberry.⁵⁴ Newberry defeated Ford in the Senate primary, leading Ford to take the Democratic nomination instead to remain in the general election.⁵⁵

45. SCOTT JOHN HAMMOND, ROBERT NORTH ROBERTS, VALERIE A. SULFARO, *CAMPAIGNING FOR PRESIDENT IN AMERICA, 1788–2016* 36 (2016).

46. *Fifth Annual Message*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29546> (last visited Mar. 17, 2018).

47. 34 Stat. 823 (1906).

48. Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279, 280 (1991).

49. 36 Stat. 822 (1910).

50. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983 (2010).

51. LARRY J. SABATO & HOWARD R. ERNST, *ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS* 146, 147 (2d ed. 2007).

52. *Id.*

53. 256 U.S. 232 (1921).

54. RAYMOND J. LA RAJA, *SMALL CHANGE: MONEY, POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM* 53 (2008).

55. *Id.*

Newman, however, spent approximately \$180,000 in outreach on the primary race, most originating from his personal income. This far exceeded the limits imposed by federal statute, leading to a criminal conviction against Newberry in federal district court.⁵⁶

The Court ruled in *Newberry* that the Federal Constitution did not give Congress the authority to regulate primary elections and party nominating conventions.⁵⁷ Thus, the spending limits placed in the FCPA could not be imposed on federal candidates. This Court decision did not have any direct effect on state campaign finance regulations, as states had yet to implement similar spending limits, but arguably set the stage for future constitutional questions on expenditures and state campaign finance law which will be discussed below.

Following the Court ruling, Congress attempted to strengthen the FCPA to include multistate parties and campaign committees in 1925.⁵⁸ The FCPA put in place quarterly reporting requirements. The amendments largely failed to eliminate most problems that plagued the original statute. For example, total campaign contributions were not regulated and no penalties were included for violating the law. Congress also failed to identify an agency to enforce the regulations. Instead, enforcement of the regulations was left to Congress, creating perfect conditions for conflicts of interests. Campaigns could also set up multiple campaign committees to avoid the \$100 disclosure floor.⁵⁹

Most central to this analysis, *Burroughs v. United States*⁶⁰ presented a Court challenge to the FCPA's disclosure requirements. Ada L. Burroughs and James L. Cannon acted as treasurer and chair of an anti-Catholic and Prohibitionist Political Action Committee, respectively, during the 1928 presidential election.⁶¹ Both refused to disclose contributions made to the committee in violation of the FCPA, leading to eleven indictments against them. On each appeal, the courts found that the FCPA was constitutional and that the indict-

56. *Id.*

57. The Supreme Court has explained that the power to control party primaries for designating candidates for the Senate is not within the grant of power "to regulate the manner of holding elections" (U.S. CONST., Art. I, § 4)—neither within the fair intentment of the words used nor the meaning ascribed to them by the framer of the Constitution; it is not necessary in order to effectuate the power expressly granted (U.S. CONST. Art. I, § 8, cl. 18), and its exercise would interfere with purely domestic affairs of the states and infringe upon liberties reserved to the people. *Newberry v. United States*, 256 U.S. 232 (1921).

58. BROOKINGS INST. PRESS, *Money and Politics: A History of Federal Campaign Finance Law and "Soft Money,"* in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 29 (Trevor Potter, et al. eds., 1997).

59. *Id.*

60. 290 U.S. 534 (1934).

61. MUTCH, *supra* note 36, at 93.

ments were justified. Most importantly, the Court upheld disclosure requirements, arguably cementing them as a cornerstone for campaign finance law reformers.⁶²

A. WATERGATE REFORM

State endeavors to regulate campaign finances were largely non-existent from the 1930s to the 1960s, barring a few isolated cases. The numerous challenges to campaign finance regulations in state court may have engendered significant reluctance among the state legislatures from enacting any meaningful changes.⁶³ This trajectory changed when Congress passed the first federal public finance program in 1966. Sponsored by Senator Russell Long, the program provided a \$1.00 checkoff for individuals on their tax forms. The program was quickly repealed a year later, never being used in an election.⁶⁴

The effort to rein in campaign contributions and expenditures was revitalized with the passage of Federal Election Campaign Act⁶⁵ (“FECA”).⁶⁶ The first and most impactful challenge to FECA was a lawsuit brought by Senators James Buckley and Eugene McCarthy, supported by organizations including the American Civil Liberties Union and the American Conservative Union.⁶⁷ In *Buckley v. Valeo*,⁶⁸ the petitioners argued that the provisions of the amended FECA placed undue restrictions on First Amendment speech protections, including campaign contribution limits, disclosure requirements, and expenditure limits.⁶⁹

The *Buckley* ruling was mixed for campaign finance reformers. Multiple provisions of the 1974 amendments were declared unconstitutional by the United States Supreme Court in a per curiam, seven-to-two decision. Most notably, the Court was exceptionally troubled by the how sweeping and restrictive FECA’s expenditure limits were,

62. *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934). The Supreme Court noted:

The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means is primarily for the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

Burroughs, 290 U.S. at 547-48.

63. BRICKNER, *supra* note 31, at 196.

64. *The FEC and the Federal Campaign Finance Law*, FEC, <http://classic.fec.gov/pages/brochures/fecfeca.shtml> (last visited Mar. 17, 2017).

65. Pub. L. No. 92-225, 86 Stat. 3 (1971).

66. Federal Election Campaign Act, 52 U.S.C. § 301 (1971).

67. LA RAJA, *supra* note 54, at 77.

68. 424 U.S. 1 (1976).

69. *Buckley v. Valeo*, 424 U.S. 1, 11 (1976).

stating that “[t]he provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement ‘relative to a clearly identified candidate’ in a major metropolitan newspaper.”⁷⁰ The Court further wrote that expenditure limits violated constitutional protections that allow “candidates, citizens, and associations to engage in protected political expression.”⁷¹ The Court also decided that the appointment procedure for the Federal Elections Commission violated the separation of powers principle for giving selection authority to congressional leadership rather than the President.⁷²

Even though expenditure limits were ruled unconstitutional, *Buckley* provided state governments with a legal justification to maintain limits on direct contributions. The Court determined that FECA’s \$1000 limits were “closely drawn,” stating that “[FECA’s] \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions.”⁷³ The Court further found that “the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.”⁷⁴ In doing so, the Court set a \$1000 contribution level as being an appropriate limit for exercising First Amendment rights.⁷⁵ The new federal public finance program was also left relatively untouched by the Court’s decision, giving constitutional support to programs that require candidates to surrender their ability to raise funds privately in exchange for taxpayer funded subsidies.

The Court was significantly more supportive of disclosure requirements, arguably cementing them as the least legally challenged campaign finance regulation for decades. As noted, disclosure requirements, unlike public finance laws and contribution limits, do not stop speech from happening. Under disclosure requirements alone, funds can still be transferred from the donor to the campaign. By simply requiring candidates to report their campaign contributions, the Court ruled that such reports “deter actual corruption and avoid the appearance of corruption by exposing large contributions

70. *Buckley*, 424 U.S. at 40.

71. *Id.* at 59.

72. The Supreme Court wrote that “the appointment of Ambassadors and Judges of the Supreme Court was confided to the Senate, and that the authority to appoint—not merely nominate, but to actually appoint—all other officers was reposed in the President.” *Id.* at 130.

73. *Id.* at 28.

74. *Id.* at 29.

75. The Supreme Court also stated that “[a]s the Court of Appeals observed, if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” *Id.* at 30.

and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election.”⁷⁶

As campaign disclosure was declared constitutional by federal courts, disclosure regulations were significantly strengthened by state governments. In contrast to the early disclosure laws, state governments actively attempted to find ways to better enforce their statutes. Arguably, the most important reform to disclosure requirements in the states during the 1970s was a ban on large cash donations.⁷⁷ Banning major cash donations gave the state governments an exceptionally powerful tool to track donations to candidates, finally giving officials the means necessary to enforce disclosure requirements. Indeed, during the 1974 election, there was very little evidence that a significant amount of money went undisclosed following the ban.⁷⁸

B. MODERN REFORM

The precedent that the United States Supreme Court relied upon through the 1990s and 2000s was still relatively supportive of state campaign finance regulation. Arguably, *Citizens United v. FEC*⁷⁹ marked the biggest change in the trajectory of the future of state campaign finance regulation.⁸⁰ The conservative group Citizens United wished to air and advertise a negative film against Hillary Clinton titled *Hillary: The Movie* within thirty days of the 2008 Democratic primary. Showing the ad was in direct violation of the McCain-Feingold Bipartisan Campaign Reform Act of 2002⁸¹ (“BCRA”), which banned any electioneering communications that were aired thirty days before a primary and sixty days before a general election.

In *Citizens United*, the Court unraveled decades of court precedent regarding independent expenditures made directly from treasuries. Federal limits on independent expenditures from unions and corporations were declared unconstitutional. The decision in *Citizens United* partially overruled *Austin v. Michigan Chamber of Commerce*,⁸² which upheld the Michigan ban on corporations from using treasury funds from political activity. *Citizens United* also completely

76. *Id.* at 67.

77. Adoption of the cash donation ban was not universal. For example, Texas still allowed candidates to collect significant contributions through cash. See David Broder, *Epilogue*, in *CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES* 311 (1976).

78. *Id.*

79. 558 U.S. 310 (2010).

80. *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

81. Pub. L. No. 107-155, 116 Stat. 81 (2002).

82. 494 U.S. 652 (1990).

overturned *McConnell v. FEC*,⁸³ which allowed the federal government to regulate “electioneering communications.”

The Court once again provided support for disclosure requirements in *Citizens United*.⁸⁴ *Burroughs v. United States*⁸⁵ began a trend of favorable decisions followed by *Citizens United*. Writing the opinion of the Court, Justice Kennedy stated that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”⁸⁶ The Court also noted that disclosure requirements could provide exceptionally vital information to voters, serving as a tool that could be used to increase democratic accountability.

It should be noted that *Citizens United* did not have a direct impact on state disclosure requirements. The precedent set in *Citizens United*, however, has been used extensively to challenge state campaign finance regulations. For example, in both *Iowa Right to Life Committee, Inc. v. Tooker*,⁸⁷ and *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,⁸⁸ the courts struck down disclosure requirements tied to independent expenditures made by individuals and groups. Once these individuals and groups reached a certain threshold, ongoing independent expenditure reports had to be filed with the state. The Court had previously upheld very similar requirements, arguably pointing to the misapplication of *Citizens United*.⁸⁹ As will be discussed below, however, the reporting requirements in Colorado could hardly be considered slow. Instead, both states required rather rapid reporting once a contribution or expenditure was made to a candidate or political committee.

C. CONSTITUTIONALITY OF DISCLOSURE LAW: STRICT SCRUTINY AND EXACTING SCRUTINY

Previous scholarly work on disclosure requirements has discussed two standards by which campaign finance laws are tested in courts: exacting scrutiny and strict scrutiny.⁹⁰ It is vital to briefly discuss these two concepts to fully understand how the courts have ruled on disclosure requirements. Strict scrutiny is commonly known to be the most stringent judicial standard applied by the courts. Strict scrutiny is applied when there is a fundamental constitutional right being in-

83. 540 U.S. 93 (2003).

84. Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV. INTER ALIA (Apr. 3, 2016), https://ylpr.yale.edu/inter_alia/taking-disclosure-seriously.

85. 290 U.S. 534 (1934).

86. *Citizens United*, 558 U.S. at 366.

87. 717 F.3d 576 (8th Cir. 2013).

88. 692 F.3d 864 (8th Cir. 2012).

89. Sund, *supra* note 20.

90. Kevin Bandy, Justice v. Hosemann: *The Fifth Circuit's Devaluation of State Ballot Initiatives and Political Participation*, 84 U. CIN. L. REV. 475 (2016).

fringed by government action. To pass strict scrutiny, a statute must be narrowly tailored to further a compelling government interest. Very few campaign finance laws have been upheld when the strict scrutiny test is applied. On the other end of judicial scrutiny standards is the rational basis test. Under this test, a law is constitutional when no fundamental rights are at question. For a law to pass this test, it must simply be rationally related to some government interest.

The courts have traditionally used something less than strict scrutiny, but more than the rational basis test, when considering the constitutionality of disclosure requirements, referred to as exacting scrutiny.⁹¹ Exacting scrutiny attempts to balance the burdens that disclosure laws can place on free speech while giving states the ability to design policies that keep the public informed about campaign contributions and expenditures.⁹² This test has been much easier for state governments to meet under constitutional challenge. Like strict scrutiny, however, the government must have more than “mere showing of some legitimate governmental interest.”⁹³ That is, the government’s interest must be sufficiently important for the law to be constitutional.

III. FACTS AND RULING OF INDEPENDENCE INSTITUTE V. WILLIAMS

Founded in 1985, the Independence Institute is a nonpartisan think tank that operates out of Denver, Colorado. The Independence Institute brought a challenge to Colorado’s disclosure requirement in 2014. The Institute hoped to air an advertisement sixty days before the 2014 gubernatorial election that was critical of the State’s inability to audit its new health insurance change. The advertisement mentioned incumbent Colorado Governor Hickennlooper, who was running for reelection at the time, by asking voters to contact his office to support legislation that would start an audit.

The Colorado Constitution requires “any person who spends at least \$1000 per year on ‘electioneering communications’ to disclose the name, address, and occupation of any person who donates \$250 or more for such communications.”⁹⁴ “Electioneering communications” are defined as:

any communication broadcasted by television or radio . . .
that: (1) unambiguously refers to any candidate; and (2) is

91. See Levinson, *supra* note 4.

92. Zachary R. Clark, *Constitutional Limits on State Campaign Finance Disclosure Laws: What’s the Purpose of the Major Purpose Test?*, 2015 U. CHI. LEGAL F. 527 (2016).

93. Bandy, *supra* at 90.

94. COLO. CONST. art. XXVIII, § 6, cl. 1.

broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and (3) is broadcasted to . . . an audience that includes members of the electorate for such public office.⁹⁵

Concluding that the advertisement would be considered an “electioneering communication,” the Independence Institute sought a preliminary injunction against the disclosure requirement fearing that they would infringe on their members’ First Amendment rights to free association.

The Independence Institute agreed in its argument that disclosure requirements could be used to regulate speech that was campaign related. Further, it did not challenge the law because the statute was too ambitious or vague. Rather, the Independence Institute contended that the advertisement had little to do with the actual election, even though incumbent Governor Hickenlooper was mentioned by name. Instead, the Independence Institute challenged the law on the grounds that the advertisement was simply presenting a public policy idea. Specifically, that “genuine issue advocacy,” even that mentions a candidate, is shielded by the First Amendment from disclosure requirements.⁹⁶ For that reason, the Independence Institute argued that disclosure laws could not constitutionally be applied to its advertisement.

The United States District Court for the District of Colorado⁹⁷ found that the disclosure requirements survived the “exact scrutiny” test, and thus were not unconstitutional.⁹⁸ Through the “exact scrutiny” test, the court properly ruled that “it has long been held that reporting and disclosure requirements are subject to a different standard of scrutiny than restrictions on one’s ability to speak.”⁹⁹ Fur-

95. COLO. CONST. art. XXVIII, § 2, cl. 7.

96. *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016).

97. The case was originally filed as *Indep. Inst. v. Gessler*, 71 F. Supp. 3d 1194 (D. Colo. 2012), in the district court. Scott Gessler was the Colorado Secretary of State until 2015. He was replaced by Wayne Williams.

98. District Judge R. Brooke Jackson wrote very strongly that:

To begin, and just to be clear, this case is not about preventing the Independence Institute from speaking on the issues of the day. It is not about prohibiting the Institute from broadcasting its advertisement. The Institute is free to broadcast its advertisement so long as it complies with the reporting and disclosure requirements of Article XXVIII. Moreover, the Institute could have broadcast the ad without any reporting or disclosure requirements more than 60 days before the November 4, 2014 election. It can likewise broadcast the ad without any reporting or disclosure requirements after the election. In fact, it could broadcast the advertisement today without the reporting or disclosure requirements if it did not refer unambiguously to a candidate presently running for office.

Gessler, 71 F. Supp. 3d at 1198.

99. *Id.*

ther, the district court found that “the distinction between issue speech and express advocacy has no place in the context of disclosure requirements.”¹⁰⁰ The case was later appealed to the United States Court of Appeals for the Tenth Circuit.

The Independence Institute was unsuccessful in its appeal. The court of appeals also ruled in favor of the Colorado disclosure requirements for two primary reasons. First, the Tenth Circuit found that the disclosure requirements were significantly tailored to reach some form of speech. Indeed, the court agreed that the United States Supreme Court allowed for some forms of disclosure requirements even if the speech did not directly relate to an election. *Citizens United v. FEC*¹⁰¹ directly formed the basis of this reasoning. The Tenth Circuit cited *Citizens United* where the Court stated that “the distinction between issue speech and express advocacy has no place in the context of disclosure requirements.”¹⁰² The Colorado law was exceptionally similar to the disclosure provisions of the BCRA.¹⁰³ Like the requirements in *Citizens United*, disclosure requirements can encompass some forms of advocacy speech if they are “cabined within the bounds of exacting scrutiny.”¹⁰⁴ Since the Court ruled that there was no distinction between advocacy and campaign advertisements, the Colorado disclosure requirements were constitutional as they pertained to the Independence Institute’s ad.¹⁰⁵

Secondly, because the Colorado disclosure requirements were so similar to those upheld in *Citizens United*, the court reasoned that they were sufficiently tailored to meet exacting scrutiny. The court found that the trigger provision was the only difference between the Colorado and BCRA disclosure.¹⁰⁶ The Colorado disclosure regulation required those who annually spend \$1000 or more to disclose donors of \$250 or more. In contrast, federal regulations require reporting for those who annually spend an aggregate of \$10,000 or more to disclose donors of \$1000 or more. The court reasoned that state disclosure regulations would naturally have a lower threshold as state elections are typically less expensive to run than federal elections. Thus, the disclosure requirements were tailored to meet the public’s informational interest. Even though disclosure requirements chill potential donors,

100. *Id.* at 1201.

101. 558 U.S. 310 (2010).

102. *Williams*, 812 F.3d at 794.

103. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

104. *Williams*, 812 F.3d at 792.

105. *Id.* at 796.

106. *Id.* at 797-98.

they are far less restrictive than other forms of campaign finance regulations.¹⁰⁷

IV. ARGUMENT

A. THE TENTH CIRCUIT CORRECTLY APPLIED THE EXACTING SCRUTINY STANDARD TO COLORADO'S DISCLOSURE LAW

It should be no surprise that disclosure requirements were upheld by the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit. As noted, disclosure requirements have been consistently upheld by the United States Supreme Court, including the seminal *Buckley v. Valeo*¹⁰⁸ and *Citizens United v. FEC*¹⁰⁹ cases. Indeed, the Tenth Circuit has been quite diligent in using the exacting scrutiny standard for disclosure, including the *Sampson v. Buescher*¹¹⁰ case. Fundamental to these decisions is the agreement by the courts that information is a vital part of the democratic process. The Court has recognized that disclosure requirements provide invaluable information to voters about the sources of campaign contributions and spending. Each ruling recognized the fact that disclosure requirements provide an increased level of accountability to the democratic process. Because of this, disclosure has traditionally been the most upheld campaign finance regulation.

The district courts and courts of appeal have not been able to find consistency in applying the appropriate legal standards on disclosure requirements, even though they have enjoyed a long history of protection by the United States Supreme Court.¹¹¹ In many ways, the Court has not provided much guidance to the lower courts in how to apply this standard, even though it was first established under *Buckley*. This has led to highly contradictory decisions in federal and state courts alike, creating some uncertainty among state policymakers as to how far to craft their disclosure requirements.¹¹² Indeed, the courts of appeal have made wildly different opinions on how to apply the major purpose test versus the exacting scrutiny standard to disclosure requirements.¹¹³

The way the Tenth Circuit properly distinguished between the previous precedent on campaign finance regulations and their relation to the exacting “scrutiny standard” was quite commendable. Deviat-

107. *Id.* at 798.

108. 424 U.S. 1 (1976).

109. 558 U.S. 310 (2010).

110. 625 F.3d 1261 (10th Cir. 2010).

111. Benjamin N. Levin, *Missouri Campaign Reporting Requirements in the Shade of Citizens United*, 81 Mo. L. Rev. 1195, 1195-1214 (2016).

112. Levinson, *supra* note 4.

113. Clark, *supra* note 92.

ing from previous decisions such as *Iowa Right to Life Committee, Inc. v. Tooker*,¹¹⁴ the Tenth Circuit was careful to differentiate the several types of campaign finance laws and their relation to *Buckley* and *Citizens United*, leading to a decision that is far more in line with Court precedent. Writing the opinion of the court, Judge Tymkovich separated disclosure requirements, campaign contribution limits, and expenditure limits, pointing to the fact that they fall under different rules.¹¹⁵ Citing *Randall v. Sorrell*¹¹⁶ and *Buckley*, the Tenth Circuit acknowledged that both forms of campaign finance regulation “impinge on protected associational freedoms.”¹¹⁷ Campaign contribution limits may only provide a “marginal” impact on an individual’s right to free speech. So long as they meet the closely drawn standard, campaign contribution limits are constitutional. Expenditure limits are not simply an impediment to speech. Rather, expenditure limits are a direct mechanism to reduce the amount of political communication that can be made by a campaign. Thus, any expenditure limit must be scrutinized under the strict scrutiny standard. Up until now, there has not been an expenditure limit that has passed constitutional muster, even limits that were voluntary, such as New Hampshire.¹¹⁸

On the other hand, the Court found in *Buckley* that disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign related activities.”¹¹⁹ The Tenth Circuit emphasized that, under *Citizens United*, disclosure requirements only require the government to meet the exacting scrutiny, “which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.”¹²⁰

Of course, it is important to note the similarities between the state and federal laws. Since the disclosure requirements utilized by Colorado were carefully tailored to match those upheld under *Citizens United*, the Independence Institute did not have nearly enough justification to argue against the statute. In this sense, nothing beyond a ruling in favor of the Colorado statute should have been acceptable. Had the Tenth Circuit failed to conform to prior precedent, it would have been unduly constrained in its ability to craft new disclosure requirements.

114. 717 F.3d 576 (8th Cir. 2013).

115. *Indep. Inst. v. Williams*, 812 F.3d 787, 791-92 (10th Cir. 2016).

116. 548 U.S. 230 (2006).

117. *Williams*, 812 F.3d at 791.

118. *Kennedy v. Gardner*, Civ. No. 98-608-M, 1999 U.S. Dist. LEXIS 23480, at *16 (D.N.H. Sept. 30, 1999).

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

120. *Williams*, 812 F.3d at 792.

B. SEPARATING TYPES OF REGULATED SPEECH AND DISCLOSURE REQUIREMENTS

To avoid precedent on campaign disclosure requirements, the Independence Institute attempted to carve out “genuine issue advocacy” from other forms of campaign communication, arguing that it was shielded by the First Amendment. Rather, even though the advertisement mentioned the candidate’s name, the Independence Institute argued that any advertisement dealing specifically with these issues could not be regulated by disclosure requirements.¹²¹

That argument is a stretch, contradicting precedent that *Buckley v. Valeo*¹²² began. First, there is very little to suggest that forms of speech beyond express advocacy cannot be regulated. *Buckley* was specific in only declaring express advocacy as constitutional.¹²³ As the Tenth Circuit noted, campaign disclosure law has evolved with time along with the Court’s understanding of how the First Amendment applies to forms of speech beyond express advocacy. Instead, the *Buckley* decision was primarily a product of the statute rather than an attempt at making any constitutional distinction between both forms of speech. Under *Citizens United v. FEC*,¹²⁴ the Court found that the distinction between these forms of speech do not apply with regard to the constitutionality of disclosure requirements. Rather, disclosure requirements can extend beyond express advocacy. Thus, the Tenth Circuit correctly sided in favor of the statute, stating that the Court’s previous logic did not make such a distinction between “genuine issue advocacy” and other forms of speech.

It is apparent that the Independence Institute’s advertisement was intended to shift the public attitude about Governor Hickenlooper before the election. The decision by the Tenth Circuit may be quite intuitive considering how precedent made it clear that speech beyond candidate advocacy can be regulated under *Citizens United*. The Tenth Circuit, realizing that the campaign advertisement was obviously intended for the election, went a step further in reiterating that the difficulty in drawing a line between campaign speech and non-campaign speech was exactly why the Supreme Court did not distinguish between the two.¹²⁵ This decision further provides states flexibility to bring to light campaign contributors that may attempt to influence an election through independent expenditures.

121. *Indep. Inst. v. Williams*, 812 F.3d 787, 791-92 (10th Cir. 2016).

122. 424 U.S. 1 (1976).

123. *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976).

124. 558 U.S. 310 (2010).

125. *Williams*, 812 F.3d at 796.

C. THE TENTH CIRCUIT PROPERLY CONSIDERED THE COST OF
CAMPAIGNING AT THE STATE LEVEL

Of course, the impact of these decisions extends beyond the proper application of the exacting scrutiny standard. States have attempted to stretch disclosure requirements knowing that expenditure requirements, public finance laws, and campaign contribution limits could be challenged on constitutional grounds. Thus, disclosure requirements bear a strong burden in ensuring fair elections, more than ever before. Because of this, disclosure requirements have significantly evolved over the past two decades expanding to cover electronic reporting, independent expenditures, electioneering communications, and small group campaigning activities.¹²⁶ In some instances, such as the challenge in *South Carolina Citizens for Life, Inc. v. Krawcheck*,¹²⁷ states have not been as successful in defending these more comprehensive disclosure requirements in federal courts as these laws expand.¹²⁸ The *Independence Institute v. Williams*¹²⁹ decision is particularly noteworthy for how far the legislatures can craft disclosure requirements to regulate campaign activity to meet the needs of their respective states while still failing under the exacting scrutiny standard.

The most compelling challenge to Colorado's disclosure requirements were the differences in monetary limits built into the trigger provisions. As noted, the Colorado disclosure trigger provision was only set at \$1000 compared to the \$10,000 level upheld in the *Buckley v. Valeo*¹³⁰ decision, setting a much lower limit on the regulation of speech. The courts have grappled with the question of what level of money is appropriate in other unrelated cases, particularly with cam-

126. Schmeida R. McNeal, et al., *E-Disclosure Laws and Electronic Campaign Finance Reform: Lessons From the Diffusion of E-Government Policies in the States*, GOV'T INFO. Q., https://www.researchgate.net/publication/220526960_Reflecting_on_E-Government_Research (last visited Oct. 30, 2017).

127. 301 F. App'x 218 (4th Cir. 2008).

128. The court in *South Carolina Citizens for Life, Inc. v. Krawcheck* stated:

Like the regulations in the above cited cases, the South Carolina Ethics Act imposes numerous burdens on entities that qualify as committees under S.C.Code Ann. § 8-13-1300(6) without reference to the entity's major purpose. As previously stated, the Ethics Act imposes approximately fifteen burdens of varying degree. These burdens include requirements that each committee file recurring certified campaign reports; maintain records of contributions, contributors, and expenditures; comply with various bank account requirements; reject anonymous and cash contributions; and disclose information about contributions and expenditures. . . This Court concludes that the committee provisions of the South Carolina Ethics Act at issue simply sweep too far. The committee definition set forth at S.C.Code Ann. § 8-13-1300(6) is in direct conflict with the Fourth Circuit's decision in *Leake*, and therefore requires invalidation by this Court.

S.C. *Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 718-20 (D.S.C. 2010).

129. 812 F.3d 787 (10th Cir. 2016).

130. 424 U.S. 1 (1976).

paign contribution limits. States that tested this level have been challenged in court with varying success.

Missouri's campaign contribution limits were upheld by the *Nixon v. Shrink*¹³¹ United States Supreme Court decision. Missouri set a campaign contribution level of \$1075. The petitioners argued that this campaign contribution limit was unconstitutionally low. Rather, the \$1000 limit upheld under *Buckley* was only constitutional so long as the limits were increased to inflationary pressures. Writing for the Court, Justice Souter wrote that "this assumption is a fundamental misunderstanding of what we held."¹³² Instead, the Court asked in *Buckley* if "the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'"¹³³ The *Buckley* decision upheld a \$1000 federal campaign contribution limit. The *Buckley* Court stated, however, that this \$1000 limit was not a constitutional minimum for which the states could set their statutes.¹³⁴

Other states have not been as successful arguing for lower campaign contribution limits. For example, Vermont's campaign contribution limits were challenged in the *Randall v. Sorrell*¹³⁵ United States Supreme Court decision. The Vermont campaign contribution limits were the most restrictive in the country in 2005 at \$200 for the State House, \$300 for the Senate, and \$400 for all statewide elections. These totals included any campaign contribution made in-kind and were not indexed for inflation. This campaign finance law also imposed expenditure limits on all state campaigns.¹³⁶

During oral arguments, Justice Antonin Scalia openly questioned if Vermont legislators could be bought at such a low level of campaign support. William Sorrell, arguing for the State of Vermont, stated that "in over 65 hearings before our legislature and then through a 10-day trial, we established that as the trial court said, the threat of corruption in Vermont is far from illusory," to which Justice Scalia asked "[t]o the extent that Vermont legislators can be bought off by \$51?" (Justice Scalia was said to be indexing the campaign contribution limit to 1972 prices when FECA was enacted).¹³⁷ William Sorrell replied that Vermont's gubernatorial elections have the second lowest expenditures in the nation and exceptionally cheap media markets

131. 528 U.S. 377 (2000).

132. *Nixon v. Shrink*, 28 U.S. 377, 396 (2000).

133. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

134. *Buckley*, 424 U.S. at 21.

135. 548 U.S. 230 (2006).

136. *Randall v. Sorrell*, 548 U.S. 230, 237 (2006).

137. Transcript of Oral Argument at 28, *Randall v. Sorrell*, 530 U.S. 230 (2006) (No. 04-1528).

around Burlington.¹³⁸ Thus, Sorrell implied that Vermont candidates could effectively run a campaign under these strict campaign contribution limits.

The Court was not convinced that the low cost of campaigns, nor the motivation to combat corruption, were sufficient to uphold Vermont's campaign contribution and expenditure limits. In a six-to-three decision, the Court ruled that the Vermont campaign contribution and expenditure limits were unconstitutional and failed to meet the "closely drawn" standard since they were "sufficiently low as to generate suspicion that they are not closely drawn."¹³⁹ The United States Supreme Court admitted that the courts typically do not wish to set specific limits for states. As ruled in *McConnell v. FEC*,¹⁴⁰ the Court found that the "legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office."¹⁴¹

State legislatures' ability to regulate campaign finance law requirements can only go so far. Writing the opinion of the Court, Justice Breyer wrote that a lower bound does exist when setting campaign finance laws, consistent with the *Buckley* decision. Further, Justice Breyer stated that "[a]t some point the constitutional risks to the democratic electoral process become too great."¹⁴² Eventually, low limits would impose a significant burden on candidates hoping to mount an effective campaign.

These cases are only relevant to campaign disclosure requirements inasmuch as they reinforce the importance of courts to consider the cost of conducting state elections. In most ways, it is improper to directly compare court decisions on campaign contribution limits and disclosure requirements through the subtle intricacies of these cases. As noted earlier, the courts have consistently ruled that campaign contribution limits impact speech in a much more direct manner than disclosure requirements.

With this being said, campaign contribution limits and disclosure requirements are oftentimes grouped together in federal court decisions as constitutional ways to remove corruption in elections. Indeed, the *Buckley* Court ruled that campaign contribution limits, "along with the disclosure provisions, constitute the [FECA's] primary weapons against the reality or appearance of improper influence stemming

138. Transcript of Oral Argument, *supra* note 137, at 31.

139. Randall, 548 U.S. at 249.

140. 540 U.S. 93 (2003).

141. *McConnell v. FEC*, 540 U.S. 93, 137 (2003).

142. *McConnell*, 540 U.S. at 136.

from the dependence of candidates on large campaign contributions.”¹⁴³

Both campaign contribution limits and disclosure requirements use specific monetary levels set at an amount the legislature believes is proper to conduct a campaign in its state. In most cases, this falls well below what it would cost to run a state legislative campaign. Thus, it is vital that the courts fully understand the cost differences associated with running a state compared to a federal campaign. If they fail to do so, state legislators will find it nearly impossible to regulate state elections effectively. The Tenth Circuit decision found that “smaller elections can be influenced by less expensive communications.”¹⁴⁴ In this manner, the *Williams* decision was an exceptionally supportive decision for policymakers seeking to set disclosure requirements that will have a real impact on state elections. Indeed, per data from the National Institute on Money in State Politics, the average campaign contribution to state legislative candidates in 2014 was \$507.41.¹⁴⁵ Ninety percent of all campaign contributions were below \$1000. Without the recognition of the courts of these relatively low totals, most state campaign contributions and expenditures would never be made available to the public.

This is not to say, however, that disclosure requirements cannot be detrimental to speech. States should act with free rein in setting their disclosure requirement levels. Disclosure requirements that are set at an exceptionally low level or that are vague can hinder private individuals’ ability to advocate for a policy position. For example, Arizona’s disclosure requirements were struck down in federal district court in *Galassini v. Town of Fountain Hills*¹⁴⁶ for placing exceptional burdens on small groups and individuals to express their First Amendment rights by requiring them to first register as a political action committee.¹⁴⁷ States should still be cautious when determining the trigger provisions for their campaign disclosure laws.

D. LACK OF APPEAL TO THE UNITED STATES SUPREME COURT

Following the decision, Independence Institute President John Caldra stated that the case would be appealed to the United States

143. *Buckley*, 424 U.S. at 59.

144. *Williams*, 812 F.3d at 797.

145. NAT’L INST. ON MONEY IN STATE POLITICS, www.followthemoney.org (last visited Jan. 20, 2018).

146. No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122 (D. Ariz. 2013).

147. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122, at *59 (D. Ariz. 2013).

Supreme Court.¹⁴⁸ Interestingly, *Independence Institute v. Williams*¹⁴⁹ was never appealed. Instead, the Independence Institute opted to appeal another case, *Independence Institute v. FEC*,¹⁵⁰ under a suit it brought to federal courts concurrently with *Williams*, which challenged federal disclosure law requirements under BCRA.¹⁵¹ The two cases have many parallels beyond the circumstance of being argued before federal courts at the same time. The legal arguments used against disclosure requirements in *Independence Institute v. FEC* decision closely mimic those in *Williams*. This led to only one of the cases being appealed to the United States Supreme Court. Likewise, the findings of the Tenth Circuit and district courts were highly similar. As discussed below, *Williams* was directly cited in the lower court three-judge panel decision for *Independence Institute v. FEC*.

Like *Williams*, the Independence Institute wanted to run an ad in Colorado for the 2014 election. In this case, the ad was in support of the Justice Safety Valve Act (“JSVA”) and told constituents to call Senators Udall and Bennet to back the legislation. Senator Mark Udall was formally running for reelection, and thus the communication would have fallen under federal disclosure requirements. The Independence Institute declined to run the ad believing that it would be regulated under BCRA.¹⁵²

The Independence Institute argued that the large-donor disclosure law violated its First Amendment rights in two ways. First, nearly identical to *Williams*, the Independence Institute argued that the advertisement is “general issue advocacy,” and thus it is constitutionally exempt from disclosure.¹⁵³ Second, since the Independence Institute is a nonprofit organization and cannot engage in political activity, advertisements of a legislative matter also constitutionally exempt the ad from disclosure law.¹⁵⁴

The panel provided a very strong decision in favor of the large-donor BCRA disclosure requirements. In a highly similar manner to the Tenth Circuit decision in *Williams*, the three-judge panel found no difference between the two forms of speech. It reiterated the fact that the United States Supreme Court rejected the argument that the First Amendment requires Congress to regulate “issue advocacy” from “ex-

148. John Frank, *Colorado Campaign Disclosure Law Upheld by Federal Appeals Court*, DENVER POST (Feb. 5, 2016, 4:32 PM), <http://blogs.denverpost.com/thespot/2016/02/05/federal-appeals-court-upholds-colorados-campaign-disclosure-law/124936/>.

149. 812 F.3d 787 (10th Cir. 2016).

150. 816 F.3d 113 (D.D.C. 2014).

151. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

152. *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016).

153. *Williams*, 812 F.3d at 796.

154. *Id.*

press advocacy.”¹⁵⁵ The court wrote, “First, the Supreme Court and every court of appeals to consider the question have largely, if not completely, closed the door to the Institute’s argument that the constitutionality of a disclosure provision turns on the context of the advocacy accompanying an explicit reference to an electoral candidate.”¹⁵⁶

Second, the court found the “genuine” issue advocacy exception constitutionally ‘unworkable.’” Simply, the Independence Institute did not offer any sort of rule or guideline on how advocacy directly mentioning electoral candidates would be constitutionally judged or how the FEC could neutrally enforce it. The trial court directly referenced *Williams*, stating that it was even questionable that the advertisement could not be construed as a candidate-centered message.¹⁵⁷

Finally, the three-judge panel also ruled that the large-donor disclosure requirement was fully constitutional under the “exacting scrutiny” test, properly applying Court precedent in its decision. The three-judge panel found that the United States Supreme Court already ruled that the large-donor disclosure requirement under BCRA “advances substantial and important government interest.” Quoting *McConnell v. FEC*,¹⁵⁸ the three-judge panel emphasized that disclosure requirements provide “the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.” Also, the disclosure requirement is “tailored to substantially advance those interests” since they did not stop anyone from speaking or present a ceiling on campaign related activities.

The decision of the three-judge panel was appealed to the United States Supreme Court. The Court, however, simply upheld the decision without further comment.¹⁵⁹ The ruling by the United States Supreme Court to uphold the lower court’s decision in *Independence Institute v. FEC* without comment cannot be overemphasized. As discussed, the Court has not shied away from controversial rulings on campaign finance law in recent years. It appears that the Court is quite adamant about the constitutionality of both state and federal disclosure requirements, in stark contrast to the concern of many following the *Citizens United v. FEC*¹⁶⁰ decision.

The lack of an appeal for *Williams* is also critical. Obviously, without an appeal, the decision stands intact. While it does not carry the same weight as a United States Supreme Court decision, the

155. *Id.* at 793-94.

156. *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 187 (D.D.C. 2016).

157. *Indep. Inst.*, 216 F. Supp. 3d at 189.

158. 540 U.S. 93 (2003).

159. *Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017) (mem.).

160. 558 U.S. 310 (2010).

Tenth Circuit decision could provide leeway to state governments experimenting with varying forms of disclosure requirements, especially since the decision was directly cited in the three-judge panel decision that was upheld by the Court. With this, policymakers should feel more comfortable in designing disclosure regulations that match the nuances of campaigning in their own state.

V. CONCLUSION

Following *Independence Institute v Williams*,¹⁶¹ we might see a shift among courts in their efforts to properly apply the exacting scrutiny standard to disclosure requirements. Overall, the trajectory of decisions regarding disclosure requirements tended to be quite poor for campaign finance reformers. The number of successful challenges to state disclosure requirements increased during the past two decades. There are notable signs in *Williams* that the courts may be more willing to defend disclosure requirements in the future, particularly with the staunch support provided by the *Independence Institute v. FEC*¹⁶² United States Supreme Court decision.

Of course, two of the most recent and controversial decisions that led to incorrect interpretations of the exacting scrutiny standard both came from the United States Court of Appeals for the Eighth Circuit, immediately suggesting that these rulings might be limited. Unsurprisingly, the *Iowa Right to Life Committee, Inc. v. Tooker*¹⁶³ decision borrowed heavily from the *Minnesota Citizens Concerned for Life, Inc. v. Swanson*¹⁶⁴ ruling.¹⁶⁵ Both cases draw from the same underlying Court precedent on campaign disclosure requirements. Courts of appeal and district courts draw from each other's decisions. Indeed, the exacting scrutiny standard test in *Williams* was recently cited in the *Calzone v. Hagan*¹⁶⁶ decision. This case, combined with *Independence Institute v. FEC*, may provide some clarity on how to properly apply the exacting scrutiny standard.

In the short time that has passed, the *Williams* decision has been quite durable. The Colorado disclosure requirements were once again upheld by the United States Court of Appeals for the Tenth Circuit in both the *Vogt v. City of Hays*¹⁶⁷ and the *Coalition for Secular Govern-*

161. 812 F.3d 787 (10th Cir. 2016).

162. 816 F.3d 113 (D.D.C. 2014).

163. 717 F.3d 576 (8th Cir. 2013).

164. 692 F.3d 864 (8th Cir. 2012).

165. See generally *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013) (citing *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012), throughout the case's rationale).

166. No. 2:16-cv-04278-NKL, 2017 U.S. Dist. LEXIS 29937 (W.D. Mo. 2017).

167. 844 F.3d 1235 (10th Cir. 2017).

*ment v. Williams*¹⁶⁸ decisions. In its decisions, the court reaffirmed its application of the exacting scrutiny standard used in *Independence Institute v. Williams*.

The *Independence Institute v. Williams* decision may also provide much needed coverage to state governments as they craft campaign finance laws. The number of policy options at the disposal of state governments continues to shrink as federal and state courts strike down campaign contribution limits, public financing, and expenditure requirements; disclosure is the final regulation for policymakers and reformers to implement without the risk of significant constitutional challenge. Recognizing that state campaigns are less expensive than federal campaigns, legislatures are provided leeway with crafting disclosure requirements that meet the needs of their citizens.

168. 815 F. 3d 1267 (10th Cir. 2016).

