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## Learning from Campaign Finance Information

Abby K. Wood

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# LEARNING FROM CAMPAIGN FINANCE INFORMATION

*Abby K. Wood\**

## ABSTRACT

*In an age of dark money—the anonymous political spending facilitated by gaps in our campaign finance disclosure laws after Citizens United—the Supreme Court’s campaign finance disclosure jurisprudence may be on a collision course with campaign finance disclosure laws. It is urgent for the Court to understand the informational benefits of campaign finance disclosure, so it may avoid this collision.*

*Campaign finance transparency teaches us more than one-dimensional information about the candidate’s left- or right-leaning policy preferences. It also helps us learn about candidate type. Social scientists, including myself, have run several studies examining voter learning from campaign finance information. As I explain in this Article, when voters learn about a candidate’s position with regard to dark money, they learn and vote differently than if they did not have that information. Experimental and observational research also suggests that voters punish noncompliance and reward overcompliance. In other words, transparency about campaign finance disclosure and compliance informs voters.*

*These findings point to useful policy innovations for states and cities, while the federal government is unable or unwilling to regulate. The innovations I propose include “disclosure disclaimers,” which inform voters about the presence of dark money in a campaign, and campaign finance audits, which inform voters about compliance with campaign finance laws. But more basic loophole-closing can also provide helpful information to voters. I explain implications for the courts, campaigns, and policymakers, as well as limitations on the argument.*

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## INTRODUCTION

Lev Parnas and Igor Fruman were arrested at Reagan National Airport with one-way tickets to Vienna and indicted for campaign finance violations.<sup>1</sup> Among other charges, they are alleged to have funneled over \$300,000 in foreign money through a limited liability corporation (LLC) into political campaigns, including former President Trump's "official" SuperPAC.<sup>2</sup> The SuperPAC is required to disclose its donors, but the LLC is not, so the public's ability to "follow the money" ends with the LLC's name and not the foreign sources of the money behind the LLC.<sup>3</sup> The public is kept in the dark.

Dark money, or anonymous spending in our political campaigns, has accounted for at least \$1 billion since *Citizens United*, a sum that greatly undercounts the actual amount of dark spending because dark money groups have also run thousands of issue ads over that time period.<sup>4</sup> Expanded disclosure requirements can reduce the amount of undisclosed money in our elections. At the federal level, the Federal Election Commission (FEC) passed an anemic disclosure regulation, and the Senate has blocked other regulatory efforts to shed more light on the money in American politics.<sup>5</sup>

Some states have passed laws demanding more transparency in our elections, but the Supreme Court's disclosure jurisprudence may be on a collision course with these laws. Part of the reason for the pending collision is the Court's limited understanding of the informational benefits of campaign finance disclosure. It is therefore urgent to help the Court right-size its understanding of what we learn from campaign finance disclosures.

The Supreme Court has upheld disclosure regulations that support a combination of governmental interests, namely combatting corruption or its appearance, informing the electorate, and enabling enforcement.<sup>6</sup> However, its

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<sup>1</sup> See Mark Mazzetti, Eileen Sullivan, Adam Goldman & William K. Rashbaum, *2 Giuliani Associates Arrested with One-Way Tickets at U.S. Airport*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/10/us/politics/lev-parnas-igor-fruman-arrested-giuliani.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating Fake News and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1268 (2018).

<sup>4</sup> *Citizens United at 10: The Consequences for Democracy and Potential Responses by Congress: Hearing Before the Subcomm. on the Const., Civ. Rts., & Civ. Just. of the H. Comm. on the Judiciary*, 116th Cong. 73, 77 (2020) (statement of Ciara Torres-Spelliscy, Professor of Law, Stetson University College of Law); Wood & Ravel, *supra* note 3.

<sup>5</sup> Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 668–69 (2012).

<sup>6</sup> Katherine Shaw, *Taking Disclosure Seriously*, 34 YALE L. & POL'Y. REV. INTER ALIA 18, 18, 28 (2016); Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 12 (2018).

definition of corruption is narrow: it only cares about quid pro quo corruption. Moreover, majority opinions striking campaign finance regulations have repeated the legal fiction that some types of spending cannot corrupt—namely independent expenditures by outside groups like SuperPACs, and expenditures in ballot initiative campaigns. According to the Court’s rationale, independent expenditures cannot corrupt because of the ban on coordination with campaigns for independent expenditures.<sup>7</sup> Further, the Court has held that expenditures by state ballot initiative campaigns cannot corrupt because there is no one on the other side of the spending—meaning, no candidate—to receive a *quid* and perform a *quo*. These groups receive and spend hundreds of millions of dollars each cycle. As a result, the main rationale for upholding disclosure requirements for independent spending and ballot initiatives rests on the informational benefit.

But the Court’s understanding of the informational benefit is incomplete because it is too narrow. The oft-repeated line from *Buckley v. Valeo* that disclosure “allows voters to place each candidate in the political spectrum” is correct, as far as it goes.<sup>8</sup> On this one-dimensional understanding of how voters choose a candidate, political scientists have established that, yes, disclosures can help predict how a candidate will vote once in office.

But we learn more from campaign finance transparency. As I explain in this Article, social scientists, including myself, have run several studies examining voter learning from campaign finance information. When survey respondents learn about a candidate’s position on or support from dark money groups, they choose different candidates than control group respondents who do not see that information. And when campaign finance compliance information is available to voters, voters reward overcompliance and punish noncompliance.

In other words, disclosure and compliance information help voters to learn about a dimension that the court has not considered: candidate type. For example, studies on dark money have tested questions of candidate trustworthiness and find consistent reactions among survey respondents. And when cued with information about campaign finance noncompliance, voters update their impressions of a candidate’s trustworthiness, intelligence, ethics and competence.

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<sup>7</sup> *Buckley v. Valeo*, 424 U.S. 1, 46–51 (1976) (per curiam); *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); Brief of Amicus Curiae Former FEC Commissioner Ann M. Ravel in Support of Petitioners at 18–22, No. 19-1398 (July 21, 2020); Brief Amici Curiae from Legal Scholars of Campaign Finance in Support of Petitioners at 10–17, *Lieu v. FEC*, No. 19-1398 (July 29, 2020).

<sup>8</sup> *Buckley*, 424 U.S. at 67.

These findings point to useful policy innovations for states and cities while the federal government is unable or unwilling to regulate.<sup>9</sup> Disclosure disclaimers are only used in one jurisdiction—Montana—and they require a disclaimer that “this communication is funded by anonymous sources” at the end of a video advertisement or on the face of a still or print advertisement.<sup>10</sup> These disclaimers can inform voters about the parties involved in a campaign without threatening donor privacy or chilling speech. Another useful innovation is campaign finance audits conducted either comprehensively or randomly. Audits are still rare in our elections.

Suppose disclosure disclaimers and campaign finance audits are adopted, then challenged. The Court should uphold both innovations. The biggest threat to disclosure disclaimers is that of compelled speech. But stand-by-your-ad requirements were upheld in *McConnell v. FEC* against a charge of this nature, so the precedents are not in challengers’ favor.<sup>11</sup> And audits are on even firmer constitutional footing. It would be hard for challengers to make a First Amendment claim that audits “chill” speech to the point of violating the right to free speech. Moreover, in other regulatory contexts, the Court has repeatedly upheld both audits and the public’s interest in knowing audit results.

The experiment findings also have implications for campaigns and policymakers. In the absence of regulatory changes, campaigns should publicize their opponents’ relationship to dark money groups and brag about their own “clean hands” by comparison. Policymakers should understand the tradeoffs between the two dimensions of voter information. On the one hand, voters’ ability to predict policy positions is enhanced with broad mandatory disclosure requirements. On the other, voters’ ability to learn about non-policy attributes of campaigns, like trustworthiness, is enabled by voluntary disclosures. The more aggressive a mandatory disclosure regime, the less voters will learn about candidate trustworthiness when it comes to campaign finance transparency. I provide several examples of policy levers beyond disclosure disclaimers and audits, including changing the disclosure threshold, modifying the amount of donor information made public, and eliminating dark money to the extent possible.

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<sup>9</sup> As this Article goes to the printer, the For the People Act of 2021 has been passed by the House and may receive a floor vote in the Senate. It contains provisions aimed at reducing the amount of “dark” money in federal elections. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 4501, 4601 (1st Sess. 2021).

<sup>10</sup> MONT. CODE ANN. § 13-35-237 (2016).

<sup>11</sup> *McConnell v. FEC*, 540 U.S. 93, 196–98 (2003).

The Article walks through this argument. In Part I, I describe the ways in which disclosure of the sources of campaign financing in our elections is incomplete. I then explain, in Part II, the Court's approach to campaign finance disclosure and how social science can help inform the true scope of the information benefit. In Part III, I explain how the Court should address campaign finance transparency efforts aimed at informing voters on the "valence" dimension, as well as limitations to my argument. In Part IV, I describe the implications of the argument for courts, campaigns, and policymakers.

### I. INCOMPLETE DISCLOSURE OF MONEY IN AMERICAN POLITICAL CAMPAIGNS

Little by little, the courts have emptied the campaign finance regulatory toolkit by ruling that campaign finance regulations unconstitutionally infringe on the First Amendment rights to free speech or free association.<sup>12</sup> As a result, regulation of money in elections centers more heavily on disclosure.<sup>13</sup> The Supreme Court has upheld disclosure repeatedly in the past six years.<sup>14</sup> While the existing disclosure regime has significant loopholes, the Court seems generally bullish on disclosure.

Disclosure comes in a few forms. First is run-of-the-mill campaign contribution disclosure. Campaigns for federal office that receive direct contributions<sup>15</sup> gather information about donors (name, address, amount contributed, and employer). If a donor's aggregate contributions reach the \$200 mandatory disclosure threshold, the donor's information is reported to the FEC in the periodic filings.<sup>16</sup> Most states follow a similar system, though the mandatory disclosure thresholds vary considerably.<sup>17</sup> Disclaimers are another

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<sup>12</sup> See Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 432–33, 447–48 (2016). Contribution limits and restrictions on contributions from foreign nationals are the final, major substantive limits in campaign finance regulation. Before the death of Justice Antonin Scalia, commentators predicted that contribution limits could be the next frontier of deregulation. See, e.g., Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 13–14 (2012). Now that he has passed, much remains uncertain.

<sup>13</sup> Levinson, *supra* note 12, at 432–33; see Shaw, *supra* note 6, at 18, 28.

<sup>14</sup> Shaw, *supra* note 6, at 19.

<sup>15</sup> Direct contributions are those received by the campaign. I am not referring to donations sent via an intermediary, like ActBlue or RedWin, which have a different disclosure process. R. Michael Alvarez, Jonathan N. Katz & Seo-young Silvia Kim, *Hidden Donors: The Censoring Problem in U.S. Federal Campaign Finance Data*, 19 ELECTION L.J. 1, 4 (2020).

<sup>16</sup> *Id.* at 3–4.

<sup>17</sup> *Disclosure and Reporting Requirements*, NAT'L CONF. STATE LEGISLATURES (Sept. 15, 2015), <https://www.ncsl.org/research/elections-and-campaigns/disclosure-and-reporting-requirements.aspx>. See generally *Threshold to Disclose Donor*, CAMPAIGN FIN. INST. (2019), <https://cfinst.github.io/#disclosure?question=CandDonorExemption&year=2018> (including an interactive map of disclosure thresholds by state and year).

common type of disclosure. Disclaimers are attached to so-called “electioneering communications.”<sup>18</sup> The stand-by-your-ad requirements, with the candidate saying, “I’m So and So, and I approve this message,” are the most familiar example,<sup>19</sup> but disclaimers are required on many kinds of political messaging, like mailers and some (but far from all) online ads.<sup>20</sup>

In the eyes of the Court, disclosure is a less restrictive means of regulating campaign finance, so “[t]he Government may regulate . . . political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”<sup>21</sup> Until deregulation gained steam, its proponents urged the Court to adopt this “deregulate and disclose” approach.<sup>22</sup> But after some successes in the courts, some deregulatory groups have turned on disclosure. Rather than defending disclosure as a less restrictive mean to achieve important governmental interests, they now argue that, like other campaign finance regulations, disclosure impermissibly burdens First Amendment speech.<sup>23</sup>

The existing regulatory framework for disclosure is imperfect, to be sure. Disclosure requirements are arguably both over and underinclusive. Critics argue that the current system is overinclusive at the federal level because it requires disclosure of relatively small contributions—when a supporter’s aggregate contributions reach \$200, the campaign must disclose.<sup>24</sup> The anti-corruption benefit to government may not be furthered by disclosing such small amounts. Less has been written about whether small contributions contain valuable information that improves voter competence—the ability of voters to choose the people and policies that represent their values. On the one hand, they may not, because candidates are less likely to respond to small-time contributors. On the other hand, they may, insofar as one uses the contributions of friends and neighbors as a heuristic, or informational shortcut, about who to support.

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<sup>18</sup> Electioneering Communications, 67 Fed. Reg. 65,190 (Oct. 23, 2002) (codified at 11 C.F.R. pts. 100 and 114); Levinson, *supra* note 12, at 441.

<sup>19</sup> *See id.* at 441 n.54.

<sup>20</sup> *See* MONT. CODE ANN. § 13-35-237 (2016); Wood & Ravel, *supra* note 3.

<sup>21</sup> Citizens United v. FEC, 558 U.S. 310, 319 (2010).

<sup>22</sup> DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW: CASES AND MATERIALS 883 (5th ed. 2012).

<sup>23</sup> *Id.* at 883–84; *see, e.g.*, DAVID M. PRIMO, INST. FOR JUST., FULL DISCLOSURE: HOW CAMPAIGN FINANCE LAWS FAIL TO INFORM VOTERS AND STIFLE PUBLIC DEBATE 1, 3 (2011), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/fulldisclosure.pdf](http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf). Not all challenges to disclosure come from the political right. The ACLU has argued that disclosure “violates individual privacy and chills free speech on important issues,” especially for “individuals who support controversial movements.” Letter from Laura W. Murphy, Dir. of the Washington Legis. Off., ACLU, and Michael W. Macleod-Ball, Chief Legis. & Pol’y Couns., ACLU, to the U.S. Senate 2 (July 23, 2010) (available at [https://www.aclu.org/sites/default/files/field\\_document/Ltr\\_to\\_Senate\\_re\\_ACLU\\_opposes\\_DISCLOSE\\_Act.pdf](https://www.aclu.org/sites/default/files/field_document/Ltr_to_Senate_re_ACLU_opposes_DISCLOSE_Act.pdf)).

<sup>24</sup> Alvarez et al., *supra* note 15, at 3–4 (quoting 11 C.F.R. § 104.3(4)(i) (2020)).

So-called “reformers” argue that the current system is underinclusive because much of the money that supports campaigns and ballot initiatives cannot be traced back to its donors. Indeed, if the goal was full disclosure, the *Buckley* Court did away with the possibility of full disclosure four decades ago.<sup>25</sup> Donors seeking anonymity have found it in the past few elections by donating to “social welfare” organizations created under Section 501(c) of the tax code or to LLCs.<sup>26</sup> The groups use the donations to make independent expenditures on behalf of or against a candidate, but they are not required to disclose their donors for anything but electioneering communications (which they avoid making).<sup>27</sup> These groups also pump money into SuperPACs. The SuperPACs are required to disclose their contributors to the FEC, but when the contributor is an LLC or a 501(c) organization, the public is unable to follow the money to its original source.<sup>28</sup> Reformers see 501(c) disclosure as an obvious next step in regulating campaign finance.<sup>29</sup>

In framing the debate, deregulation activists focus on donor privacy, and they frame the concern as a First Amendment problem, bringing lawsuits to challenge existing laws.<sup>30</sup> First Amendment activists and groups preferring nondisclosure bring challenges to state, local, and federal disclosure requirements, usually without much luck.<sup>31</sup> On the political left, activists attempt to bring sunlight to political spending through the legislative and regulatory

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<sup>25</sup> *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (per curiam).

<sup>26</sup> Stan Oklobdzija, *I’ll Be Disclosed by Christmas: What ‘Pop-Up PACs’ Can Teach Us About Disclosure and Dark Money* 9 (Dec. 16, 2019) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441922)).

<sup>27</sup> *Presidential Ad Volumes Less than Half of 2012*, WESLEYAN MEDIA PROJECT (Oct. 18, 2016), <http://mediaproject.wesleyan.edu/releases/oct-2016/> (“‘We’re seeing dark money groups that have spent millions of dollars in Senate races fade away, rather than report their spending to the FEC as they’re required to do beginning two months before the election,’ said Sheila Krumholz, the executive director of the Center for Responsive Politics. ‘It’s a way to get around telling the IRS next year that a great deal of their activity was political, which isn’t supposed to be the case with 501(c) groups.’”).

<sup>28</sup> See Tyler J. Kassner, *Bringing Dark Money into the Light: 501(c)(4) Organizations, Gift Tax, and Disclosure*, 10 HASTINGS BUS. L.J. 471, 476–81 (2014).

<sup>29</sup> See Briffault, *supra* note 5, at 708–09; see also Complaint at 3, Campaign Legal Ctr. v. FEC, 245 F. Supp. 3d 119 (D.D.C. 2017) (No. 16-752) (alleging that the FEC failed to address the use of LLCs to circumvent disclosure laws); Peter Overby, *What’s a 527, Anyway? A Primer*, NPR (Aug. 7, 2008, 10:18 AM), <http://www.npr.org/templates/story/story.php?storyId=93368983> (including a series of blog posts and articles tracking undisclosed funding in 2008 elections).

<sup>30</sup> AM. LEGIS. EXCH. COUNCIL, *DONOR DISCLOSURE LEGISLATIVE TOOLKIT* (Sept. 5, 2017), <https://www.alec.org/app/uploads/2017/09/ALEC-Donor-Disclosure-Legislative-Toolkit-1.pdf>.

<sup>31</sup> See Robert Faturechi, *The Conservative Playbook for Keeping ‘Dark Money’ Dark*, PROPUBLICA (Feb. 4, 2016), <https://www.propublica.org/article/the-conservative-playbook-for-keeping-dark-money-dark>.

processes.<sup>32</sup> These “reformers” focus on the benefits of voters having donor information and of disclosure’s ability to deter corruption.<sup>33</sup>

While loopholes persist, the Supreme Court has almost always upheld existing disclosure laws, and it recently denied certiorari on a disclosure challenge.<sup>34</sup> Indeed, the Court has upheld disclosure laws three times in the past decade, but with “reasoning more broad than deep.”<sup>35</sup> No challenge to dark money in the post-*Citizens United* world has reached the Supreme Court.<sup>36</sup> The Court’s recent, brief rejections of disclosure challenges should not be overinterpreted, given the changing composition of the Court and the deregulatory political climate.<sup>37</sup>

#### A. “Dark Money,” “Gray Money,” and Other “Veiled Political Actors”

There are several ways that political money is spent without disclosure. In this section, I briefly review “dark money,” “gray money,” and other “veiled political actors.”

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<sup>32</sup> See, e.g., DISCLOSE Act of 2012, S. 3369, 112th Cong. § 324(a)(2). But see *FEC Public Hearing on the McCutcheon v. FEC Advance Notice of Proposed Rulemaking*, FEC, <https://transition.fec.gov/pages/hearings/McCutcheonRulemakingPublicHearing.shtml> (last visited May 26, 2021) (finding an insufficient number of votes to open a rulemaking to increase disclosure).

<sup>33</sup> See Faturechi, *supra* note 31.

<sup>34</sup> *Del. Strong Families v. Denn*, 136 S. Ct. 2376 (2016). The Delaware Strong Families case is a familiar disclosure attack fact pattern, in which a perfectly sympathetic plaintiff will be burdened by disclosure requirements established by the state and so challenges the requirements. In this particular case, a nonprofit organization put out a voter guide in 2012 and planned to do so again in 2014. *Id.* at 2376–77 (Thomas, J., dissenting). In the intervening time, in the wake of the surge in dark money enabled by holes in the federal disclosure regime, Delaware amended its disclosure laws to require disclosure of donors or persons supplying “electioneering communications,” which include the voter guide. *Id.* Delaware Strong Families challenged the law, because it did not want to disclose donor information. *Id.* The law would have required disclosure of donors who earmarked their donations for the voter guide and those who gave more than \$100 to the nonprofit during the election period. *Id.*

<sup>35</sup> Shaw, *supra* note 6, at 19.

<sup>36</sup> Such a challenge would be difficult to win and would have an uncertain policy result, anyway. Dark money became a problem after congress and—especially—the FEC failed to regulate dark money in the wake of *Citizens United*. Agency inaction is usually upheld by the courts, and even if it were not, it would be remanded to the agency to then act—say, by opening a notice-and-comment rulemaking, at which point a wide array of policies would be available. Even where agencies act, courts tend to be deferential under the *Chevron* doctrine. One attempt to address the dark money problem was *Van Hollen v. FEC*. In the case, Rep. Chris Van Hollen (D-MD) challenged an FEC disclosure regulation for outside groups. 811 F.3d 486, 486 (D.C. Cir. 2016), *reh’g en banc denied*, 2016 U.S. App. LEXIS 17528 (D.C. Cir. 2016). Under the regulation, only donors who contribute to a group’s express advocacy must be disclosed. *Id.* The D.C. Circuit upheld the regulation under step two of the *Chevron* analysis. *Id.* at 492–95.

<sup>37</sup> See Shaw, *supra* note 6, at 23–24. This is particularly true in light of mixed signals from the Court regarding how exacting the “exacting scrutiny” should be for disclosure, as well as the fact that Justices Ginsburg and Breyer were willing to join Justice Thomas in striking down a disclosure provision in *McIntyre*. See *infra* Part III.

The category of undisclosed spending that most people are familiar with is money spent by corporations after *Citizens United*, which allowed corporations to make independent expenditures from their general treasuries.<sup>38</sup> After the case, the FEC did not pass comprehensive disclosure regulations, and other agencies were prohibited from doing so with appropriations riders<sup>39</sup> or regulatory decisions.<sup>40</sup> This means that corporations are able to spend “dark money” in campaigns without public disclosure of its source.

A related category of undisclosed political spending is “gray money,” or the money passed through LLCs and 501(c) organizations, rendering it untraceable.<sup>41</sup> Even if a group, like a SuperPAC, is subject to disclosure laws it can receive money from other sources, like dark money groups.<sup>42</sup> When that happens, the disclosure of the group subject to disclosure laws only contains the dark money group’s name, but the money trail goes cold for people hoping to see the actual individuals behind the expenditure.

There are many other ways that political actors can remain “veiled.”<sup>43</sup> First, donors can give directly to campaigns, parties, or PACs below the disclosure threshold. When that happens, their identity is not disclosed.<sup>44</sup>

Groups actively seeking to delay disclosure can make their expenditures late in the cycle.<sup>45</sup> That way, disclosures appear only after the votes have been cast. A colleague, Stan Oklobdzija, calls these “Pop Up PACs.”<sup>46</sup> In recent elections,

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<sup>38</sup> See Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 339 (2014).

<sup>39</sup> See Consolidated Appropriations Act, 132 Stat. 348 (2018) (“None of the funds made available by this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.”) The most common “dark money” organizational form among those regulated under Section 501(c) of the Internal Revenue Code are so-called non-profit “social welfare” organizations, which are tax exempt under Section 501(c)(4).

<sup>40</sup> See Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47,447 (proposed Sept. 10, 2019) (to be codified 26 C.F.R. pt. 1); I.R.S. Notice 2019-47, Penalty Relief Related to Reliance on Revenue Procedure 2018-38 (Nov. 15, 2019).

<sup>41</sup> See Anna Massoglia, ‘Dark Money’ Groups Find New Ways to Hide Donors in 2020 Election, OPEN SECRETS (Oct. 30, 2020, 4:26 PM), <https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/>.

<sup>42</sup> See *id.*

<sup>43</sup> See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005).

<sup>44</sup> A key exception is when we donate online, through a group like ActBlue, which is considered a conduit by regulators and therefore must disclose all contributions it handles, regardless of how small. *Earmarked Contributions*, FEC (Apr. 23, 2018), <https://www.fec.gov/updates/earmarked-contributions/>.

<sup>45</sup> Oklobdzija, *supra* note 26, at 2.

<sup>46</sup> *Id.*

they have been funded mostly by parties, though future election cycles may feature different sources of Pop Up expenditures.<sup>47</sup>

It is also very common for online advertisements to lack disclaimers that they should otherwise contain.<sup>48</sup> Running paid advertisements online without disclaimers violates FEC requirements, but it happens a lot, especially by groups at the fringes of the campaigns.<sup>49</sup>

Disclosure is therefore far from comprehensive. Its gaps have emerged from the Court's deregulation—inviting new spenders in—followed by inaction by Congress and agencies to close the gaps and demand disclosure from the new spenders.<sup>50</sup> In the next Part, I explain the way the courts analyze campaign finance disclosure regulations.

## II. CONSTITUTIONALIZED CAMPAIGN FINANCE

*Buckley v. Valeo* constitutionalized the Court's review of campaign finance regulations.<sup>51</sup> The plaintiffs in the case argued that parts of the Federal Election Campaign Act violated the First Amendment right to freedom of speech and association.<sup>52</sup> The argument—which won the day—is that money spent in campaigns is inextricably linked to the speech that it funds, and that speech is protected by the First Amendment. Therefore, the money that facilitates the speech should also be protected by the First Amendment.<sup>53</sup>

Here's how the review works. Because disclosure is analyzed in a First Amendment framework, we only reach analysis of the benefits of disclosure if the Court believes that a regulation infringes upon the First Amendment right to free speech or association.<sup>54</sup> If it does, the Court's amorphous “exacting scrutiny” standard requires that we identify a “substantially related,”<sup>55</sup> or even

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<sup>47</sup> *Id.* at 9.

<sup>48</sup> For more on this, see Wood & Ravel, *supra* note 3, at 1248–53.

<sup>49</sup> See Young Mie Kim, Jordan Hsu, David Neiman, Colin Kou, Levi Bankston, Soo Yun Kim, Richard Heinrich, Robyn Baragwanath & Garvesh Raskutti, *The Stealth Media? Groups and Targets Behind Divisive Issue Campaigns on Facebook*, 35 POL. COMM'N 515 (2018).

<sup>50</sup> See Abby K. Wood, *Citizens United Turns 10 Today. Here's What We've Learned About Dark Money*, WASH. POST: MONKEY CAGE (Jan. 21, 2020), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/>.

<sup>51</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>52</sup> *Id.* at 1.

<sup>53</sup> *Id.* at 19–23, 57–59.

<sup>54</sup> For more on the limited and contradictory evidence that disclosure chills speech, see Wood, *supra* note 6, at 11.

<sup>55</sup> See *Buckley*, 424 U.S. 1; *Citizens United v. FEC*, 558 U.S. 310 (2008).

“narrowly tailored”<sup>56</sup> state interest sufficient to overcome the burden. Depending on the case, the interest must be “overriding,”<sup>57</sup> “sufficiently important,”<sup>58</sup> or even “compelling.”<sup>59</sup>

The governmental interests the Court has recognized since *Buckley* are enforcement, deterring corruption, and providing information to the voters (understood narrowly).<sup>60</sup> The FEC does conduct some enforcement actions based on the information revealed in campaign finance disclosures, but FEC enforcement is both slow and rare.<sup>61</sup> Deterring corruption is important, and it is the most discussed rationale in the disclosure context. Nevertheless, under Chief Justice Roberts, the Court has narrowed its conception of corruption, undermining states’ efforts to regulate campaign finance.<sup>62</sup> That leaves the governmental interest in informing voters to bear a heavy weight for governments defending their disclosure regulations, particularly in ballot initiative campaigns and with outside spenders. As Daniel Ortiz puts it, “[d]isclosure now hangs on this single thread.”<sup>63</sup>

Because disclosure regulations are the last robust tool of campaign finance regulations, it is hardly an overstatement to say that what remains of campaign finance regulation turns, in large part, on the government’s interest in improving voter competence. Accordingly, in the following section, I focus on the informational benefit of disclosure regulations.<sup>64</sup> First, I explain the limited imagination the Court has used to date to describe the informational benefit. Then, I argue that voters glean much more information from disclosures than the Court envisions. It is not just the information contained in the disclosures that informs voters—the quality of the disclosures themselves, and the amount of information disclosed, provide additional information that can enhance voter competence. I support my argument with recent social scientific findings.

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<sup>56</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting).

<sup>57</sup> *Id.*

<sup>58</sup> *Citizens United*, 558 U.S. at 310.

<sup>59</sup> *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014).

<sup>60</sup> Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 668 (2012).

<sup>61</sup> Meredith McGehee, *Fix the FEC: Background Memorandum on New Bipartisan Legislation to Address a Dysfunctional Agency*, CAMPAIGN LEGAL CTR. (Sept. 17, 2015), <http://www.campaignlegalcenter.org/news/publications-speeches/fix-fec-background-memorandum-new-bipartisan-legislation-address-0>.

<sup>62</sup> See Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 118 (2009).

<sup>63</sup> Ortiz, *supra* note 60, at 666.

<sup>64</sup> For more on the anti-corruption benefit, see Wood, *supra* note 6, at 11.

### A. *The Informational Benefit*

The informational benefit is, essentially, an interest in increasing voter competence. While voter competence is not mentioned explicitly in the Constitution, the Supreme Court has called it a “First Amendment” interest.<sup>65</sup> Scholars have argued that it is a constitutional value<sup>66</sup> and that an “effective accountability” canon or “democracy” canon should be recognized in statutory interpretation.<sup>67</sup>

To date, the informational benefit has only been conceived of on the left-to-right policy spectrum.<sup>68</sup> So, in the current understanding, voter competence exists where a voter is able to vote as she would if she had full information about the extent to which the candidates’ preferred policies are aligned with her own.<sup>69</sup> As I will explain, by limiting its voter competence assumption to a single dimension, the Court sells short the benefits of disclosure. But first, I explain how the Court conceives of how disclosures inform voters.

#### 1. *Information on the Policy Dimension*

According to the *Buckley* majority, the information disclosed pursuant to campaign finance disclosure regulations “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”<sup>70</sup> The Court went on to say that “[t]he sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”<sup>71</sup> This understanding is so focused on a one-dimensional left-to-right policy line that the Court continued, “the governmental interest in disclosure is diminished when the contribution in question is made to a minor party . . . . As minor parties usually represent definite and publicized

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<sup>65</sup> *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003).

<sup>66</sup> Elizabeth Garrett, *The Law and Economics of ‘Informed Voter’ Ballot Notations*, 85 VA. L. REV. 1533, 1539 (1999).

<sup>67</sup> Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010); Hasen, *supra* note 62, at 73.

<sup>68</sup> Ortiz, *supra* note 60, at 675. For a helpful primer of the ways that lower courts have interpreted the informational interest, see Lear Jiang, Note, *Disclosure’s Last Stand? The Need to Clarify the ‘Informational Interest’ Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 506–15 (2018).

<sup>69</sup> Garrett, *supra* note 66, at 1534 (citing Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *CITIZEN COMPETENCE & DEMOCRATIC INSTITUTIONS* 147, 149 (Stephen L. Elkins & Karol Edward Soltan eds., 1999)).

<sup>70</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

<sup>71</sup> *Id.*

viewpoints, there may be less need to inform the voters of the interests that specific candidates represent.”<sup>72</sup>

I use a running example to illustrate how the *Buckley* majority thought voters “place each candidate in the political spectrum more precisely.”<sup>73</sup> Suppose I think that a candidate in a Democratic primary is a middle-of-the-road Democrat, say a 5 out of 10, where 1 is perfectly moderate (almost a moderate Republican) and 10 is perfectly progressive. The candidate has given plenty of stump speeches and interviews, and he and his opponent have run ads. Voters therefore have some information on which to base their assessment of him as a 5 out of 10. Then, at the end of the month, the candidate’s FEC disclosures reveal that he has received money from anti-abortion activists and the head of the National Rifle Association.

The candidate’s primary opponent is quick to run an ad publicizing the contributions from these conservatives. If it is a high-profile election, the media may also comb through the FEC disclosures and write about them, meaning that voters will have two opportunities to update their assessments of the primary candidate’s place on the moderate-to-liberal spectrum. As a result of the ads or the news story, voters will revise their understanding of the candidate’s policies. Now they may place him at a 3 out of 10 on the progressivism scale. The new information indicates that the candidate will be more likely to take meetings from anti-abortion and pro-gun lobbyists if he wins the election—and he will be more responsive to those groups in policy making. Access to abortions could be restricted, and gun regulations could be relaxed by policies that result from those meetings. If voters prefer a very progressive candidate, this information will make them less likely to vote for him. If they prefer a middle-of-the-road candidate, this information might make them more likely to vote for him. Voters are better able to choose a candidate that will represent their policy desires—they are more competent as voters—because of the disclosures.

The policy signal from the composition of each candidate’s donor pool has been documented by scholars. First, donor ideology can be estimated with some precision. Political scientist Adam Bonica has used repeat donations to state and federal candidates to estimate donor ideology, or “CF scores.”<sup>74</sup> In turn, donor ideologies, when aggregated by donee-candidates, can be used to estimate floor votes by members of Congress.<sup>75</sup> Indeed, donations are *as accurate* at predicting

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<sup>72</sup> *Id.* at 70.

<sup>73</sup> *Id.* at 67.

<sup>74</sup> Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 373–76 (2014).

<sup>75</sup> Adam Bonica, *Inferring Roll-Call Scores from Campaign Contributions Using Supervised Machine*

floor votes of incumbents as the incumbents' prior votes.<sup>76</sup> This suggests that campaign finance disclosures are highly informative along the policy dimension.

Even under the policy-only understanding of voter competence, an informational problem exists when so much of campaign financing by outside groups goes undisclosed. Individuals and outside groups, like SuperPACs and 501(c) organizations, can spend unlimited amounts to support or oppose a candidate. The Supreme Court has ruled that this independent spending does not corrupt.<sup>77</sup> Nevertheless, disclosure provides a more credible signal of policy preferences than the voter would have in the absence of disclosure, in which case the voter would only have stump speeches, ads, and other political messaging as information to guide her vote choice. The absence of disclosure information from outside groups, therefore, probably makes scholarly estimates of floor votes less precise than they would be if the sources of corporate expenditures were required to be disclosed. This is supported by a recent study of incidentally released data about donors to dark money groups by Stan Oklobdzija.<sup>78</sup> The data, released in the course of litigation, contained the identities of donors to a large, conservative dark money group active in a California ballot initiative campaign.<sup>79</sup> Oklobdzija found that donors to the dark money group were more liberal, as measured by their publicly disclosed spending to other campaigns, than donors who gave directly to the ballot initiative campaign itself (the disclosed donors).<sup>80</sup>

To illustrate further, imagine a wealthy Hollywood producer, known for progressive stances and issues, including direct (disclosed) contributions to progressive candidates and ballot initiative campaigns. Suppose the producer also wants to support a tax cut that is on the ballot, but he would prefer to do so anonymously. He therefore makes this conservative contribution to a dark money group that supports the ballot proposition. His ideology estimate, which is based on his disclosed contributions, would not contain the anonymous contribution. Therefore, if the list of contributors was exposed, as it was in the

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*Learning*, 62 AM. J. POL. SCI. 830, 831 (2018). The same effect could be achieved by replacing the donor's name with a donor ID number, so that the donor's name does not become public. Christopher S. Elmendorf & Abby K. Wood, *Political Ignorance: Law, Data, and the Representation of (Mis)Perceived Electorates*, 52 U.C. DAVIS. L. REV. 571, 594, 617–19 (2018); see *infra* Part IV.C.1.

<sup>76</sup> Bonica, *supra* note 75, at 838.

<sup>77</sup> See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1102–03 (2011).

<sup>78</sup> Stan Oklobdzija, *Public Positions, Private Giving: Dark Money and Political Donors in the Digital Age*, RSCH. & POL. 1, 1 (2019).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2.

case that Oklobdzija analyzes, his contribution would appear to come from someone fairly progressive.

If the same ideological mismatch between disclosed and “dark” spending exists in candidate campaigns—and why would it not?—our estimates of candidate ideology will be less precise than they would be in a world with full disclosure. Voters dislike uncertainty and may vote accordingly.<sup>81</sup> If transparency is especially important to a voter, then she may abandon a candidate who is closer on policy but less transparent for a candidate who has less desirable policy proposals but has demonstrated a commitment to transparency.<sup>82</sup>

What is more, the amount of uncertainty in the contribution data will vary from election to election and seat to seat, depending on how many contributors opt to give to “dark” organizations and corporations. The current disclosure rules and loopholes therefore leave the amount of uncertainty in the system to the whims of contributors, rather than under the control of regulators.

In sum, we are able to estimate candidate policy preferences using contributions. However, the little information we have from dark money groups indicates that at least some of their donors may differ from direct contributors. That means that our estimates are less precise than they would be if the names of all political donors—including to outside groups—were forced to be disclosed. We do not know the amount of noise that is introduced. At the moment, it may not be much, given how well Bonica’s CF scores can predict legislative floor votes. But the government has no control over the share of our political contributions that are disclosed and therefore the amount of measurement error in the data that helps us to predict the policies candidates will enact once in office.

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<sup>81</sup> Campaign management courses agree and urge their candidates to distinguish themselves with their transparency, saying that the voter demand for transparency is here to stay. See *The Importance of Transparency in Your Political Campaign*, GEO. WASH. UNIV. GRADUATE SCH. POL. MGMT. (May 29, 2020), <https://gspm.online.gwu.edu/blog/the-importance-of-transparency-in-your-political-campaign/>.

<sup>82</sup> Note that it would not require a strong preference for transparency for this voting pattern to occur. Voters could abandon candidates who are exactly aligned with their policies (according to stump speeches and disclosed contributors) but potentially responsive to undisclosed groups with whom the voter disagrees, to vote for a candidate who is less well aligned with the voter’s policy preferences but a “known quantity” because all of her supporters are disclosed. Put simply, voters might prefer the less politically aligned “sure thing” over the more politically aligned wild card.

a. *Studies of How Voters Learn and Use the Information*

We have established that the contributions themselves allow us to estimate which policies candidates will support, providing information along the left-to-right political spectrum. But do voters actually receive the information and learn from it? The answer is that some do, some of the time, as with any other information about political candidates.

The media is the key intermediary between the government and voters, disseminating campaign finance information in campaigns of interest to each outlet's readers.<sup>83</sup> Of course, the media only picks up a fraction of possible campaign finance stories.<sup>84</sup> Studies suggest that the media is more likely to pick up stories about scandals when the news cycle is slow,<sup>85</sup> campaigns are competitive, or the opponent amplifies media stories about the scandal.<sup>86</sup> Scandals aside, opposition researchers can also pump out information about the opponent's funders, emphasizing that the other side is supported by the fossil fuel industry or is the preferred candidate of out-of-state progressives. These stories may be picked up by the media as well, but, aside from the presidential campaigns, most campaigns' disclosures will receive patchwork media coverage, at best.

Do voters learn from the information? Improvement in voter competence from disclosures can be difficult to measure because there are so many intervening variables between the disclosure itself and the information the voter uses to make her choice. In the rest of this subsection, I review the political science literature on voter competence.

Political scientists dispute the baseline level of voter competence upon which campaign finance disclosures may build.<sup>87</sup> We know that voters are "rationally ignorant,"<sup>88</sup> yet voters also have a lot of information available to

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<sup>83</sup> Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 237 (2007).

<sup>84</sup> *Id.* at 239, 246; Ben Gaskins, Ellen Seljan, Todd Lochner, Katie Kowal, Zane Dundon & Maya Gold, *From the FEC to the Ballot Box: Voter Accountability for Campaign Finance Law Violations*, 47 AM. POL. RSCH. 1000, 1008 (2018).

<sup>85</sup> Brendan Nyhan, *Scandal Potential: How Political Context and News Congestion Affect the President's Vulnerability to Media Scandal*, 45 BRIT. J. POL. SCI. 435, 450–55 (2015).

<sup>86</sup> Brian J. Fogarty, *Scandals, News Coverage, and the 2006 Congressional Elections*, 30 POL. COMMUN. 419, 427–28 (2013).

<sup>87</sup> JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 42–52 (1992); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 64, 72 (1994).

<sup>88</sup> ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957).

them.<sup>89</sup> We only use information that is valuable to us—meaning that it improves knowledge and helps us make more accurate choices, given our preferences.<sup>90</sup> Campaign finance information can serve that role for undecided or persuadable voters who actually need the information to help them make choices that fit their preferences. The informational benefits of campaign finance information should be largest for these undecided or persuadable voters.

Voters operate based on heuristics like a candidate's party identification.<sup>91</sup> It may not seem like it in the months leading up to the November election season, but most elections in the U.S. are either nonpartisan or feature candidates from the same party. Consider party primary elections, nonpartisan judicial elections, nonpartisan city elections, elections in states dominated by one party that have top-two primaries, and ballot initiatives. Voters cannot use party identification as a heuristic in any of these kinds of elections. Without party identification as an available shortcut, voters look to other heuristics, like endorsements and campaign finance information. In a general election, party identification should be a more powerful heuristic than campaign finance disclosure.<sup>92</sup> Recent work by Rhodes et al. shows this to be the case, though the informational effects of campaign finance disclosure persist even in the face of partisan cues.<sup>93</sup>

In a seminal study on heuristics, Arthur Lupia showed that voters use campaign finance information as a heuristic in the ballot initiative context.<sup>94</sup> Lupia analyzed voter behavior in a year when there were five competing initiatives on the California ballot, all pertaining to insurance reform.<sup>95</sup> Voters were able to make the choice that best aligned with their preferences if they knew which of the five ballot initiatives was supported by the insurance industry.<sup>96</sup> Cheryl Boudreau and Scott MacKinzie ran a similar study using a survey experiment. They found that donor information influenced opinions about the

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<sup>89</sup> The information varies in quality and is used with varying amounts of sophistication. See Rachel Bernhard & Sean Freeder, *The More You Know: Voter Heuristics and Information Search*, 42 POL. BEHAV. 603 (2018).

<sup>90</sup> "Reasoned choice does not require full information; rather, it requires the ability to predict the consequences of actions. We define this ability as knowledge." ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 2 (James E. Alt & Douglass C. North eds., 1998).

<sup>91</sup> Samuel C. Rhodes, Michael M. Franz, Erika Franklin Fowler & Travis N. Ridout, *The Role of Dark Money Disclosure on Candidate Evaluations and Viability*, 18 ELECTION L.J. 175, 187 (2019).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Lupia, *supra* note 87, at 65–66.

<sup>95</sup> *Id.* at 63.

<sup>96</sup> *Id.*

initiative, that the effect was as large as party or policy information, and that the largest effects were among the best-informed voters.<sup>97</sup>

In some contexts, voters' ability to glean information from heuristics may be limited because their signal is too noisy. A working paper by David Broockman, Aaron Kaufman, and Gabriel Lenz describes a survey in which the authors presented survey respondents with the names of special interest groups, many of which are involved in campaign financing.<sup>98</sup> Respondents performed poorly in placing the special interest groups on an ideological spectrum across several experiments.<sup>99</sup> The founders of PACs and 501(c)(4) groups often give them ambiguous names, increasing the "noise" in the signal, and reducing the heuristic value of their names. These findings can be used by reformers to argue for increased disclosures. Bonica-style ideology estimation is possible only with disclosure.

So far, the discussion has covered what we know about voters' ability to place a candidate or campaign on a left-to-right political or ideological spectrum. This is a limited perspective on a benefit that I argue is multidimensional. Information about campaign finance transparency—and compliance—can help us predict the kind of public official a candidate will be in office. This non-policy, or "valence" information, has nothing to do with the left-to-right policy spectrum. It introduces another dimension to voters' evaluations of candidates.

## 2. *The Ignored Benefit of Campaign Finance Disclosure: Candidate "Valence" Information*

Voters care about more than policy. A long line of studies in political science establishes the importance of voter evaluations of non-policy traits, which we call "valence" characteristics.<sup>100</sup> Campaign finance disclosures and campaign

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<sup>97</sup> Cheryl Boudreau & Scott MacKinzie, *Follow the Money? How Donor Information Affects Public Opinion about Initiatives*, POL. RSCH. Q. (Feb. 15, 2021) (available at <https://journals.sagepub.com/doi/pdf/10.1177/1065912921990744>); cf. David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION L.J. 114, 118–19 (2013) (designing an experiment in which it was harder for voters to find campaign finance information among other information provided, and finding smaller learning effects, possibly as a result of the study's design).

<sup>98</sup> David E. Broockman, Aaron R. Kaufman & Gabriel S. Lenz, *Heuristic Projection: How Interest Group Cues Can Harm Voters' Judgments* 12–13 (Univ. of Cal. Berkeley, Working Paper) (available at <https://osf.io/6yskq/download>).

<sup>99</sup> *Id.*

<sup>100</sup> Walter J. Stone & Elizabeth N. Simas, *Candidate Valence and Ideological Positions in U.S. House Elections*, 54 AM. J. POL. SCI. 371, 371 (2010); Donald E. Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 373 (1963); see WILLIAM T. BIANCO, TRUST: REPRESENTATIVES AND CONSTITUENTS 2 (John E. Jackson & Christopher H. Achen eds., 1994); Carl McCurley & Jeffrey J. Mondak, *Inspected by #1184063113: The Influence of Incumbents' Competence and Integrity in U.S. House Elections*, 39 AM. J. POL.

finance regulatory compliance information enable voters to evaluate not just candidates' policies, but the candidates themselves. A candidate who is supported by dark money groups may have something to hide. That possibility undermines voters' evaluation of candidates' trustworthiness, as I explain below.

Most voters do not scroll lists of candidate donations on FEC.gov. To evaluate the quality and extent of campaign finance disclosures, voters usually require the assistance of information intermediaries and audits. "Information intermediaries" are any entity that digests and disseminates campaign finance information, such as the media, transparency advocacy groups, and even the candidates themselves, who might brag about the information contained in their disclosures (like Bernie Sanders's oft-repeated 2016 claim that his average contribution was \$27)<sup>101</sup> or who might use candidates' campaign disclosures against them. "Audits" are any review of campaign finance disclosures, not necessarily by an accountant or by the government.<sup>102</sup> Information intermediaries, particularly those who have expertise in transparency and

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SCI. 864, 864–65 (1995); JEFFREY J. MONDAK, NOTHING TO READ: NEWSPAPERS AND ELECTIONS IN A SOCIAL EXPERIMENT I (1995).

Valence characteristics were front-and-center in the 2016 elections. Both candidates received low likeability evaluations. Lydia Saad, *Trump and Clinton Finish with Historically Poor Images*, GALLUP (Nov. 8, 2016), <https://news.gallup.com/poll/197231/trump-clinton-finish-historically-poor-images.aspx>. The 2016 presidential campaigns focused on other non-policy factors, as well. Democrats emphasized how unfit and unprepared Donald Trump was to be commander-in-chief. See, e.g., Kevin Liptak, *Obama Says Trump 'Unfit' for Presidency*, CNN (Aug. 2, 2016), <https://www.cnn.com/2016/08/02/politics/obama-says-trump-unfit-for-presidency/index.html>. Hillary Clinton and her surrogates were sure to emphasize how Trump could not be trusted with the nuclear arsenal. See, e.g., Jeremy Diamon, *New Clinton Ad Questions Trump's Fitness to Command Nuke Arsenal*, CNN (Oct. 7, 2016, 10:03 PM), <https://www.cnn.com/2016/10/07/politics/hillary-clinton-donald-trump-nuclear-arsenal/index.html>. The media and the Trump campaign made much hay out of Clinton's use of a private email address and server during her time as Secretary of State, casting her as "untrustworthy" as a result. See, e.g., Clare Foran, *The Curse of Hillary Clinton's Ambition*, ATLANTIC (Sept. 17, 2016), <https://www.theatlantic.com/politics/archive/2016/09/clinton-trust-sexism/500489/>.

<sup>101</sup> Philip Bump, *Bernie Sanders Keeps Saying His Average Donation is \$27, But His Own Numbers Contradict That*, WASH. POST (Apr. 18, 2016, 10:46 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/18/bernie-sanders-keeps-saying-his-average-donation-is-27-but-it-really-isnt/>.

<sup>102</sup> Audits can range in stringency and invasiveness from a look at what is actually disclosed to a look at the campaign's books, bank statements, and receipts. See OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., HANDBOOK FOR THE OBSERVATION OF CAMPAIGN FINANCE 47–48 (2015). Opposition researchers, transparency groups, and the media can easily do the former kind of audit and already do in some races. Corporate contributions—which are illegal in many states and for federal candidates—and excessive contributions are easily detectable and appear frequently in disclosures. *Who Can and Can't Contribute*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/> (last visited May 26, 2021); *Campaign Contribution Limits: Overview*, NAT'L CONF. STATE LEGISLATURES (Oct. 4, 2019), <https://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx> (finding that "22 states completely prohibit corporations from contributing to political campaigns"). Detailed audits require access and expertise, and they should lend credibility to disclosures beyond the credibility boost given by a look at the disclosures themselves.

disclosure, also audit disclosures, though they do not typically have access to the underlying documentation and receipts behind the disclosures.<sup>103</sup> Audits, especially when conducted by a trusted or neutral party, enhance the credibility of disclosures.<sup>104</sup>

Audits can also reveal whether a candidate is a compliant or noncompliant type. Noncompliance can lead to scandals that might harm candidate reputations.<sup>105</sup> Of course, the communication of a candidate being a compliant or noncompliant type only matters if two things are true: (1) voters will care, and (2) campaigns realize that voters will care and avoid compliance problems accordingly. Research indicates that voters do care, especially in party primaries and non-partisan elections.<sup>106</sup> Candidate behavior indicates that at least some campaigns realize that voters care and structure their behavior accordingly.<sup>107</sup> Thus, audits and compliance information more generally builds on the non-policy information that is gained solely from disclosure.

Deterrence theory holds the mechanism. As deterrence theory teaches us, when the probability of detection increases, the likelihood of realizing the costs associated with being caught violating the rules also increases.<sup>108</sup> In turn, the net benefit of breaking rules decreases.<sup>109</sup> Audits, therefore, shift the balance against the marginal fraudulent behavior in campaign financing.

Deterrence often operates through “reputation markets,” which impose the cost on violating entities. Reputation markets exist among taxpayers<sup>110</sup> and industries engaged in environmental information releases,<sup>111</sup> and between

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<sup>103</sup> See, e.g., *2016 Presidential Race*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pres16/> (last visited May 26, 2021) (providing a summary of campaign funding by candidate, as well as outside committees, sector and industry totals, SuperPAC donors, and more).

<sup>104</sup> Accounting research has established that audits enhance the credibility of disclosures and that information intermediaries can be useful in communicating with the public, which often means communicating with shareholders. For a summary, see Paul M. Healy & Krishna G. Paleu, *Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature*, 31 J. ACCT. & ECON. 405, 413 (2001).

<sup>105</sup> Nyhan, *supra* note 85, at 443.

<sup>106</sup> See *infra* Part III.

<sup>107</sup> Dave Levinthal, *Mum’s the Word: Some Democratic Presidential Hopefuls Won’t Discuss Their Big-Dollar ‘Bundlers’*, PUB. INTEGRITY (Apr. 22, 2019), <https://publicintegrity.org/politics/elections/bundlers-president-election-2020>.

<sup>108</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968).

<sup>109</sup> See *id.* at 204–05; Francesca R. Jensenius & Abby K. Wood, *Caught in the Act but Not Punished: On Elite Rule of Law and Deterrence*, 4 PA. ST. J.L. & INT’L AFFS. 686, 688–89 (2016).

<sup>110</sup> Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 692 (2012).

<sup>111</sup> The market rewards “superior performance” and punishes revelations of poor performance. See Clifford Rechstchaffan, *Competing Visions: EPA and the States Battle for the Future of Environmental*

corporations, consumers, and shareholders.<sup>112</sup> Bad publicity reduces trust, which costs regulated parties in the private sector, especially in areas like fraud and product safety.<sup>113</sup> These findings also suggest that overcompliance in the face of a reputational market is not irrational.<sup>114</sup>

In the campaign context, the relevant reputation market comprises the voters, the media, opposition candidates, and interest groups. A robust reputation market in campaign finance is important because the governmental enforcement mechanisms are weak. Penalties for campaign finance violations are small and delayed.<sup>115</sup> The small, delayed penalties are by design, and they serve the interests of both the incumbent legislators and regulators. Incumbent legislators' discount on time is very large and dictated by the election cycle. Regulators are overseen by the incumbents whose campaigns they regulate. Legislators have historically been willing to defund campaign finance enforcement programs that they interpret as being overly aggressive or overly intrusive into their reelection campaigns.<sup>116</sup> As a result, without a reputation market facilitated by the informational intermediaries in this domain—the media and watchdog groups—campaigns would have little incentive to comply with campaign finance regulations, and voters would know less about the candidates and initiatives on the ballot.

Several empirical studies have examined how voters learn from campaign finance disclosures. They help us understand the size of voter learning effects on this non-policy dimension. The studies provide information about the *extent* and *quality* of campaign finance disclosures. I turn to them now.

*a. Studies of Voter Reactions to Donor Anonymity and Legal Noncompliance*

Information about the extent of disclosures teaches voters about campaign transparency. In particular, it seems to help voters evaluate how trustworthy they find candidates. Compliance-related information is separately informative but requires audits or additional information over-and-above what the disclosures themselves provide. Many studies combine the two types of information; though

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*Enforcement*, 30 ENV'T L. REP. 10803, 10819–20, 10827–28 (2000) (listing studies).

<sup>112</sup> Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?*, 21 FORDHAM ENV'T L. REV. 1, 13–15 (2010).

<sup>113</sup> Nicholas R. Parillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REGUL. 165, 210–11 (2019).

<sup>114</sup> Babcock, *supra* note 112, at 37–38.

<sup>115</sup> See DANIEL I. WEINER, *FIXING THE FEC: AN AGENDA FOR REFORM* 4 (2019).

<sup>116</sup> See Abby K. Wood, *The FEC's Institutional Predicament*, 45 ADMIN. & REGUL. L. NEWS 1, 4–6 (2019).

in describing these studies for readers, I try to separately explain the two types of information the researchers provide to respondents. The key conceptual takeaway is that disclosure information alone can be used to teach voters about candidate types. This is why I argue that the information benefit of disclosures is multidimensional—it is not just about policy on the left-to-right spectrum. When we add audits of the disclosed campaign finance information to reveal compliance information, the non-policy informational benefits are even stronger.

The most common strategy in social science research about campaign finance information is to explain to respondents that an ad has anonymous donors. Respondents can then evaluate the transparency of the campaign in choosing between two hypothetical candidates or evaluating an advertisement. For example, Conor Dowling and Amber Wichowsky showed subjects an ad attacking a state senate candidate.<sup>117</sup> An outside group ran the ad, and the ad included the FEC-required disclaimer.<sup>118</sup> The researchers followed the ad with disclosure information either as a chart of top contributors, a news story about outside groups generally, or a news story that the outside group had anonymous contributors.<sup>119</sup> Anonymity, when exposed as such, reduced the persuasiveness of the message.<sup>120</sup> It also reduced respondents' confidence in the credibility or trustworthiness of the sender of the message.<sup>121</sup>

Another research team found that respondents viewed disclaimers by outside groups, including those mentioning the sponsor was funded by small donors, as most credible and trustworthy.<sup>122</sup> Where donors are both large and anonymous, respondents saw them as much less credible and trustworthy.<sup>123</sup>

In a series of survey experiments, I present respondents with hypothetical candidates and measure their reactions to the candidates' campaign finances as well as other characteristics.<sup>124</sup> The scenarios present candidates running in a

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<sup>117</sup> Conor M. Dowling & Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RSCH. 965, 976–77 (2013).

<sup>118</sup> *Id.* at 973–74.

<sup>119</sup> *Id.* at 982–84.

<sup>120</sup> *Id.* at 985–86.

<sup>121</sup> *Id.* at 981–82.

<sup>122</sup> Travis N. Ridout, Michael M. Franz & Erika Franklin Fowler, *Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RSCH. Q. 154, 155 (2015).

<sup>123</sup> *Id.* at 163–64. This research could not distinguish between the effects of donor size and anonymity, however, necessitating follow-up studies to answer this question.

<sup>124</sup> Abby K. Wood, *Show Me the Money: Candidate Selection Based on Campaign Finance Transparency*, at app. at A23, A39 (Univ. S. Cal. Ctr. for Law & Soc. Sci., Research Paper Series No. CLASS17-24, 2018) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3029095](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029095)); Gaskins et al., *supra* note 84, at 1023.

party primary for an open seat for a state office. These choices of party primary and open seats are intentional. A party primary lacks party name as a heuristic. A state office is less salient than federal office. And the open seat eliminates the incumbency advantage.<sup>125</sup> In other words, these are where I expect campaign finance disclosure and compliance information to affect voter choice.

In the first study, I presented respondents with two hypothetical candidates with similar policy preferences who differed on whether they were supported by organizations that did not disclose their donors or over-complied with campaign finance rules.<sup>126</sup> On average, respondents rewarded overcompliance and punished noncompliance, and they rewarded transparency and punished its lack thereof. The effect is observable in vote choice, candidate preferences, and trustworthiness ratings. The study suggests that voters to react to “disclosure disclaimers”: they care about whether a candidate is supported by dark money. They also find candidates who reveal more than the law requires to be particularly trustworthy, and, in turn, they are slightly more likely to vote for them.<sup>127</sup>

These are interesting results, but how much do voters really care about transparency when they’re awash in other information about candidates? Will they trade transparency for their preferred policies? Will they trade transparency for a candidate’s persuasiveness or grasp of the issues? To test the limits of the results from the first experiment, I conducted a survey experiment called a “conjoint analysis.”<sup>128</sup> In a conjoint analysis, the researcher randomized a number of different levels of candidate attributes. Respondents chose their preferred candidate in different “match ups.” Respondents were able to view nine randomly presented facts about the candidates’ policy positions (immigration and sex education), campaign financing (percent small donors, amount raised, and whether they were supported by anonymous sources), compliance with campaign finance laws, professional background, and campaign skills (persuasiveness and grasp of the issues). Even in the face of candidate policy preferences, respondents were more likely to select a candidate that discouraged dark money groups from supporting the campaign than one who received dark money support.

If disclosures are audited, voters can learn about candidate compliance. In recent years, scholars have studied voter reaction to various types of misbehavior

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

and scandal by candidates and public officials. When voters learn about noncompliance with campaign finance regulations, they rate candidates lower on trust,<sup>129</sup> intelligence, ethics, competence, and general job approval.<sup>130</sup> Interestingly, they do not change their evaluation of perceived ideology.<sup>131</sup> Voters may also learn about the candidate's propensity to operate transparently or engage in corruption.<sup>132</sup>

My conjoint experiment provided information about compliance with campaign finance rules alongside other kinds of information. Respondents were much less likely to select a candidate with campaign finance compliance problems compared to one who is "in compliance." They were even slightly more likely to select a candidate that provided more information than the law requires, compared to a candidate that is "in compliance," though the estimate is just shy of statistical significance in many of the analyses. The degree of policy mismatch between the respondent and the candidate seemed to have little impact on the respondents' reaction to noncompliance and dark money support.

While my studies took place in hypothetical primary elections, a recent study by Sam Rhodes and coauthors compared voter reactions to a candidate's relationship to dark money groups with and without partisan cues.<sup>133</sup> The authors found that voters reacted to candidate support from dark money groups in the absence of party cues—like my primary setting—but when party cues were present, the effects, while still statistically different from zero, were less pronounced.<sup>134</sup>

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<sup>129</sup> Wood, *supra* note 124, at app. A23, A39; Gaskins et al., *supra* note 84, at 1023.

<sup>130</sup> See Gaskins et al., *supra* note 84, at 1023.

<sup>131</sup> Gaskins, et al. found two exceptions about the effects of scandals, but both are outside of the campaign finance context. Respondents in their study perceived hypothetical tax evaders to be more conservative than their non-scandal-ridden (hypothetical) counterparts and hypothetical candidates with sex scandals to be more liberal. *Id.*

<sup>132</sup> Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislators' Election Outcomes and Behavior*, 65 AM. J. POL. SCI. (forthcoming 2021) (manuscript at 6, 27) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3236939](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236939)). Strictly speaking, disclosure and transparency are not the same thing. Reporting requirements demand information of persons by government, like individuals or companies in the private sector. The government, which requires the reports, then discloses them to the public. See *Public Financial Disclosure Guide*, U.S. OFF. GOV'T ETHICS, <https://www.oge.gov/Web/278eGuide.nsf> (last visited May 26, 2021). Transparency laws, like FOIA or Open Meetings Laws, force government actors to make decisions publicly. Freedom of Information Act, 5 U.S.C. § 552; Alex Aichinger, *Open Meeting Laws and Freedom of Speech*, MIDDLE TENN. STATE UNIV. (2009), <https://www.mtsu.edu/first-amendment/article/1214/open-meeting-laws-and-freedom-of-speech>. The difference is mostly semantic in the candidate context, where candidates span the public and private sphere. Candidates for elected office are private individuals vying for public office—even when they are running as incumbents. Campaign finance disclosure is, at its root, candidate transparency.

<sup>133</sup> Rhodes et al., *supra* note 91, at 180–81, 183–85.

<sup>134</sup> *Id.* at 180–81, 187–88.

Compliance information, released in the face of partisan cues, can still result in big voter reactions, as Christian Grose and I have found.<sup>135</sup> In 1976, the brand-new FEC decided to audit campaigns for the 1976 House elections.<sup>136</sup> Limited resources forced the agency to audit only a subset, so they randomly selected 10% of campaigns for audit.<sup>137</sup> Incumbents who were randomly selected for audit after the 1976 campaign lost vote share in the 1978 election compared to the non-audited incumbents.<sup>138</sup> They were also more likely to retire, meaning that we may be underestimating the true effect.<sup>139</sup> Where the audits revealed violations, the effects were even larger.<sup>140</sup>

Compliance learning effects persist with party cues in the survey experimental context as well. Gaskin and coauthors found that voters from both parties punished in-party candidates who were out of compliance, with Republicans slightly less punitive for financial noncompliance and more punitive on sex scandals.<sup>141</sup>

The takeaway from these studies is that respondents evaluate candidates and messages differently when they learn about the candidate's relationship to non-disclosing groups, and when they learn about the candidate's failure to comply with campaign finance laws. Voters are *informed* about non-policy characteristics of candidates when they learn about the campaign's transparency and compliance with campaign finance laws. Yet the Court has not taken this non-policy dimension into account when it considers the benefits of campaign finance transparency.

### III. TOWARD A JURISPRUDENCE THAT VALUES THE FULL RANGE OF CAMPAIGN FINANCE DISCLOSURE'S INFORMATIONAL BENEFITS

The Court can expand its view of the benefits of campaign finance disclosures in a way that is incremental and accords with its jurisprudence in other areas of the law. After all, campaigns, like corporations, are regulated entities. The Court has long taken the stance that consumers learn from corporate disclosures and transparency around corporate compliance issues.<sup>142</sup> The

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<sup>135</sup> See Wood & Grose, *supra* note 132.

<sup>136</sup> *Id.* at 8.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 19.

<sup>139</sup> *Id.* at 16.

<sup>140</sup> *Id.* at 17, 20.

<sup>141</sup> See Gaskins et al., *supra* note 84, at 1025.

<sup>142</sup> See Cong. Rsch. Serv., R45700, Assessing Commercial Disclosure Requirements Under the First Amendment 1–2, 4 (2019), <https://fas.org/sgp/crs/misc/R45700.pdf>.

analogy is obvious: consumers are also voters and can learn from candidate disclosures and candidate compliance problems. In this Part, I explain why courts should uphold two policy innovations aimed at improving voter competence on non-policy dimensions: (1) “disclosure disclaimers” and (2) audits. Disclosure disclaimers are an idea initially proposed by Dean Heather Gerken and coauthors in an op-ed.<sup>143</sup> Simply put, a disclosure disclaimer would appear with a political advertisement to inform voters about the role of dark money in paying for the ad. Audits may be conducted as part of the campaign finance transparency regulatory process. Audits inform voters about campaign finance compliance. The research summarized above suggests that candidates’ dark money support and compliance are two issues that voters care about and can learn from. I take them in turn. I conclude this Part discussing limitations of the argument.

#### A. Disclosure Disclaimers

The Court currently assumes that campaign finance disclosures inform voters of the policies the candidate will support while in office.<sup>144</sup> It is only a half-step to expand the Court’s concept of the informational benefit to include voter learning that results from, for example, seeing whether candidates are supported by ads from outside groups with untraceable donors.<sup>145</sup> As the research shows, respondents to survey experiments make different choices when they learn about candidates’ relationships to dark money groups.<sup>146</sup> On average, they use the information to vote differently in primary elections than they otherwise would. Respondents deem the more transparent candidates to be more trustworthy. In the same way that the Justices believe that disclosure informs voters about the policies a candidate might support in office, it also informs voters about non-policy characteristics—especially trustworthiness—that are important to voters.<sup>147</sup>

Importantly, no additional government disclosures are required to assist voters in learning about candidate type. Journalists and other intermediaries can continue to highlight the types of support a candidate or ballot initiative receives—including dark money support—and voters can continue to vote accordingly. And of course, intermediaries could systematically produce

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<sup>143</sup> Heather K. Gerken, Wade Gibson & Webb Lyons, *Rerouting the Flow of ‘Dark Money’ into Political Campaigns*, WASH. POST (Apr. 3, 2014), [https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08\\_story.html](https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08_story.html).

<sup>144</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

<sup>145</sup> See Gerken et al., *supra* note 143.

<sup>146</sup> See *supra* Part II.C.

<sup>147</sup> *Buckley*, 424 U.S. at 67.

information in the mode of Dean Gerken's "disclosure disclaimers" to help inform voters across all campaigns about campaign finance transparency.<sup>148</sup>

Acknowledgment of the full scope of the informational benefit will help to bolster disclosure regulations against challenges. This is especially helpful for regulations requiring disclosure of donors to ballot initiative campaigns and to outside groups, where the Court has decided that the anti-corruption benefit is not available as a governmental interest in disclosure.<sup>149</sup>

Part of the discomfort about disclaimers is that they are speech that the government requires to appear on the face of a political communication. Could "disclosure disclaimers" be struck as compelled speech? In 2002, seven years after *McIntyre v. Ohio Elections Commission* declared an Ohio disclaimer requirement unconstitutional, a district court struck down a required disclaimer that a recommendation in a mailer contrary to the "official endorsement" of the state party contain a statement that it was "NOT THE POSITION" of the party.<sup>150</sup> But the Bipartisan Campaign Reform Act's stand-by-your-ad requirement was upheld the following year by the Supreme Court in *McConnell v. FEC*.<sup>151</sup> Moreover, the *McConnell* Court referred to the voters' information interest as constitutional in nature.<sup>152</sup> While the jurisprudence is slightly murky, the Supreme Court's decision in *McConnell* suggests that courts would uphold a challenge to a narrowly tailored disclosure disclaimer.

In the next section, I discuss the jurisprudence that relates to campaign finance audits, the best mechanism to reveal compliance information.

### B. Audits and Compliance Information

Information about candidate compliance with campaign finance laws may affect votes even more than information about a candidate's relationship to dark money.<sup>153</sup> Candidate compliance information is available through campaign finance audit programs.

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<sup>148</sup> *Id.*

<sup>149</sup> *Doe v. Reed*, 561 U.S. 186, 233 (2010) ("Similarly, because '[r]eferenda are held on issues, not candidates for public office,' the 'risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.'" (quoting *First Nat'l Bank of Bos. v. Belotti*, 435 U.S. 765, 790 (1978))).

<sup>150</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348–49 (1995); *Levine v. Fair Pol. Pracs. Comm'n*, 222 F. Supp. 2d 1182, 1184, 1191 (E.D. Cal 2002).

<sup>151</sup> *McConnell v. FEC*, 540 U.S. 93, 94 (2003).

<sup>152</sup> *Id.* at 196. California's requirement that political ads be accompanied by a top-five donor disclosure disclaimer has not yet been challenged in court.

<sup>153</sup> *See supra* Part II.C.

Some audits involve publicly financed campaigns, such as audits conducted by the New York City Campaign Finance Board.<sup>154</sup> An added justification for these audits is to ensure that the public's money is not being used fraudulently.<sup>155</sup> But most campaign finance regulators administer programs involving 100% private money. For example, the Fair Political Practices Commission in California does not administer a public financing campaign, yet it still audits 10% of campaigns raising small amounts and 25% of campaigns raising larger amounts.<sup>156</sup> In private money regimes, the justification of ensuring that the public's money is not misspent is not available.

Put aside the political challenges of getting an audit program through incumbent legislators to whom the reputational damage of noncompliance accrues. If it were to exist, an audit program should be upheld by the courts, especially against the First Amendment challenges that are so common against campaign finance regulations.

The courts have long recognized the informational benefits of compliance information in the consumer and watchdog context. For example, the D.C. Circuit has recognized the value of information regarding environmental compliance to investors evaluating the performance of a company because “the ability to avoid [compliance] problems provides an index to management’s overall quality.”<sup>157</sup>

Plaintiffs challenging disclosure of campaign-related information allege that information about enforcement actions will create reputational damage.<sup>158</sup> Because of the assumed information transmission to the reputational market, courts are particularly willing to allow pre-enforcement challenges to regulations in instances where the damage may be “irreparable” or accrues to a heavily regulated industry.<sup>159</sup>

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<sup>154</sup> *About The CFB*, N.Y.C. CAMPAIGN FIN. BD., <https://www.nyccfb.info/about> (last visited May 26, 2021).

<sup>155</sup> *Id.*

<sup>156</sup> *Audit Program*, CAL. FAIR POL. PRACS. COMM’N, <https://fppc.ca.gov/enforcement/audit-program.html> (last visited May 26, 2021).

<sup>157</sup> *Nat. Res. Def. Council v. SEC*, 432 F. Supp. 1190, 1205–06 (D.D.C. 1977), *rev’d on other grounds*, 606 F.2d 1031 (D.C. Cir. 1979).

<sup>158</sup> *Doe v. FEC*, 302 F. Supp. 3d 160, 172 (D.D.C. 2018), *aff’d*, 920 F.3d 866 (D.C. Cir. 2019).

<sup>159</sup> The line of cases begins with *Abbott Labs v. Gardner*, which challenged a regulation that would have required the company to either come into compliance at great cost or be out of compliance while challenging the rule. 387 U.S. 136, 152–54 (1967). The Court allowed the company to challenge the regulation before it was enforced, noting the difficult situation that the company was in. *Id.* However, where the reputational damage may not accrue, the courts are less likely to grant an injunction to allow a pre-enforcement challenge. In *Toilet Goods Association v. Gardner*, the FDA interpreted a provision of the FDCA to require companies to allow inspectors in or potentially suffer suspension of certification services for color additives. *See* 387 U.S. 158, 161

But reputational damage is hardly a reason to strike down a campaign finance audit program. If anything, as in the consumer context, “one purpose of [transparency] is to utilize public opinion as a lever in insuring compliance with the nation’s statutory goals.”<sup>160</sup> A challenge claiming reputational damage to political candidates is unlikely to succeed in light of the jurisprudence. Indeed, the FEC’s disclosure policy around its conciliation agreements, under which the agency discloses the nature of campaign finance violations, including the party that committed the infraction (among other information),<sup>161</sup> was recently upheld by the D.C. Circuit.<sup>162</sup>

In *Doe v. FEC*, plaintiffs filed suit to prevent the FEC from disclosing their identities when it publicly released information pertaining to a closed investigation.<sup>163</sup> The court ruled that disclosure was appropriate despite alleged reputational harm “arising from the fact that they were under investigation” because, unlike a reasonable showing that plaintiffs would be subject to “threats, harassment, or reprisals,” mere reputational harm does not prohibit disclosure of their identities.<sup>164</sup>

The courts have also invalidated laws demanding the non-disclosure of compliance problems by public officials. In *Stilp v. Contino*, Judge Conner’s order invalidated § 1108(k) of the Pennsylvania Public Official and Employee Ethics Act, which prohibited disclosure of the fact that a complaint was filed with the Commission.<sup>165</sup> The judge ruled that the government’s asserted interest of “prevent[ing] damage to the reputation of government officials where the allegations were unfounded” does not justify a blanket prohibition on

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(1967). The Court refused the injunction in this case because the injury was only speculative. *Id.* at 165. In the case of random campaign finance audit, the injury is also only speculative. Assuming limited auditing capacity, audits will be conducted randomly. A subset of campaigns—probably comprising the majority of campaigns—will not be audited. *See supra* Part II.C. If audited, the audit report can be “clean” (and potentially help the candidate) or show violations of varying degrees of severity. *See Wood & Grose, supra* note 132, at 3. Thus, there are at least two steps between the decision to conduct random audits and the reputational damage: (1) being audited and (2) the audits revealing violations.

“Irreparable” may not be a concept that travels well to the context of political campaigns. A violation that is uncovered late in an electoral cycle is more likely to be “irreparable” when compared to a violation that is uncovered early in a cycle and that the campaign quickly resolves. Campaign finance regulators have several steps in their enforcement processes. To actually be fined, a campaign has to fail to come into compliance repeatedly. *See Wood, supra* note 6, at 23. But reputational damage can attach before the fine itself.

<sup>160</sup> *United Techs. Corp. v. Marshall*, 464 F. Supp. 845, 854–55 (D. Conn. 1979).

<sup>161</sup> The guidance document on the disclosure policy enumerates twenty-one pieces of information to be disclosed for closed matters. *See* Notice on Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,703 (Sept. 1, 2016).

<sup>162</sup> *See Doe v. FEC*, 302 F. Supp. 3d 160 (D.D.C. 2018), *aff’d*, 920 F.3d 866 (D.C. Cir. 2019).

<sup>163</sup> *Id.* at 162.

<sup>164</sup> *Id.* at 172.

<sup>165</sup> *Stilp v. Contino*, 743 F. Supp. 2d 460, 467 (M.D. Pa. 2010).

disclosure.<sup>166</sup> He said that “absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech,”<sup>167</sup> and that “injury to official reputation is an insufficient reason for repressing speech that would otherwise be free.”<sup>168</sup> The latter quote is from an opinion that resulted from an even tougher set of facts for those hoping to keep the public from learning about their campaign finance violations. In *Landmark Communications, Inc. v. Virginia*, the Supreme Court held that a statute proscribing criminal penalties for anyone who disclosed the existence of a confidential ethics investigation against a judge—before the outcome was known—violated the First Amendment.<sup>169</sup>

Challengers could also argue that their political spending (“speech”) is unconstitutionally burdened by the additional compliance costs brought about by the audits. Compliance costs were important to the *Citizens United* Court and partly justified the Court’s decision to permit corporations to make independent expenditures from their general treasuries, rather than establish separate segregated funds to make the expenditures.<sup>170</sup> However, here, campaigns should already be complying with campaign finance rules, with or without an audit, and they should incur whatever costs are required to comply. Compliance costs are common among regulated entities, and we know that audits do create costs, even for campaigns with perfect books, because campaign staff must spend time with the auditors. But it is hard to imagine a fact pattern in which the Court would decide that audits increase costs enough for the Court to flip the switch from “not burdensome” (in a regime without audits) to “burdensome” (with audits). An argument that audits raise compliance costs so much that they should be deemed an unconstitutional infringement on free speech would probably fail to persuade the Court to strike an audit program.

Campaign finance audits provide benefits to the public aside from improving voter competence. The benefit of aiding in enforcement of the substantive laws, recognized in the campaign finance disclosure cases, clearly applies in the campaign finance audit context.<sup>171</sup> As before, the enforcement rationale has been recognized in other non-campaign-finance contexts. For example, when a government contractor resisted an executive order requiring disclosure of statistics about the number of women and minorities employed by the contractor,

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<sup>166</sup> *Id.* at 467, 469.

<sup>167</sup> *Id.* at 469 (first quoting *Butterworth v. Smith*, 494 U.S. 624, 634 (1990); then quoting *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978)).

<sup>168</sup> *Id.* at 467.

<sup>169</sup> *Landmark Commc’ns*, 435 U.S. at 841.

<sup>170</sup> *Citizens United v. FEC*, 558 U.S. 310, 339, 415 (2008).

<sup>171</sup> *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam).

the resulting court order said “[t]he mere fact that the company may be embarrassed by the public disclosure of the [information] . . . is not sufficient to warrant withholding [the information] . . . . Indeed, it would seem that one purpose of the [requirement] is to utilize public opinion as a lever in insuring compliance with the nation’s statutory goals.”<sup>172</sup>

Most importantly, anti-fraud and anti-corruption rationales attach to audit programs.<sup>173</sup> As long as audits are narrowly tailored to meet these interests, the audit programs and public release of the resulting compliance information should withstand judicial scrutiny.

### C. *Limitations of the Argument*

The informational benefit is not limitless. Here, I discuss the contexts in which campaign finance and compliance information is particularly helpful to voters, and contexts in which it may matter relatively less (but still matter). I also address slippery slope arguments.

#### 1. *Scope Conditions*

As discussed above, people often use heuristics to inform their vote choice, and campaign finance information will be most beneficial where heuristics are less available.<sup>174</sup> This includes nonpartisan elections, like local elections and some judicial elections, as well as party primaries. Once we are in the general election, the heuristic of party dominates, though voters still react to information about dark money’s involvement in campaigns<sup>175</sup> and campaign finance compliance,<sup>176</sup> even where party cues are present.

Heuristics are also less available when the spending comes from outside groups, which often have confusing or vague names.<sup>177</sup> Most outside groups do not persist across elections,<sup>178</sup> so their prior compliance with campaign finance

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<sup>172</sup> United Techs. Corp. v. Marshall, 464 F. Supp. 845, 854–55 (D. Conn. 1979).

<sup>173</sup> Wood & Grose, *supra* note 132, at 4. An anti-fraud rationale could attach in the ballot initiative context, even where the court has made the anti-corruption rationale unavailable by narrowing the definition of corruption to “quid pro quo.”

<sup>174</sup> See *supra* Part II.A; Wood, *supra* note 6, at 19.

<sup>175</sup> See generally Rhodes et al., *supra* note 91 (discussing the influence of information about dark money political sponsorship on voters).

<sup>176</sup> Wood & Grose, *supra* note 132, at 2.

<sup>177</sup> See Broockman et al., *supra* note 98.

<sup>178</sup> Paul S. Herrnson, Jennifer A. Heerwig & Douglas M. Spencer, *The Impact of Organizational Characteristics on Super PAC Financing*, in *THE STATE OF THE PARTIES 2018: THE CHANGING ROLE OF CONTEMPORARY AMERICAN POLITICAL PARTIES* (John C. Green, Daniel J. Coffey & David B. Cohen eds., 8th ed. 2018).

rules, which could be revealed via audit, is less relevant in this context. However, whether the groups disclose their donors, and whether some of their donors are dark money groups (making them “gray money” groups) matters to voters.<sup>179</sup> These issues can be revealed in real time, prior to the election, by informational intermediaries or disclosure disclaimers.

Finally, voters in ballot initiative states can learn from disclosure disclaimers.<sup>180</sup> Understanding who donates to groups helps voters make a choice that is in line with their policy interests.<sup>181</sup> Understanding whether either side of the ballot initiative contest has benefited from (or rejected) dark money is probably also helpful to voters. They may make an adverse inference against the side supported by dark money, assuming that the money comes from out-of-state, for example. With ballot initiatives, various features of the campaign combine to make information about dark money more or less helpful. The more confusing the language in the initiative, the vaguer the funding group’s name, and the more competing initiatives on the ballot, the more helpful that “disclosure disclaimers” will be to voters.

Outside groups making independent expenditures and ballot initiative campaigns are categories in which the courts do not recognize the government’s interest in preventing corruption as compelling. The informational and enforcement benefits are all that remain to support disclosure regulations should they come under attack from deregulatory groups.<sup>182</sup>

In sum, this theory of an expanded informational benefit has purchase in the majority of elections: primary elections, nonpartisan elections, and even non-salient local, county, and state elections. The scope of the informational benefit will be less important where voters are awash in information, like in general elections for federal office. The informational benefit matters most where the courts will not recognize the government’s anti-corruption interest.

## 2. *The Slippery Slope*

Of course, slippery slope arguments abound. An aggressive court’s interpretation of “non-policy information” could be abusively broad. If it is

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<sup>179</sup> Dowling & Wichowsky, *supra* note 117, at 985.

<sup>180</sup> See Wood, *supra* note 6, at 19.

<sup>181</sup> *Id.*; see Boudreau & MacKinzie, *supra* note 97.

<sup>182</sup> *Doe v. Reed*, 561 U.S. 186, 233 (2010) (“Similarly, because ‘[r]eferenda are held on issues, not candidates for public office,’ the ‘risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.’” (quoting *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765, 790 (1978))).

acceptable to evaluate candidates based on their perceived trustworthiness, as political science research shows that voters do when they learn about dark money support, then what other non-policy information may governments require campaigns to disclose? If voters like trustworthiness, they probably also like generosity. Should the government release candidate tax returns? Voters probably like conscientiousness and intelligence. Should the government disclose candidates' college transcripts? Where does the voters' need for candidate information stop and candidates' right to privacy start?

As with all government regulations, there are lines to be drawn. Here, Congress and the FEC drew the lines long ago, and a lot of campaign finance information is already disclosed to voters.<sup>183</sup> “Disclosure disclaimers” can be made without demanding any more information from candidates or campaigns, or making publicly disclosed information that is not currently public.

When it comes to campaign finance audits and disclosure of the audit results, if noncompliance in the campaign finance realm is informative to voters, information about other legal noncompliance may also help voters to learn. How is information about campaign finance compliance different from information about other kinds of legal compliance (obeying traffic laws, tax laws, labor laws, etc.)? My answer is that it is not. Information about legal violations is available to the public unless expunged from the candidate's record.<sup>184</sup>

We are all regulated by the state and subject to periodic audit as to whether we are violating the laws.<sup>185</sup> Random TSA checks at airports, sobriety checkpoints, and tax audits are all ways we, as people engaging with the regulatory state, encounter audits. Corporations are also subject to audits of their environmental or labor practices. Candidates are regulated entities, too. They opt into a regulatory regime—that of campaign financing—and the government can audit their compliance.

As our study of the FEC audits suggests, information that results from audits is helpful to voters.<sup>186</sup> But that does not mean that the voters are entitled to learn all information that might be helpful to them as they make their choices.

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<sup>183</sup> See 2 U.S.C. § 431–442.

<sup>184</sup> See, e.g., *Violation Tracker Agency Summary Page*, GOOD JOBS FIRST, [https://violationtracker.goodjobsfirst.org/prog.php?agency\\_sum=EPA](https://violationtracker.goodjobsfirst.org/prog.php?agency_sum=EPA) (last visited May 26, 2021) (listing top EPA regulatory violators); *Examples of Employment Tax Fraud Investigations – Fiscal Year 2017*, IRS, <https://www.irs.gov/compliance/criminal-investigation/examples-of-employment-tax-fraud-investigations-fiscal-year-2017> (last visited May 26, 2021) (listing employment tax fraud violations).

<sup>185</sup> Christian R. Grose & Abby K. Wood, *Randomized Experiments by Government Institutions and American Political Development*, 185 PUB. CHOICE 401, 404–05 (2019).

<sup>186</sup> See Wood & Grose, *supra* note 132.

## IV. IMPLICATIONS

The findings and interventions discussed here have implications for courts, political spenders, and policymakers.

*A. For Courts*

Disclosure supports the “First Amendment interest[] of individual citizens seeking to make informed choices in the political marketplace.”<sup>187</sup> The information that disclosures, disclosure disclaimers, and audits can provide improves voter competence in more ways than the courts have currently recognized. I discuss policy and non-policy information in turn.

Few of the Court’s assumptions about the costs and benefits of disclosure in *Buckley* have undergone thorough empirical analysis. The policy dimension of the informational benefit is the most thoroughly analyzed benefit of disclosure.<sup>188</sup> The research to date indicates that the Court was correct in assuming that informational benefits of disclosure exist for placing candidates on the left-to-right spectrum.<sup>189</sup> It also indicates that the current regime, which allows for some independent spending to go undisclosed, probably adds noise to our estimates of how politicians will vote on the bills before them.<sup>190</sup> The failure to regulate after *Citizens United* arises from appropriations riders prohibiting the SEC and IRS from acting.<sup>191</sup> The Court would probably call this a problem for the legislature to resolve; however, to the extent that voter information is a constitutional value, an argument could be made that the appropriations riders themselves are unconstitutional. An aggressive stance, to be sure, but a colorable argument, nonetheless.

When it comes to non-policy information, our research also strongly suggests that voters learn about the candidates themselves—perhaps their management abilities, organization, or tendency toward corruption—from compliance with the campaign finance laws.<sup>192</sup> Similarly, the evidence suggests that at least in some contexts, voters are willing to reward overcompliance.<sup>193</sup> Finally, on average, voters are less likely to vote for candidates that receive

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<sup>187</sup> *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003); *see also* Elmendorf, *supra* note 67, at 1084 (discussing “voters’ Equal Protection rights and candidates’ and political parties’ First Amendment associational rights”).

<sup>188</sup> Bonica, *supra* note 75, at 831.

<sup>189</sup> *See Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (per curiam).

<sup>190</sup> Wood, *supra* note 6, at 12.

<sup>191</sup> *See* Wood, *supra* note 50.

<sup>192</sup> Wood & Grose, *supra* note 132, at 6–7, 25.

<sup>193</sup> Wood, *supra* note 124.

support from dark money groups.<sup>194</sup> All of these findings indicate that there is an informational benefit both from the disclosures themselves (or lack thereof, for dark money groups), and that the informational benefit is not as much about policy as it is about the candidate herself. The Court can embrace “disclosure disclaimers” as well as audits for providing crucial information to voters.

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The Court *should* right-size its understanding of the information benefit. But will it? The chances that the Court will broaden its understanding of voter competence to encompass this understanding of the information voters receive through campaign finance disclosures depends in large part on who is on the Court when the issue is next before them. A careful read of earlier cases reveals that the Justices who are still on the Court and are friendly to disclosure like it for deterring corruption and improving voter competence. Moreover, the Justices’ ideological commitments do not always predict their votes on the information benefit.

Only two disclosure holdings have turned on the information rationale and not the anti-corruption rationale. In *McIntyre*, the liberal wing of the court voted to strike down an Ohio law requiring disclosure on pamphlets.<sup>195</sup> Justice Stevens, writing for the majority and joined by Justices O’Connor, Souter, and Breyer, with Justices Ginsburg and Thomas concurring, ruled that disclaimers on pamphlets are not that informative to voters, and even if they were, the informational interest is “plainly insufficient to support the statute’s disclosure requirement, since the speaker’s identity is no different from other components of a documents’ contents that the author is free to include or exclude, and the author’s name and address add little to the reader’s ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader.”<sup>196</sup> Justice Thomas concurred, saying that he would have analyzed the question of disclosure for a pamphleteer using only the original understanding of “freedom of speech, or of the press,” which he believed led to the majority opinion overturning the disclosure mandate.<sup>197</sup> Justice Ginsburg’s concurrence emphasized that “in for a calf is not always in for a cow” and that in other circumstances the state may require a speaker to “disclose its interest by disclosing its identity.”<sup>198</sup> Justice Scalia and Chief Justice Rehnquist, both

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<sup>194</sup> Rhodes et al., *supra* note 91.

<sup>195</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 335, 357 (1995).

<sup>196</sup> *Id.* at 335.

<sup>197</sup> *Id.* at 359 (Thomas, J., concurring).

<sup>198</sup> *Id.* at 358 (Ginsburg, J., concurring).

conservatives, recognized the importance of disclosure to an informed electorate.<sup>199</sup> They challenged the idea that there has ever existed a “hitherto unknown right-to-be-unknown” when engaging in political speech in a “free, democratic election.”<sup>200</sup>

*McIntyre* did not start a trend. Since that case, the Court has upheld disclosure requirements in *McConnell*, *Citizens United*, and several other cases. In his *McConnell* dissent, Justice Thomas complained, “[t]he Court now backs away from [*McIntyre*], allowing the established right to anonymous speech to be stripped away based on the flimsiest of justifications.”<sup>201</sup> Of the two Justices from the *McIntyre* Era that remain on the Court today (Breyer and Thomas) both voted to overturn the statute in *McIntyre*, but only Justice Thomas has continued to insist that disclosure laws are an unconstitutional infringement on the First Amendment right to free speech.<sup>202</sup>

The *Citizens United* majority opinion for the disclosure issue had support from Chief Justice Roberts and Justice Alito from the current Court. The opinion also supported the idea that the information interest alone can support broad disclosure requirements, saying that “the public has an interest in knowing who is speaking about a candidate shortly before an election” and that “the informational interest alone is sufficient to justify application of” disclosure rules to the ads the group was running.<sup>203</sup> Justice Thomas dissented on that issue, maintaining his position that *McIntyre* stands for a right to anonymity in political speech.<sup>204</sup>

The Court’s composition has changed since *Citizens United* was decided in 2010. Two members of the majority—Justices Kennedy and Scalia—are no longer on the Court. Both Justices were strong proponents of disclosure. Justice Kennedy believed that disclosure held promise for holding both donors and spenders accountable in an otherwise deregulated campaign finance system.<sup>205</sup> Justice Scalia wrote that “[r]equiring people to stand up in public for their

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<sup>199</sup> *Id.* at 371–85 (Scalia, J., dissenting).

<sup>200</sup> *Id.* at 371, 381.

<sup>201</sup> *McConnell v. FEC*, 540 U.S. 93, 276 (2003) (Thomas, J., dissenting).

<sup>202</sup> *Citizens United v. FEC*, 558 U.S. 310, 480–85 (2010) (Thomas, J., concurring in part and dissenting in part); *McConnell*, 540 U.S. at 274 (Thomas, J., concurring in part and dissenting in part).

<sup>203</sup> *Citizens United*, 558 U.S. at 369.

<sup>204</sup> *Id.* at 480–85 (Thomas, J., concurring in part and dissenting in part).

<sup>205</sup> *Id.* at 352, 371 (majority opinion) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . [A country that allows anonymous campaigning] does not resemble the Home of the Brave.”<sup>206</sup>

The three new members of the Court will bring fewer votes for disclosure. Justice Scalia’s replacement, Justice Gorsuch, is far more skeptical of campaign finance disclosure. During his confirmation hearing, Justice Gorsuch signaled his willingness to look closely at disclosure laws, saying that the First Amendment contains competing interests.<sup>207</sup> He said that *Buckley* stands for the notion that Congress can regulate money in politics, and that there “may be limits when it chills expression, as it did in the *NAACP* case. And we have to be worried about that[.]”<sup>208</sup> Justice Kennedy’s replacement, Justice Kavanaugh, seems to follow Justice Kennedy’s belief that independent expenditures cannot corrupt.<sup>209</sup> His rulings before he joined the Court suggest that he, like Kennedy, will be generally skeptical of campaign finance limits and bans.<sup>210</sup> His position

<sup>206</sup> *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).

<sup>207</sup> *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, S. Comm. on the Judiciary*, 115th Cong. 137 (2018) (statement of then-Judge Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit).

<sup>208</sup> *Id.* The entire exchange was fascinating for a student of campaign finance law. It was one of the more revealing exchanges in the three-day hearing. It continued as follows:

Senator WHITEHOUSE: So if we have to be worried about the chilling of expression, which is a value proposition that you have just enunciated, should we not—am I not also entitled to ask the question about whether we should be worried about the influence of dark money essentially corrupting our politics? . . . I am taking a lot of time to get what I would think would be a fairly simple answer.

Judge GORSUCH: Well, I am sorry, but I do not think this is simple stuff at all, Senator. . . . I think you have First Amendment concerns and precedents . . . in the area . . . that would have to be considered. We would have to see what law Congress enacted. I would then want to go through the full judicial process . . . .

Senator WHITEHOUSE: But you just asserted right here that the value of not chilling speech is something that we should consider, right?

Judge GORSUCH: I said that the Supreme Court of the United States in *NAACP* recognized that the First Amendment protections we all as people in this country enjoy . . . [c]an be chilled sometimes. . . . It is a First Amendment right we are talking about, Senator.

Senator WHITEHOUSE: And where does anonymity—let us say \$1 billion in anonymous funding into our elections, where does that fit . . . into the values that you bring to this?

Judge GORSUCH: In the first instance, Senator, it is for this body to legislate . . . then it would come to court, and the record will be made.

Senator WHITEHOUSE: Of course, *Citizens United* did actually overrule a law that we had written, so that is hardly the be all and the end all.

*Id.* at 137–38. Justice Gorsuch is referring to *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>209</sup> See Peter Overby, *On Appeals Court, Kavanaugh Helped to Loosen Political Money Laws*, NPR (Aug. 8, 2018), <https://www.npr.org/2018/08/08/636299187/on-appeals-court-kavanaugh-helped-to-loosen-political-money-laws>.

<sup>210</sup> For a good summary of then-Judge Kavanaugh’s prior opinions, see *id.*

on disclosure is less clear. We know less about the campaign finance opinions of Justice Ginsburg's replacement, Justice Barrett. However, she clerked for Justice Scalia and has said that "his judicial philosophy is mine."<sup>211</sup> Whether that extends to his strong support for campaign finance disclosure is yet to be seen.

### B. For Campaigns

The research cited in Part II suggests that campaigns and so-called "outside groups" stand to gain from four approaches to campaign finance disclosure. First, they should point out when the opposing side has violated campaign finance laws; in my research, the biggest impact on voter choice and vote share is when campaign finance violations are revealed. Second, campaigns should publicize when their opponents are supported by dark money groups. To benefit from the—more modest—benefits of overcompliance, campaigns should also request that groups who want to support their side must disclose information about their donors. Where possible, campaigns should over-comply with disclosure requirements where they can meaningfully inform voters about their sources of support, *and brag publicly about having done so*. Consider, for example, Senator Elizabeth Warren's insistence on disclosing her bundlers and urging other candidates to do the same.<sup>212</sup> Finally, campaigns should undergo voluntary audits in the absence of a government audit program, to provide backing for their claims of running a clean campaign.<sup>213</sup> These steps will be especially helpful in elections in which party is not an available heuristic, like party primaries or nonpartisan elections.

### C. For Policymakers

Campaign finance disclosure is popular, and most voters say they seek the information at least some of the time.<sup>214</sup> Moreover, despite the fact that disclosure is becoming a polarizing issue among political elites, disclosure is not

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<sup>211</sup> Marica Coyle, 'His Judicial Philosophy Is Mine': Amy Barrett Touts Scalia in Remarks from Rose Garden, LAW.COM (Sept. 26, 2020, 5:27 PM), <https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/>.

<sup>212</sup> Gregory Krieg & MJ Lee, *Elizabeth Warren Wants 2020 Rivals to Name Big Donors with Influential Campaign Positions*, CNN (Oct. 15, 2019, 11:17 AM), <https://www.cnn.com/2019/10/15/politics/elizabeth-warren-campaign-finance-donor-disclosure/index.html>.

<sup>213</sup> Groups may have good reasons to organize as a 501(c)(4) rather than a 527, PAC, or SuperPAC. The 501(c)(4) groups can conduct any "social welfare" activity, and in some years, they may not engage in political campaigning at all. See *Social Welfare Organizations*, IRS, <https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations> (last visited May 26, 2021). The other organizational forms are campaign focused.

<sup>214</sup> See Wood, *supra* note 6.

a particularly partisan issue for voters.<sup>215</sup> Lawmakers looking to score points with their constituents could do so by introducing more disclosure into the existing framework.

In designing an optimal framework, policymakers must consider the two types of information communicated through campaign finance disclosure regulations. Mandatory disclosure increases the information about the policies that candidates will favor once in office.<sup>216</sup> But where policymakers leave room for voluntary disclosure, the results from the studies described here suggest that voters learn about transparency and trustworthiness of candidates and the groups that support them.

If reformers err too much on the side of voluntary disclosure, voters may receive a suboptimal amount of information about policy. A purely voluntary disclosure regime will under-provide campaign finance information because many dark money groups will continue to choose not to disclose. If reformers instead err too much on the side of mandatory disclosure, voters will miss out on information about trustworthiness and transparency that comes when candidates and groups voluntarily disclose more than the law requires. For the rest of this section, I explain how regulatory choices affect policy and non-policy information available to voters.

### *1. Campaign Finance Regulatory Choices That Affect Policy Information*

Arguments for changing our disclosure regime in ways that maximize voter *policy* information have centered on disclosure thresholds, the type of donor information collected and disclosed, forcing mandatory disclosure on 501(c)(4) groups, and online advertising. The tradeoffs faced by policymakers for each of these four areas of disclosure are worth a brief discussion.

#### *a. Modifying Disclosure Thresholds*

Disclosure thresholds vary across jurisdictions.<sup>217</sup> Some states require disclosure of all contributions, and others have thresholds higher than the threshold for federal candidates (\$200).<sup>218</sup> Some lawyers and scholars argue that disclosure thresholds should be raised,<sup>219</sup> meaning that more campaign financing

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<sup>215</sup> *Id.* at 14.

<sup>216</sup> Bonica, *supra* note 74, at 373–76.

<sup>217</sup> *Disclosure and Reporting Requirements*, NAT'L CONF. STATE LEGISLATURES (July 17, 2015), <https://www.ncsl.org/research/elections-and-campaigns/disclosure-and-reporting-requirements.aspx>.

<sup>218</sup> *Id.*

<sup>219</sup> Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010),

would be subject only to voluntary disclosure. In a post-*McCutcheon* world in which individuals can give over \$300,000 to “joint victory funds”<sup>220</sup> and unlimited amounts to SuperPACs,<sup>221</sup> the identity of donors of \$200 probably does not add much information to voters’ information about policies the candidate is likely to pursue once in office. This is particularly true in expensive federal elections. Raising the threshold would also allow more “space” for candidates to voluntarily disclose.

Voluntary disclosure of small donors might not have salutary benefits for voters’ perceptions of the transparency or trustworthiness of a candidate.<sup>222</sup> Suppose reformers raised the threshold modestly, say to \$500. Voters may not reward voluntary disclosure of donors between some smaller amount and the new threshold. Relatively speaking, \$500 is still not much money in our world of big-money politics. Suppose now that policymakers raise mandatory disclosure thresholds by a lot, say, to the federal contribution limit of \$2,700. Candidates and groups choosing to disclose fairly large donors, such as all donors above \$1,000 or \$2,000, might reap transparency and trustworthiness benefits. The extent to which we would lose precision in our estimates of candidate policies is currently not known, but it is knowable using Bonica’s data.<sup>223</sup> Future researchers—and the campaigns themselves—can estimate where the valence benefits kick in. In general, a modest raise of disclosure thresholds would not do much to affect the mix of information available to the voters, but a larger change in disclosure thresholds could.

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<http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/>;  
Lloyd Hitoshi Mayer, *Disclosures about Disclosure*, 44 IND. L. REV. 255, 280–82 (2010); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 300 (2010).

<sup>220</sup> See Bob Biersack, *How Wealthy Donors Fund the National Party by Giving to the States*, OPENSECRETS (July 24, 2017, 6:38 PM), <https://www.opensecrets.org/news/2017/07/wealthy-donors-fund-national-party-giving-to-state.s/>.

<sup>221</sup> *Contributions to Super PACs and Hybrid PACs*, FEC, <https://www.fec.gov/help-candidates-and-committees/taking-receipts-pac/contributions-to-super-pacs-and-hybrid-pacs/> (last visited May 26, 2021).

<sup>222</sup> Contributors may feel “protected” from disclosure when they give below a mandatory threshold, and they may feel unfairly “exposed” if the candidate or group discloses their identity when the law does not require it. This happens more often than one might expect: in state-level races between 2000 and 2008, 17% of all contributions that candidates and campaigns reported were below the state’s mandatory threshold. Giving below the threshold is not a safe harbor from being identified. Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302, 305 n.20 (2016). And now, with the advent of online donation vehicles like ActBlue, donors may not realize that they are giving to a conduit, which must disclose every contribution, no matter how small. See Alvarez et al., *supra* note 15, at 1, 4.

<sup>223</sup> See Bonica, *supra* note 74.

*b. Expand the Types of Spenders Subject to Disclosure to Solve the “Dark Money” Problem*

What are the informational tradeoffs faced by policymakers considering mandatory disclosure for 501(c) groups and LLCs? In federal campaigns, disclosure by these groups is currently entirely voluntary as long as they are not running political ads thirty days before a primary or sixty days before a general election and where the contribution is earmarked for particular ads—a requirement that is easy to circumvent.<sup>224</sup> As the studies presented here show, respondents reward disclosure where it is not legally required. Respondents evaluated the candidates supported by voluntarily disclosing groups as more trustworthy. Most politically active 501(c)(4) groups and LLCs do not voluntarily disclose their donors.<sup>225</sup>

If policymakers were to require disclosure of at least some donors (especially large donors) from these non-disclosing groups, voters would gain policy-relevant information. While the political leanings of the biggest dark money groups are already strongly identified with policy positions or ideologies, such as the NRA-Institute for Legislative Action and the U.S. Chamber of Commerce, other groups have names that are not easily identified with a particular ideology or policy platform.<sup>226</sup> Consider “American Action Network,” “One Nation,” and “iAmerica Action,” all of whom spent millions in the 2016 elections, and whose names do not indicate their political leanings.<sup>227</sup>

If disclosure rules change, anonymity-seeking donors might still find nondisclosure due to the nature of 501(c)(4) and 501(c)(6) organizations. The organizations can engage in social welfare and policy work outside of election season.<sup>228</sup> Requiring mandatory disclosure of the donors whose money goes to support campaign-related activities can therefore incentivize 501(c)(4) groups to segregate their donors into “disclosable” and “non-disclosable” donors. Money from non-disclosable donors could go to overhead or social welfare

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<sup>224</sup> 52 U.S.C. § 30104.

<sup>225</sup> *Dark Money Basics*, OPENSECRETS, <https://www.opensecrets.org/dark-money/basics> (last visited May 26, 2021).

<sup>226</sup> See Broockman et al., *supra* note 98; Torres-Spelliscy, *supra* note 77.

<sup>227</sup> See *American Action Network*, ISSUE ONE, <https://www.issueone.org/dark-money-groups-american-action-network/> (last visited June 18, 2021); *One Nation*, OPENSECRETS, <https://www.opensecrets.org/political-action-committees-pacs/C90016262/expenditures/2016> (last visited June 18, 2021); *iAmerica Action*, OPENSECRETS, <https://www.opensecrets.org/political-action-committees-pacs/iamerica-action/C90016288/summary/2016> (last visited June 18, 2021).

<sup>228</sup> That is why Our Revolution organized as a 501(c)(4) nonprofit organization, rather than a PAC, in the first place. See Eliza Newlin Carney, *Nonprofit Structure Backfires on ‘Our Revolution’*, AM. PROSPECT (Sept. 1, 2016), <https://prospect.org/power/nonprofit-structure-backfires-our-revolution/>.

improving activities that are not campaign related. Money from disclosable donors could go to campaign-related activities. The donation form can simply ask contributors whether they are comfortable with their donation being made public. Corporations, or people giving to support a policy that is incongruent with their public persona, in particular, might opt for “non-disclosable” status.<sup>229</sup>

In sum, the hydraulics of campaign finance means that forcing mandatory disclosure on these “dark money” groups might result in incomplete donor information because donors who seek anonymity can still have it. The donor information that is revealed is likely to be the least “objectionable” set of donors, from a public opinion perspective—perhaps from the most politically moderate subset of the organization’s donors. Putting aside the ban on coordination between candidates and groups, partial disclosure would provide a biased estimate of the policy pressures on the candidate as a result of expenditures made by the group. However, information leading to biased estimates is better than no information, particularly because researchers can often correct for bias.

The policy information gained by increased disclosure must be weighed against the trustworthiness benefits lost by mandating disclosure. The amount of transparency information we would sacrifice with more disclosure depends on where the mandatory threshold is set. If policymakers require disclosure of only large donations, say above \$10,000, disclosure-friendly groups could continue to voluntarily disclose below the threshold, and voters and the voluntarily disclosing groups would benefit accordingly.<sup>230</sup>

*c. Modifying the Type of Donor Information That Is Collected or Disclosed*

Policymakers may consider changing the donor information gathered and reported by candidates to optimize the informational tradeoffs. The FEC currently releases contributor name, city, state, zip code, principal place of

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<sup>229</sup> See Oklobdzija, *supra* note 78.

<sup>230</sup> Policymakers can also force disclosure on all *types* of spending by closing the main regulatory gap: online advertising. There are two ways in which online advertising lacks disclaimers. First, the small ads that appear next to search results or on Facebook page are exempt from federal disclaimer requirements under the “small items” exemption for ads so small that including a disclaimer on them is impractical. See *Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/> (last visited May 26, 2021). Second, the FEC exempts from disclaimers any advertising placed “for a fee on another’s website”. *Id.* This second exemption turns political communication on the Internet into the “wild west.” Nathaniel Persily, *Facebook May Soon Have More Power over Elections Than the FEC. Are We Ready?*, WASH. POST (Aug. 10, 2016), <http://wapo.st/2b3yWuH>. For more information on ways to fix these gaps, see Wood & Ravel, *supra* note 3, at 1248–53, and Abby K. Wood, *Facilitating Accountability for Online Political Advertisements*, 16 OHIO ST. TECH. L.J. 520 (2020).

business, occupation, date of each contribution, and amount contributed each time.<sup>231</sup> All of this information can be informative with regard to the policies that a donor might support.

For example, a contributor's geographic information may predict the policies that the candidate's supporters favor. Consider two hypothetical California contributors. A contributor from Los Angeles and a contributor from San Diego, despite living only 120 miles apart, probably have different policy concerns. The Angeleno lives in a city culturally dominated by the entertainment industry but also deeply involved in international trade and petroleum.<sup>232</sup> The San Diego donor, on the other hand, lives on the Mexican border near several U.S. military installations.<sup>233</sup> Zip codes within large cities like these can help voters to refine their estimates of donor policy preferences even more closely. The geographic location of a donor can help voters know more about the policy pressures a candidate will face.

Donors and voters alike want to protect their economic interests, which include their jobs. Disclosing the sector in which a donor is employed is useful for predicting future policy responsiveness of an elected official supported by donors from that sector.<sup>234</sup> Similarly, a donor's general occupation is useful for predicting a candidate's preferred policies. Consider the healthcare sector. Within the sector, or even within one hospital, if nurses support a candidate but hospital management does not, voters can learn about pressures the candidate may face with regard to labor issues.<sup>235</sup>

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<sup>231</sup> *Individual Contributions*, FEC, <https://www.fec.gov/introduction-campaign-finance/how-to-research-public-records/individual-contributions/> (last visited May 26, 2021).

<sup>232</sup> L.A. CNTY. ECON. DEV. CORP., *THE ENTERTAINMENT INDUSTRY AND THE LOS ANGELES COUNTY ECONOMY* 1–3 (2012), <https://laedc.org/2012/11/01/entertainment-industry-los-angeles-county-economy/>; *Global Trade and Foreign Investment*, L.A. AREA CHAMBER COM., <https://lachamber.com/issues/level1/global-trade-and-foreign-investment/> (last visited May 26, 2021); *A History of Neighborhood Drilling*, STAND-L.A., <https://www.stand.la/history-of-oil-in-los-angeles.html> (last visited May 26, 2021).

<sup>233</sup> *Military Information*, SAN DIEGO, <https://www.sandiego.org/articles/military/military-information.aspx> (last visited May 26, 2021).

<sup>234</sup> Of course, there are corruption-based reasons for wanting to know the more granular information of the employer, so that the public can hold elected officials accountable for working to benefit donors versus non-donors.

<sup>235</sup> Where workers donate is not straightforward, as Alexander Hertel-Fernandez's work shows. In general, employer political pressure stops short of suggesting where workers should send their money, but some of the workers and employers he surveyed reported it happening. See ALEXANDER HERTEL-FERNANDEZ, *POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS* (2018). Of course, revealing employer information can actually help the government detect instances in which employers pressure employees to make political contributions. Too many contributions in too short of a time period from one company might be indicative that something fishy is going on.

Similarly, the date of the contribution provides useful information, insofar as it can help voters—and campaigns—understand which policy speeches and news stories contributors are reacting to. Famously, the Obama campaign raised \$10 million in the 24 hours following Sarah Palin’s speech at the 2008 Republican National Convention.<sup>236</sup> Her speech included policy mentions of energy, state budget surpluses, taxes, and manufacturing. Policy information in the campaign is revealed not only by geography and sector, but also over time.<sup>237</sup>

For any one individual donation, public disclosure of the donor’s name is probably the least informative piece of information available to voters. However, name is probably the *most* important piece of donor information for predicting the ideologies and roll call votes of candidates across time. Donor name is the main piece of information that can reliably link contributions over time. Donor ideology can be estimated with some precision, as Bonica’s work has shown.<sup>238</sup> The same effect could be achieved by replacing the donor’s name with a donor ID number, so that the donor’s name does not become public.<sup>239</sup> That said, there is probably a threshold above which a contributor plays such an outsized role in a campaign or group expenditure that voters need to know the identity of the contributor. Changing a name like “Charles Koch” or “George Soros” to an ID number would represent a real loss of information about policy pressures on and preferences of candidates.

Should policymakers make any of this disclosure voluntary, rather than mandatory? The two most sensitive items disclosed are contributor name and place of employment or occupation. Replacing name with an ID number would still allow the ideology-predicting benefits of linked donations over time, so that experts could still provide estimates of candidate ideology. There could be some informational losses to people searching the contributions of respected friends, neighbors, or leaders, in making their voting decisions, but to my knowledge these losses have not been studied. On net, the informational losses about candidate policy pressures that would result from replacing names with ID numbers seem small, at least below a certain “mega donor” threshold. In an ID number disclosure regime, candidates might be able to gain valence benefits by voluntarily disclosing the names of donors below a certain (very high) threshold, especially in states with no contribution limits.

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<sup>236</sup> Matthew Mosk, *Obama Raises Record \$10 Million Since Palin Speech*, WASH. POST (Sept. 4, 2008, 5:15 PM), <http://voices.washingtonpost.com/44/2008/09/obama-raised-8-million-since-p.html>.

<sup>237</sup> The biggest beneficiary of such information is probably the candidate, as Elmendorf and I argue. See Elmendorf & Wood, *supra* note 75.

<sup>238</sup> See *supra* notes 72–74 (referring to the (policy) informational benefit).

<sup>239</sup> See Elmendorf & Wood, *supra* note 75.

The public disclosure of place of employment and occupation provides voters with policy information for the reasons described above. Were these data no longer required, voters might appreciate seeing them, especially in the aggregate, for example, the amounts contributed by employees of certain industries. Such voluntary disclosure could promote perceptions of trustworthiness and transparency.

Policymakers might also choose to continue to require the information but break the link between the employment and occupation information and the identity of the individual making the contribution when posting it online. Breaking this link would only marginally reduce voter information about policy—it rarely matters that Person *X* in Job *Y* in Company *Z* donated. It might matter that Person *X* gave, especially if the person is a mega donor, and it does matter that people doing Job *Y* support the candidate and that people at Company *Z* are contributing.

## 2. *Campaign Finance Regulatory Choices That Affect Non-policy Information*

The overcompliance described and rewarded in the studies above was based on voluntary disclosure. These effects can occur without further action on the part of lawmakers and regulators. Respondents in the studies discussed above reacted in dramatic fashion to candidates' failure to comply. Detecting such failures requires audits. Audits happen after the campaign; dark money disclosure and, short of that, disclosure disclaimers can also help inform voters.

### a. *Adopting Disclosure Disclaimers*

Where political support for demanding mandatory dark money disclosure is lacking, disclosure disclaimers provide a middle ground. The dark money treatments in the experiments presented above provided “disclaimers about disclosures,” as they made clear to would-be voters when candidates received support from non-disclosing groups. Even if voters do not learn the identity of big money donors to outside groups, knowing that outside groups supporting the candidate do not disclose their donors helps voters use policy *and* non-policy information to make their ballot choices. Therefore, one option for improving information is to require a disclaimer at the end of an ad funded by non-disclosing organizations, saying that the message is provided by a group that does not disclose its donors.

Candidates are legally prohibited from coordinating with outside groups.<sup>240</sup> They cannot prevent outside groups from forming. Moreover, it seems that some outside groups that sprout up spend the vast majority of the money they take in on salaries and consultants, and only a very small percentage—as low as 10%—actually supporting candidates and issues.<sup>241</sup> So it might seem unfair to the candidates to include a disclaimer about anonymity at the end of ads the candidate has no control over now that we know voters react to that information by punishing the candidate, like they did with Johnson in the experimental vignette. Yet nothing is stopping candidates from campaigning against outside groups and insisting publicly that donors do not fund outside groups who claim to support the candidate. Indeed, Donald Trump did just that in January 2016.<sup>242</sup> Campaigning against outside groups while accepting audits might be the best of both worlds for candidates, helping them to maximize voters' perceptions of their trustworthiness and ability to comply with campaign finance rules.

As commonly happens in the world of electoral reform, enterprising state governments have led the way, under the assumption that voters will use information about disclosure to form opinions about candidates and issues. For example, the State of Montana requires disclaimers about non-disclosure of funding sources.<sup>243</sup> Montana requires that groups who do not disclose their donors “clearly and conspicuously include in all communications advocating the success or defeat of a candidate . . . the following disclaimer ‘This communication is funded by anonymous sources. The voter should determine the veracity of its content.’”<sup>244</sup>

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<sup>240</sup> 11 C.F.R. §§ 109.20–109.21 (2006).

<sup>241</sup> Paul H. Jossey, *How We Killed the Tea Party*, POLITICO (Aug. 14, 2016), <http://www.politico.com/magazine/story/2016/08/tea-party-pacs-ideas-death-214164>.

<sup>242</sup> Maggie Haberman, *PAC Is Backing Donald Trump, Despite Campaign's Policy*, N.Y. TIMES (Feb. 12, 2016, 2:44 PM), <http://www.nytimes.com/politics/first-draft/2016/02/12/pac-is-backing-donald-trump-despite-campaigns-policy/> (“Last year, it emerged that a super PAC using the same name as his campaign slogan—Make America Great Again—had ties to officials on his campaign. The person running that group, a Republican operative from Colorado named Mike Ciletti, has a company that has been used by the campaign over the last year for things like bumper stickers. When questions were raised about overlap between the two groups, Mr. Trump’s campaign urged that group and a crop of other super PACs hoping to support him to shut down. Mr. Ciletti complied.”).

<sup>242</sup> See Gerken et al., *supra* note 143.

<sup>243</sup> MONT. CODE ANN. § 13-35-237 (2016).

<sup>244</sup> *Id.* The full statute states: “If a political committee claims to be exempt from disclosing the name of a person making a contribution to the political committee, the committee shall clearly and conspicuously include in all communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising or issue advocacy the following disclaimer: ‘This communication is funded by anonymous sources. The voter should determine the veracity of its content.’” *Id.*

*b. Mandatory or Voluntary Audits*

Mandatory disclosure requirements establish a floor for the amount of information that candidates are required to reveal. Audits can lend credibility to the mandatory disclosures and verify that the candidate did not under-disclose (or over-disclose), revealing candidate attributes and providing more information to voters. Since voters reward campaign finance transparency, candidates who want to capitalize on transparency's advantages should welcome voluntary audits. Opting in to an audit sends a signal to voters that the candidate has nothing to hide. Voters can infer that candidates who are willing to undergo an audit are earnestly trying to comply with campaign finance laws and are more willing to subject themselves to public scrutiny than candidates who opt out of a voluntary audit. In other words, voters can infer that they are a "clean" type. Of course, if the candidate has sloppy bookkeeping or has violated campaign finance regulations, then the candidate should avoid audits, because voters will punish a "dirty" audit more than they reward a clean one.

We would expect to see candidates opt in to voluntary audits of their campaign finances any time that the electoral and favorability benefits are worth the expense and inconvenience. For example, we might observe a candidate opt in to a voluntary audit when the race is tight. During primary season, candidates may elect to opt in to the audit to distinguish themselves and boost voters' impressions of how much they will embrace transparency in office. In the wake of a scandal affecting the candidate or a member of her party, a candidate might opt to undergo an audit to show her "clean hands" or remind voters that she is transparent.

Given my findings, we should not need government action for a voluntary audit program to emerge. If clean types stand to gain from voluntary audits, why have we not already seen them emerge? One reason could be that candidates do not know that voters are willing to reward transparency. Another might be that incumbents have a fundraising advantage and would therefore be less inconvenienced by dedicating resources to an audit, but because incumbent advantage is so large, the additional electoral help that a clean audit could provide is simply not needed.<sup>245</sup> This is particularly true for incumbents who do not face primary opponents.

If voluntary audits are good, are mandatory audits better? Mandatory audits would provide the information that voluntary audits provide without requiring

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<sup>245</sup> See Alexander Fourniaies & Andrew B. Hall, *The Financial Incumbency Advantage: Causes and Consequences*, 76 J. POL. 711, 711 (2014) (summarizing literature on incumbency advantage).

an adverse inference by the voters against candidates who do not undergo a voluntary audit. But, pragmatically, mandatory audits would be a tough sell to elected officials. Mandatory audits are part of some public funding programs, like the New York City campaign finance program, and agreeing to the audits is a condition to receiving public money in these programs.<sup>246</sup> But in the absence of public funding, legislators have shown themselves to be resistant to mandatory audits, even when conducted at random. After the FEC's random audits in 1977, Congress reduced the budget for the random audit program to zero dollars.<sup>247</sup> Members of Congress did not enjoy being at risk of an audit.<sup>248</sup> Legislators' reticence to submit their campaigns to random audits may deprive the public of other benefits. If random audit programs work via reputation-based signaling to force would-be non-compliers into compliance or out of the election, then two results should follow. First, our campaign financing will be cleaner than it would be in the absence of the audits, leaving elected officials less vulnerable to untraceable influences.<sup>249</sup> Second, on average, candidates will be perceived as more trustworthy, which can, in turn, lend legitimacy to government.<sup>250</sup>

Campaign finance regulations force campaigns to dedicate resources to compliance, rather than campaigning. Mandatory audits would add another cost to campaigning, raising the barrier to entry for challengers, who are generally less well-networked than incumbents. The correct balance between adding additional barriers to entry for challengers and increasing valuable information to the public is not obvious. Voluntary audits will result in more credible disclosure information reaching voters and will allow clean candidates to signal their cleanliness if they are willing to undergo the cost of the audit, without erecting more barriers to entry.<sup>251</sup>

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<sup>246</sup> *Introduction*, N.Y.C. CAMPAIGN FIN. BD., <https://www.nycfb.info/candidate-services/consultant-and-vendor-guide/introduction/> (last visited May 26, 2021).

<sup>247</sup> R. SAM GARRETT, CONG. RSCH. SERV., R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 15 n.61 (2015), <https://fas.org/sgp/crs/misc/R44319.pdf>; see Wood & Grose, *supra* note 132.

<sup>248</sup> See Wood & Grose, *supra* note 132.

<sup>249</sup> *Id.* at 5–6. Of course, campaign audits of disclosable contributions and expenditures while a “dark money” regime persists means that untraceable influences can persist, and indeed, the amount of dark money in the system may increase if audits and dark money exist at the same time. To avoid this possibility, audits of the entities making the “dark money” expenditures may need to be paired with campaign audits.

<sup>250</sup> Sofie Marien & Marc Hooghe, *Does Political Trust Matter? An Empirical Investigation into the Relation Between Political Trust and Support for Law Compliance*, 50 EUR. J. POL. RSCH. 267, 270 (2010) (“[E]mpirical evidence shows that citizens are more likely to follow the decisions of authorities if they perceive these authorities to be trustworthy and legitimate.”).

<sup>251</sup> A middle ground, and a potentially less expensive mandatory option, might be for the campaign finance regulator to require that all campaigns have a certified public accountant on record who signs off on their campaign finance disclosures, at least once contributions and expenditures reach a certain level. The current

If the incentives are such that audits can be voluntary, should disclosure be voluntary, too? No. The credibility-enhancing features of the audit can only exist if disclosures are mandated. Otherwise, audits could be conducted on incomplete information, and a candidate could be said to have a “clean” audit, even though she hid many illegal or excessive contributions that violated campaign finance law.

Institutional details of audits matter, and I consider some of them here. For example, audits’ credibility and type-revealing benefits increase with the amount of access the auditor has.<sup>252</sup> To my knowledge, no study has tested the stringency of auditing required for the benefits to kick in. It might be the case that candidates need not be too inconvenienced by audits to reap their benefits. The question remains open to future research.

For the audits to be useful, audit reports should be comparable across candidates, allowing voters to compare apples to apples. This does not necessarily require government involvement. Think of it like a certification. Other industries have managed to create voluntary certification programs without the government.<sup>253</sup> Of course, there are government-run certification

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*modus operandi* for many candidates is to operate campaign finances (sometimes literally) from a shoebox, and to hire lawyers if they are audited. John O’Connor, *50 Years Later, Illinois’ ‘Shoebox Scandal’ Still Amazes*, AP NEWS (Oct. 9, 2020), <https://apnews.com/article/political-corruption-springfield-illinois-67b7c692a1858beac0b6d4524a84b527>. A rule like this would probably decrease violations across the board, and campaign finance compliance would be less informative as to candidate type. Existing research indicates that campaigning has a “disciplining” and professionalizing effect on candidates, so including a CPA on the campaign staff would probably further discipline and professionalize candidates and campaigns. It may also weed out fraudulent or corrupt types, improving our governance by improving the candidate pool. The rule would need to be sensitive to potential deterrent effects on marginal challengers afraid of the costs of campaigning. Setting the CPA requirement monetary thresholds at 40%, for example, of campaign expenditures for the prior victor could help reduce deterrence, allowing candidates to test the waters before they take on accounting expenses. Similarly, delaying the requirement until the last quarter of the campaign for smaller or more localized campaigns would reduce the deterrent effect.

<sup>252</sup> See Nemit Shroff, *Credible Financial Statements Help Firms Raise Financing and Increase Investment*, CLS BLUE SKY (Nov. 13, 2015), <https://clsbluesky.law.columbia.edu/2015/11/13/credible-financial-statements-help-firms-raise-financing-and-increase-investment/>.

<sup>253</sup> Consider the U.S. Green Building Council, which provides the LEED rating system. “LEED” stands for Leadership in Energy and Environmental Design, and buildings that are LEED certified can credibly boast of energy and water efficiency, use of safe and sustainable materials, and other attractive qualities. *LEED Rating System*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/leed> (last visited May 26, 2021). To obtain LEED certification, an interested party simply contacts the U.S. Green Building Council, invites the inspectors in, pays fees, and receives the certification. See generally U.S. GREEN BLDG. COUNCIL, [usgbc.org](https://www.usgbc.org) (last visited May 26, 2021). Other markets use similar private certification models, like the markets for sustainable wood and for rainforest-protecting coffee. See FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/en-us> (last visited May 26, 2020); *Rainforest Alliance Certified Coffee*, RAINFOREST ALL. (Sept. 24, 2016), <http://www.rainforest-alliance.org/articles/rainforest-alliance-certified-coffee>. Examples are legion and not all involve certifications. See, for example, The Federal Communications Commission’s program for “self-audits” and “self-reports” for stations. See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM’NS. L.J. 771 (1999).

programs as well, like USDA's "organic" certification for produce, and the Energy Star certification for appliances, created jointly by the EPA and the Department of Energy.<sup>254</sup> These agencies create the standards and require that a party seeking certification bring in an inspector from an approved list to ensure that the standards are met. In the campaign finance context, maintaining a list of approved auditors would require very little regulatory effort.

Either the private or hands-off public approach could work in the campaign finance context, though if a private group were to create the system, the group would need to have credibility on both sides of the aisle to be useful in general elections. Even in a hyperpartisan age, these groups still exist.<sup>255</sup>

States are innovating with new campaign finance models regularly. For states that embrace campaign finance reform, an audit program could be created by the legislature, which could enable the regulator itself to conduct audits upon request. The legislature would have to fund enough auditors to carry out the requested audits.<sup>256</sup> Under that model, the only cost to candidates is the cost of scheduling and undergoing the audit, but not paying the auditors. As the post-Watergate random audit program at the FEC shows, political will to continue publicly funding the audits might deteriorate rather quickly.<sup>257</sup>

#### CONCLUSION

Campaigns are regulated entities. Many regulated entities are subject to disclosure and audits. In the campaign finance context, the willingness of the Court to uphold campaign finance disclosure requirements turns on its

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<sup>254</sup> See *What Is Energy Star*, ENERGY STAR, <https://www.energystar.gov/about> (last visited May 26, 2021); *Organic Regulations*, U.S. DEP'T AGRIC.: AGRIC. MKTG. SERV., <https://www.ams.usda.gov/rules-regulations/organic> (last visited May 26, 2021).

<sup>255</sup> The most obvious existing campaign finance groups to inform, if not take on, this project are the Center for Responsive Politics ([opensecrets.org](http://opensecrets.org)) for federal races and National Institute for Money in Politics ([followthemoney.org](http://followthemoney.org)) for state races, though it would be impossible for any one group to provide voluntary audits for all state races. (Note: the author is on the board of directors of the National Institute for Money in Politics.)

<sup>256</sup> FEC enforcement procedures are onerous, and enforcement is fairly unpopular with half of the commissioners, as evidenced by the number of split votes on enforcement actions over the past decade or more. See ANN M. RAVEL, *DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP* 3 (2017), <https://www.fec.gov/about/leadership-and-structure/ann-m-ravel/>; Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html>. Therefore, as long as the FEC remains split, actual enforcement would not be a real threat. The point here is to reap the benefits of transparency, not to aid enforcement.

<sup>257</sup> Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1168 (2006).

understanding of the informational benefit. I argue here that the Court's current policy-prediction-only conception is unnecessarily limited.

Disclosure aids voter competence in more ways than existing models assume, and the information provided in disclosure disclaimers and campaign finance audits can help meet the government's interest in improving voter competence. The Court should continue to uphold well-tailored disclosure requirements because the governmental interest in campaign finance transparency is even stronger than the Court has acknowledged.

The studies presented above do not interrogate the content of campaign finance law. Instead, they suggest that the current framework short sells the informational benefit of campaign finance disclosure, and that voters punish dark money and reward transparency. Future research can better establish which types of information, and which disclosure thresholds, help to maximize the benefits of campaign finance disclosure while minimizing the risks to contributors. If laws are too lax, over-complying is easy. If they are too stringent, over-complying is difficult. So, this experiment bears repeating under different disclosure regimes.