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# COMPELLED SPEECH—CONNECTICUT AND MASSACHUSETTS: INADVERTENTLY INVITING SUPPRESSION OF DISSENT POLITICAL EXPRESSION

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COMPELLED SPEECH—CONNECTICUT AND MASSACHUSETTS:  
INADVERTENTLY INVITING SUPPRESSION OF DISSIDENT  
POLITICAL EXPRESSION

*Joseph T. Poulsen \**

*People often argue that transparency in a democracy is imperative. Transparency, though, may only be achieved through disclosure. In recent years, the United States Supreme Court has strongly favored compelled disclosure in the context of political expression. Yet, there exists an exception to this mandate for minor, dissident political parties. This exception, established in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (*per curiam*), purports to shield those parties from threats, harassment, and reprisals due to their minority status. Historically this exception has been narrowly utilized to protect Cold War era socialist political parties.*

*This Note argues that the Buckley minor-party exception should be extended to not only encompass minor, partisan political parties, but also issue-based minority groups and their members. This Note will further argue that issue-oriented expression through association deserves the same First Amendment protection as direct advocacy; that association by membership deserves greater protection than association through monetary support; and that association by membership is as strong as, and therefore deserves the same degree of protection, as direct expression.*

*Absent such extension of the Buckley minor-party exception, recent legislation enacted by Connecticut and Massachusetts, is susceptible to a constitutional challenge by issue-oriented minority groups and their members who are subject to mandatory disclosure of personal information.*

[C]ritique can . . . be a form of commitment, a means of laying a claim. It's the ultimate gesture of citizenship. A way of saying: I'm not just passing through, I *live* here.<sup>1</sup>

## INTRODUCTION

In recent years, the Supreme Court has issued several highly publicized and controversial decisions concerning campaign finance. The Court in *Citizens United v. Federal Election Commission*<sup>2</sup> upheld challenged disclosure requirements<sup>3</sup> within the Bipartisan Campaign Reform Act of 2002 under the justification that electoral transparency allows the electorate to make informed decisions.<sup>4</sup> However, since *Citizens United*, anonymous spending by tax-exempt groups not subject to federal disclosure laws has increased from approximately \$69.2 million in the 2008 federal election cycle,<sup>5</sup> to approximately \$308.7 million in the 2012 cycle.<sup>6</sup> Non-disclosed spending similarly increased between non-presidential cycles.<sup>7</sup> Further, a political network

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\* Candidate for J.D., Western New England University School of Law, 2016. I would like to offer my sincerest thanks to the Western New England Law Review staff for their time and energy, my four wonderful parents for their unwavering support, and my better half, Nicole, for her endless encouragement and patience.

1. Henry Louis Gates Jr., *Patriotism*, THE NATION, July 15, 1991, at 91.

2. 558 U.S. 310 (2010).

3. The challenged provision required a disclaimer to identify the person responsible for the content of any electioneering communication funded by a non-candidate, as well as a disclosure statement filed with the Federal Election Commission by any person who spent \$10,000 or more on electioneering communications within a calendar year. *Id.* at 366.

4. *Id.* at 371.

5. *2008 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&disp=O&type=U&chrt=D> [<http://perma.cc/3GGG-Y84B>] (last visited Oct. 30, 2015).

6. *2012 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> [<http://perma.cc/M9AX-HL78>] (last visited Oct. 30, 2015). See also Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CENTER FOR RESPONSIVE POLITICS (Nov. 5, 2014), <http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/> [<http://perma.cc/N4PM-DUDV>] (analyzing the influx of anonymous funding in the 2014 mid-term elections).

7. *Compare 2014 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=U> [<http://perma.cc/C6UW-E3GZ>] (last visited Oct. 30, 2015) (showing \$173.2 million in non-disclosed spending), and *2010 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outside-spending/summ.php?cycle=2010&chrt=D&disp=O&type=U> [<http://perma.cc/6E3X-L8EH>] (last visited Oct. 30, 2015) (showing \$135.6 million in non-disclosed spending) with *2006 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?>

created and run by Charles and David Koch plans to spend nearly \$900 million in 2016 federal elections, most of which would not require donor disclosure.<sup>8</sup> An organization created under Section 501(c) of the Internal Revenue Code<sup>9</sup> is the primary tool utilized to exploit a major disclosure law loophole.<sup>10</sup> Exploitation occurs when a 501(c) organization uses its own funds to pay for an independent expenditure or other electioneering communication which advocates for an issue or candidate in an election.<sup>11</sup> This loophole was less utilitarian prior to *Citizens United* because the federal law *Citizens United* deemed unconstitutional, did not allow corporations to fund express advocacy expenditures or electioneering communications from their corporate treasuries.<sup>12</sup>

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cycle=2006&chrt=D&disp=O&type=U [http://perma.cc/9RFJ-J3GJ] (last visited Oct. 30, 2015) (showing just \$5.2 million in non-disclosed spending).

8. Nicholas Confessore, *Koch Brothers' Budget of \$889 Million for 2016 Is on Par With Both Parties' Spending*, N.Y. TIMES, Jan. 26, 2015, <http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>.

9. 26 U.S.C. § 501(c) (2010). The most notable of which for the purposes of this Note arise from 501(c)(4) and are known as social welfare groups. See generally Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337 (2013).

10. See *2008 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=V&disp=O&type=U> [http://perma.cc/3GGG-Y84B] (last visited Oct. 30, 2015); *2012 Outside Spending, by Group*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> [http://perma.cc/M9AX-HL78] (last visited Oct. 30, 2015). The loophole exists because 501(c) organizations are overseen by the Internal Revenue Service rather than a regulatory agency related to electoral law such as the Federal Election Commission. The focus of the IRS is not to enforce electoral law but to ensure these organizations qualify for tax-exempt status. Social welfare groups may therefore participate in political advocacy, so long as their primary function remains “to further the common good and general welfare of the people of the community (such as by bringing about civic betterment and social improvements).” 26 U.S.C. § 501(c)(4) (2012). In effect these organizations may dedicate 49.9% of their funding to political advocacy, while dedicating their remainder to issue advocacy. See *Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/faq.php> [http://perma.cc/Y8PS-U5BC] (last visited Jan. 31, 2015); Emma Schwartz, *The Rules That Govern 501(c)(4)s*, PBS (Oct. 30, 2012, 9:12 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/the-rules-that-govern-501c4s/> [http://perma.cc/J4L5-HYX2].

11. The definition of an independent expenditure and electioneering communication varies by jurisdiction. See Thomas B. Edsall, *In Defense of Anonymous Political Giving*, N.Y. TIMES, Mar. 18, 2014, <http://www.nytimes.com/2014/03/19/opinion/edsall-in-defense-of-anonymous-political-giving.html> [http://perma.cc/U6WM-9DVA].

12. *Citizens United*, 558 U.S. at 365–66. See also The Editorial Board, *Dark*

As a result of the influx of so-called “dark money” in politics, many states now promote increased political transparency with revamped laws that conform to *Citizens United* by disclosing, at minimum, the names and addresses of supporters of candidates, political parties, and other electoral groups.<sup>13</sup> However, by attempting to create greater political transparency, newly enacted state statutes may infringe on a person’s First Amendment right to free speech by disallowing anonymous expression. This infringement can operate as a complete, yet unintended, bar to minority or dissident viewpoints.<sup>14</sup> Transparency is an important, admirable objective, but vigorous legislative debate is required to evaluate the far-reaching effects compelled disclosure laws have on our entire political system. Anonymous expression has an important role in the political process. In fact, many of the country’s founding fathers used pseudonyms to publish political writings, such as the Federalist Papers and Anti-Federalist Papers.<sup>15</sup>

The Supreme Court in recent years has generally favored disclosure laws.<sup>16</sup> However, some contemporary proponents of anonymity argue the First Amendment protects anonymous electoral expression, such as spending, and cite *Patterson*<sup>17</sup> and *McIntyre v. Ohio Elections Commission*<sup>18</sup> in support of that

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*Money Helped Win the Senate*, N.Y. TIMES, (Nov. 8, 2014), <http://www.nytimes.com/2014/11/09/opinion/sunday/dark-money-helped-win-the-senate.html?smid=tw-share> (discussing the effect of dark money on races for the U.S. Senate in the 2014 mid-term elections); William McGeeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 864 (2011) (“[D]isclosure failed colossally in the 2010 election. The upside-down rules reached their absurd climax, exposing numerous instances of small-scale citizen participation but concealing the giant influence of financially and politically powerful entities.”).

13. See generally Mark Pazniokas, *Malloy Signs Campaign Finance Law that Loosens Restrictions*, THE CONNECTICUT MIRROR, (June 19, 2013), <http://ctmirror.org/malloy-signs-campaign-finance-law-loosens-restrictions/>; Shira Schoenberg, *Massachusetts House passes Super PAC disclosure bill*, MASS LIVE (July 31, 2014, 7:28 AM), [http://www.masslive.com/politics/index.ssf/2014/07/massachusetts\\_house\\_passes\\_sup.html](http://www.masslive.com/politics/index.ssf/2014/07/massachusetts_house_passes_sup.html) [<http://perma.cc/MY7D-E6BD>].

14. See Nat’l Ass’n for Advancement of Colored People v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

15. See, e.g., THE FEDERALIST NO. 10 (James Madison) (published under the name “Publius”); THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., University of Chicago Press 2007).

16. See *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

17. *Patterson*, 357 U.S. at 449. See *infra* Part I.A.

18. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). See *infra* Part I.A.

proposition.<sup>19</sup> They assert the First Amendment's umbrella protects dissenters and those with minority viewpoints from threats, harassment, and retaliation.<sup>20</sup>

The Supreme Court, in *Buckley v. Valeo*, created an exception to compelled disclosure when a minor political party faces a reasonable probability of receiving threats, harassment, or reprisals.<sup>21</sup> Yet, the Supreme Court has not clarified what degree of threat, harassment, or reprisal is sufficient to satisfy this standard. Additionally, *Citizens United* was decided with no reference to *Patterson* despite its substantial relevance.<sup>22</sup> The result is that *Citizens United* created a precarious framework that states are attempting to emulate, thereby leaving themselves susceptible to an as-applied challenge<sup>23</sup> by a minority or dissident party on the basis of *Patterson*.<sup>24</sup>

This Note argues that the *Buckley* minor-party exception should be extended to not only encompass minor, partisan political parties, but also issue-based minority groups and their members. Additionally, this Note argues that issue-oriented expression through association deserves the same First Amendment protection as direct advocacy. Further, this Note contend that association by membership deserves greater protection than association through monetary means. Finally, this Note will conclude that association by membership is as strong as, and therefore deserves the same degree of protection, as the express speech at issue in *McIntyre*. The result of such would be to recognize a right of anonymous association.

Part I of this Note explores relevant Supreme Court jurisprudence regarding disclosure<sup>25</sup> pertaining to politics. Part II.A will distinguish true minority advocates from those who are merely out of power. Part II.B will argue a low evidentiary level of threats, harassment, and reprisals is appropriate to overcome a

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19. Edsall, *supra* note 11.

20. *Id.*

21. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

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

23. An as-applied challenge alleges a particular law or policy is constitutional on its face, but is unconstitutional as it is applied to a particular person, group, or class, whereas a facial challenge alleges a particular law or policy may never be constitutional. *See BLACK'S LAW DICTIONARY* (9th ed. 2009).

24. *See Citizens United*, 558 U.S. at 310.

25. The personal information required for disclosure varies between the various state and federal laws. *See infra* Part I.A–B. Generally, the personal information to be disclosed at least includes: name, address, occupation, employer, and business address. *See infra* Part I.A–B.

state's informational interest and therefore does not need to rise to the level seen in *Patterson*. Part II.C defines the strength of associational speech in relation to other forms of speech and will argue associational speech based on membership is as strong as express speech, and therefore deserves the same degree of protection. Part II.D will argue that *Patterson* fits within the *Citizens United* framework. Finally, Part III will examine recently enacted legislation from Connecticut and Massachusetts that aims to comply with *Citizens United* and will argue the revamped Connecticut and Massachusetts disclosure laws are each susceptible to as-applied challenges by minority advocates due to infringement of their freedom to associate.

## I. THE SUPREME COURT AND COMPELLED DISCLOSURE

### A. *Exceptions to Compelled Disclosure: Where the First Amendment Prevails*

In 1958 the freedom to associate was first recognized by the Supreme Court as a right under the First Amendment in *Patterson*.<sup>26</sup> In that case, an Alabama statute required foreign corporations to register with the Secretary of State to do business within the state.<sup>27</sup> The Alabama Attorney General initiated an equity action against the National Association for the Advancement of Colored People (hereinafter "NAACP") to prevent the NAACP from doing business within, and to expel them from the State.<sup>28</sup> Alabama requested the NAACP produce a large quantity of documents and records that included "the names and addresses of all Alabama members and agents of the Association."<sup>29</sup> The NAACP then produced all requested documentation, including names and addresses of all officers and agents, except a list identifying rank-and-file members.<sup>30</sup> The

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26. *Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

27. *Id.* at 451.

28. *Id.* at 452. The complaint alleged the NAACP's business in Alabama included providing legal assistance to minority students who sought admission to a state university and support of a bus line boycott that sought equal seating for passengers regardless of race. *Id.*

29. *Id.* at 453 (internal quotation marks omitted).

30. *Id.* These "rank-and-file" members were those who had no positions of power, authority, or decision making within the NAACP. *Id.* For example, many (if not all) of these "rank-and-file" members were unpaid volunteers. Brief for Petitioner at 7, *Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91, October Term, 1957), 1957 WL 55387 (U.S.), at \*7.

NAACP was held in contempt and fined \$100,000.<sup>31</sup>

Upon reaching the Supreme Court, the NAACP argued that production and disclosure of membership lists would “abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.”<sup>32</sup> The Court recognized the right to associate when it held,

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment.<sup>33</sup>

Additionally, it is not necessary for associational rights to be directly restricted, rather, governmental action which in effect discourages exercise of indispensable liberties may be found to be an “unconstitutional intimidation” upon such rights.<sup>34</sup> Importantly, the Court stated privacy is a particularly indispensable aspect of freedom of association for groups with dissident viewpoints.<sup>35</sup>

Applying the newly recognized freedom of association to the issue, the Court found that rank-and-file members were subjected to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” simply by disclosing their identity.<sup>36</sup> Threats, harassment, or reprisals of that nature and magnitude would only discourage potential members from joining while encouraging then-current members to leave the NAACP.<sup>37</sup> The Court ruled a state must have a compelling interest to overcome freedom of association and that Alabama’s proposed interest to ensure the NAACP’s statutory compliance regarding its intrastate business activities did not meet that standard of “closest scrutiny.”<sup>38</sup>

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31. *Id.* at 454. The equivalent purchasing power of that sum in 2015 dollars is approximately \$874,797.79. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100%2C000.00&year1=1956&year2=2015> [<http://perma.cc/3U4Y-GQL2>] (last visited Oct. 31, 2015).

32. *Patterson*, 357 U.S. at 460.

33. *Id.*

34. *Id.* at 461.

35. *Id.* at 462.

36. *Id.*

37. *Id.* at 463.

38. *Id.* at 461, 464. Closest scrutiny is not to be confused with strict scrutiny used in other subsequent constitutional contexts; however, the requisite standard of a compelling governmental interest is the same in each standard. See Anthony

*Patterson* and its immediate progeny<sup>39</sup> arose during the tumultuous civil rights era. Thus, freedom of association was recognized to protect “civil rights activists in the segregated South”<sup>40</sup> from compelled disclosure, which would have subjected those persons to threats, harassment, or reprisals, all physical and economic in nature.<sup>41</sup> As a result of applying closest scrutiny in cases dealing with the violent segregated South and McCarthy-era blacklists, it was unclear how high the Court set the standard of threats, harassment, or reprisals for future persons to defend against disclosure by asserting freedom of association.<sup>42</sup>

Contemporary political advocacy is often contentious, but advocates usually do not face the same threat of serious harm as those from the civil rights era.<sup>43</sup> While deeming *Patterson*’s disclosure law an unconstitutional restriction on associational freedom, in other cases the Court has analyzed express political speech differently when anonymity protects a speaker who faces harm that is less serious than seen by rank-and-file NAACP members. *McIntyre v. Ohio Elections Commission* illustrates the proposition that an individual who expresses her point of view on a contentious political issue may be protected from disclosure to ensure that her viewpoint is not silenced from public debate.<sup>44</sup> At issue was a disclosure statute that the Ohio Supreme Court deemed constitutional on the basis that it was a part of the electoral process and only imposed a “‘reasonable’ and ‘nondiscriminatory’ burden on the rights of voters.”<sup>45</sup>

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Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 424 n.67 (2012) (discussing the Supreme Court’s standards of review in First Amendment contexts as having similar tests to standards of review in other constitutional contexts (i.e. “exacting scrutiny” in *Buckley* with “intermediate scrutiny.”)).

39. See *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

40. McGeveran, *supra* note 12 at 866.

41. *Patterson*, 357 U.S. at 461, 466.

42. The standard may be that persons must face the very same form and degree of threats, harassment, or reprisals manifested in *NAACP v. Alabama* and *Brown v. Socialist Workers ‘74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982). See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1206 (E.D. Cal. 2009) (“Supreme Court precedent regarding the appropriate standard of review is not a model of clarity.”).

43. See, e.g., Brief for Petitioner at 16 n.12, *Nat’l Ass’n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91, October Term, 1957), 1957 WL 55387 (U.S.), at \*16 n.12 (citing actual contemporary instances of “[t]hreats and . . . acts of violence . . . directed against Negroes” who sought “to assist their constitutional rights”).

44. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

45. *Id.* at 345 (quoting *McIntyre v. Ohio Elections Comm’n*, 618 N.E.2d 152, 154 (1993)).

The challenger to the Ohio disclosure statute, Margaret McIntyre, was fined after distributing anonymous leaflets that advocated against a school tax levy at issue in an upcoming referendum.<sup>46</sup> McIntyre wrote the contents, manufactured, and distributed the leaflets herself.<sup>47</sup> The Ohio statute barred advocacy intended to influence voters without the producer's name, business and residential addresses.<sup>48</sup> Importantly, some of the leaflets were signed by McIntyre while others were signed "CONCERNED PARENTS AND TAXPAYERS" in violation of Ohio's statute.<sup>49</sup> There was no indication the leaflets' contents were "false, misleading, or libelous."<sup>50</sup>

The Supreme Court began its analysis by stating that the First Amendment protects an author's choice of anonymity.<sup>51</sup> That choice may be made due to fear of threats, harassment, reprisals, social ostracism, to preserve privacy, or to strengthen the persuasiveness of an assertion.<sup>52</sup> Justice Stevens, writing for the majority, emphasized those rationales' deep roots in American history by using the Federalist Papers and the secret ballot as illustrative examples.<sup>53</sup>

While the Ohio Supreme Court upheld the statute on the basis that it was a part of the electoral process, because it only applied to speech designed to influence elections, and only imposed a "reasonable' and 'nondiscriminatory' burden on the rights of voters,"<sup>54</sup> the United States Supreme Court determined the statute was a regulation of the content of "pure speech" rather than the "mechanics of the electoral process."<sup>55</sup> Further, the content of the pamphlet constituted "core" speech as defined in *Buckley v. Valeo*,<sup>56</sup> and thus is subject to exacting scrutiny.<sup>57</sup> In fact,

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46. *Id.* at 337.

47. *Id.*

48. *Id.* at 338 n.3.

49. *Id.* at 337.

50. *Id.* A state has an interest in informing the electorate, which satisfies exacting scrutiny. *See infra* Part I.B.

51. *McIntyre*, 514 U.S. at 342.

52. *Id.* at 341–42.

53. *Id.* at 343 n.6. Justice Stevens also used blind-graded exams in law school as a modern attempt to eliminate bias through anonymity. *Id.* at 342 n.5. *See also* Talley v. California, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

54. *McIntyre*, 514 U.S. at 344–45 (quoting *McIntyre v. Ohio Elections Comm'n*, 618 N.E.2d 152, 155 (1993)).

55. *Id.* at 345.

56. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("Discussion of public

McIntyre's type of speech, advocacy regarding a contentious political issue, "is the essence of First Amendment expression."<sup>58</sup>

Ohio proffered two allegedly overriding interests to uphold the statute: to prevent fraudulent and libelous advocacy, and to create an informed electorate.<sup>59</sup> Providing an electorate with information pertaining to the identity of an advocate does not change the content of an assertion, and may not even enhance the voter's ability to assess its validity.<sup>60</sup> Indeed, as Margaret McIntyre was an individual, a voter would need to personally know her for McIntyre's identity, as the pamphlet's scrivener, to be of any use to the voter in assessing the merits of its contents.<sup>61</sup> Therefore, the informational interest was held insufficient to satisfy exacting scrutiny.<sup>62</sup>

While the Court agreed that preventing fraud and libel during election season carried "special weight," the fact that other safeguards existed to prevent fraud and libel, demonstrated that compelled disclosure served only to supplement those other safeguards.<sup>63</sup> The disclosure provision did not satisfy the exacting scrutiny standard as it applied to speech that was in no way fraudulent or libelous and therefore was judged overly broad.<sup>64</sup> As

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issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1948)). While *Buckley* involved political speech concerning a candidate for office, those principles apply equally to issue-based elections, as seen in *McIntyre*. *McIntyre*, 514 U.S. at 347.

57. *McIntyre*, 514 U.S. at 346. Exacting scrutiny requires a law burdening core political speech to be "narrowly tailored to serve an overriding state interest." *Id.* at 347. Further, "[w]hile [exacting scrutiny] resembles what the Court has termed intermediate scrutiny elsewhere, the Court itself does not draw that analogy in other First Amendment contexts." Johnstone, *supra* note 38.

58. *McIntyre*, 514 U.S. at 347.

59. *Id.* at 348.

60. *Id.* at 348-49.

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.

*Id.* at 348-49 n.11 (1995) (quoting *People v. Duryea*, 351 N.Y.S.2d 978, 996 (1974)).

61. *Id.* at 348-49.

62. *Id.* at 349.

63. *Id.* at 350. Those other safeguards were specific and detailed prohibitions located within Ohio's Election Code. *Id.* at 349-50 n.12.

64. *Id.* at 351.

a result, the disclosure provision was not sufficient to prevent fraud and libel,<sup>65</sup> and consequently, violated the First Amendment.<sup>66</sup>

Despite *McIntyre*'s narrow holding, which considered only Ohio's blanket prohibition of anonymous campaign literature, the Court's rationale allowed for a more expansive use for individuals for two reasons.<sup>67</sup> First, prior cases that upheld compelled disclosure laws were distinguished as being a less intrusive infringement on First Amendment rights in light of more compelling state interests.<sup>68</sup> However, as the Court noted, compelled disclosure of an individual engaging in "core" speech is more intrusive than disclosure of the identity of a contributor of an independent expenditure.<sup>69</sup> In fact, speech expressed by monetary means is generally less controversial and therefore less likely to invoke threats, harassment, or reprisals because it is "less specific, less personal, and less provocative."<sup>70</sup> Second, regardless of individuals' reasons to desire anonymity, the interest in having anonymous writings within the "marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."<sup>71</sup>

Thus, *McIntyre* stands as a strong shield to those individuals who speak<sup>72</sup> anonymously about controversial political issues, despite the possibility of fraudulent or libelous misuse of such a right.<sup>73</sup> Further, the *McIntyre* shield protects not only individuals' First Amendment freedoms, but also the "marketplace of ideas" as

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65. *Id.* at 353.

66. *Id.* at 356.

67. McGeeveran, *supra* note 121 at 859 ("The rationale for the [*McIntyre*] Court's decision was a robust understanding of privacy rights for political speech and association."). See also *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166 n.14 (2002) ("[T]he [challengers] do not themselves object to a loss of anonymity . . . . We may . . . consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously."); *Buckley v. Am. Const. Law Found., Inc.* 525 U.S. 182, 199 (1999) ("Our decision in *McIntyre* . . . is instructive . . .").

68. *McIntyre*, 514 U.S. at 356. Those other statutes were considered less intrusive because, in part, they applied only to candidate elections. *Id.* at 353.

69. *Id.* at 355 (explaining that the Court explicitly distinguished *Buckley*); see *infra* Part I.B.

70. *McIntyre*, 514 U.S. at 355.

71. *Id.* at 342.

72. "Speak" here refers only to written advocacy.

73. *McIntyre*, 514 U.S. at 357. "[I]n general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.*

a matter of public policy.<sup>74</sup>

B. *The Supreme Court's Evolution in Upholding Federal Disclosure Laws*

Compelled disclosure in the political arena has been increasingly favored by the Supreme Court since *McIntyre*.<sup>75</sup> These recent cases invoke an earlier principle, established by *Buckley v. Valeo*, that a reasonable probability of threats, harassment, or reprisals is necessary to form a constitutional challenge of compelled disclosure laws.<sup>76</sup> Interestingly, no mention is made of *McIntyre* and this post-*McIntyre* jurisprudence ignores *McIntyre's* protection of core political speech in favor of an earlier principal that such speech need only be protected when faced with threats, harassment, or reprisals.<sup>77</sup> The standard of review for reporting and disclosure requirements was established in *Buckley v. Valeo*, which relied on *Patterson*.<sup>78</sup>

*Buckley* included a challenge to portions of federal law that required a political committee to disclose the name and address of any donor who contributed more than ten dollars as well as the occupation and principal place of business of any donor who contributed greater than one hundred dollars in the aggregate.<sup>79</sup> The Court applied exacting scrutiny, a standard requiring a "relevant correlation" or "substantial relation" between a legitimate government interest and the disclosed information.<sup>80</sup>

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74. *McIntyre*, 514 U.S. at 342.

75. See *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). See also BRIAN K. PINAIRE, *THE CONSTITUTION OF ELECTORAL SPEECH LAW: THE SUPREME COURT AND FREEDOM OF EXPRESSION IN CAMPAIGNS AND ELECTIONS* 154 (2008) ("[A]nonymity claims have been trumped in other cases by the asserted democratic interest in disclosure as a kind of mechanism for regulation in the political marketplace.").

76. See *McGeeveran*, *supra* note 12, at 860.

77. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

78. *Id.* at 64. See also *Johnstone*, *supra* note 38, at 423 ("*Buckley* cited *NAACP* for its standard of review, but loosened the strict 'closest scrutiny' standard to the ironically imprecise 'exacting scrutiny' standard.").

79. *Buckley*, 424 U.S. at 62–63. "Political committee is defined . . . as a group of persons that receives contributions or makes expenditures of over \$1,000 in a calendar year. Both definitions [of contributions and expenditures] focus on the use of money or other objects of value for the purpose of . . . influencing the nomination or election of any person to federal office." *Id.* (internal quotations omitted). Portions of *Buckley* involved facial challenges to the law; however, this Note is concerned only with the portions of *Buckley* that involve as-applied analysis.

80. *Id.* at 64.

Notably, the Court deviated from *Patterson's* “strictest scrutiny” standard, which applies, when “beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”<sup>81</sup> While it acknowledged a strict test was necessary due to the possibility of substantial infringement of First Amendment rights, *Buckley* identified three categories of governmental interest that survive exacting scrutiny.<sup>82</sup>

The first category is an informational interest to provide the electorate with relevant information about a candidate.<sup>83</sup> This interest is justified in that voters may be better equipped to evaluate a candidate’s ideology and determine what interests that candidate may be beholden to once in office.<sup>84</sup> The second category of interest is the deterrence of “actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”<sup>85</sup> The last category of interest arises when recordkeeping and reporting the information provided by disclosure provisions are necessary to enforce contribution limitations.<sup>86</sup>

*Buckley's* as-applied challenge contended the disclosure provisions were overbroad regarding contributions “to minor parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.”<sup>87</sup> The Court determined the minor party or independent candidate needed to actually demonstrate threats, harassment, or reprisals as the NAACP showed in *Patterson*.<sup>88</sup> “[*Patterson*] is inapposite where . . . any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative” despite the government’s diminished interest.<sup>89</sup> However, the door was left open for a successful challenge if a challenger could provide “record evidence of the sort proffered in [*Patterson*].”<sup>90</sup>

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81. See *Patterson*, 357 U.S. at 460–61.

82. *Buckley*, 424 U.S. at 66.

83. *Id.* at 66–67.

84. *Id.* See also *Citizens United*, 558 U.S. at 369 (holding that attaining an informed electorate as the only interest needed to justify a disclosure provision).

85. *Buckley*, 424 U.S. at 67.

86. *Id.* at 67–68.

87. *Id.* at 68–69.

88. *Id.* at 69.

89. *Id.* at 70.

90. *Id.* at 71.

The challenger argued “a minor party, particularly a new party, may never be able to prove a substantial threat of harassment, however real that threat may be, because it would be required to come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear.”<sup>91</sup> The Court acknowledged a heavy burden was imposed to prove injury, especially for a minor party, and so only a “reasonable probability” needed to be present to show compelled disclosure would subject contributors to threats, harassment, or reprisals.<sup>92</sup>

The *McIntyre* Court, which found an individual who expresses her point of view on a contentious political issue may be protected from disclosure to ensure that her viewpoint is not silenced from public debate, distinguished *Buckley* in two ways. First, Margaret McIntyre’s independent actions had no implications concerning a candidate, thus eliminating actual or apparent corruption.<sup>93</sup> Second, disclosure of core political speech—such as Ms. McIntyre’s independent expenditure by producing election-related leaflets—was not useful to the electorate and was “particularly intrusive” to her.<sup>94</sup>

The Court’s first major decision that turned away from *McIntyre*’s protection of core political speech in favor of *Buckley*’s reasonable probability of *Patterson*-type harm requirement was *McConnell v. Federal Election Commission*.<sup>95</sup> The court in *McConnell* upheld the district court’s application of the *Buckley* standard, which stated, “[a]lthough this testimony demonstrates that [organization] members may ‘fear’ the potential consequences of their names being disclosed in connection with [the organization], there is no evidence before the Court that these feared consequences have been, or would be, realized.”<sup>96</sup> This application requires “specific” evidence of an incoming, or actual, realization event of threats, harassment, or reprisals.<sup>97</sup> The implications are staggering; an individual must comply with disclosure requirements and subject herself to possible death

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91. *Id.* at 73–74.

92. *Id.* at 74.

93. *McIntyre*, 514 U.S. at 354.

94. *Id.* at 355.

95. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

96. *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 246 (D.D.C.) *judgment entered*, 251 F. Supp. 2d 948 (D.D.C. 2003) *aff’d in part, rev’d in part sub nom. McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) and *aff’d in part, rev’d in part sub nom. McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

97. *McConnell*, 540 U.S. at 199.

threats or loss of gainful employment for merely associating herself with an organization in support (or in opposition) of a candidate or issue. Only then may that individual challenge the disclosure law, as an as-applied challenger, or as an aggrieved party under a facial challenge, at which point action would be futile.<sup>98</sup>

The disclosure laws at issue in *McConnell* were challenged in *Citizens United*.<sup>99</sup> The *Citizens United* Court affirmed *McConnell*'s disclosure provisions, but went further by holding an informational interest alone was sufficient to satisfy exacting scrutiny.<sup>100</sup> The Court explained, "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."<sup>101</sup> The Court further stated commercial speech may be subject to electoral campaign disclosure laws under certain circumstances.<sup>102</sup>

The challenger's argument for the *Buckley* minor-party exception was quickly rejected when it could not put forward specific evidence that its members would face threats, harassment, or reprisals in the event of disclosure.<sup>103</sup> However, the Supreme Court acknowledged the exception for minor parties remained available on a case-by-case basis. Therefore, the state's informational interest is currently the most important justification to satisfy exacting scrutiny.<sup>104</sup>

### C. *Applying the Buckley Exception to a Minor Political Party*

In *Brown v. Socialist Workers*,<sup>105</sup> the Socialist Workers Party

98. *Doe v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring) ("[T]he as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking.").

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

100. *Id.* at 369 (holding for the first time an informational interest alone was sufficient to overcome exacting scrutiny). See generally *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

101. *Citizens United*, 558 U.S. at 371.

102. *Id.* at 369. A documentary regarding then-Senator Hilary Clinton was at issue. *Id.* at 319–320. "Potentially . . . even ads from a competitor business that criticize a business owned by a candidate could be regulable ads if the ads are run directly before an election and mention the candidate." 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, 1081 (2011).

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

104. Johnstone, *supra* note 38, at 422.

105. *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982).

(“SWP”), a small Ohio-based political party with approximately sixty members, in a 1974 class action, challenged an Ohio statute that required disclosure of the names and addresses of every monetary contributor and recipient of campaign disbursements.<sup>106</sup> The law required disclosure regardless of the size of the contribution or disbursement.<sup>107</sup> Any failure to comply was punishable by a fine of \$1,000 *per day*.<sup>108</sup>

The SWP sought to effectuate its ideals entirely through the political process.<sup>109</sup> When it ran a candidate in the 1980 United States Senate race, the SWP received less than two percent of the vote.<sup>110</sup> It was such a small-scale party that it averaged only \$15,000 annually in contributions between 1974 and 1980.<sup>111</sup>

The SWP successfully challenged the law’s constitutionality under the *Buckley* minor-party exception, as-applied to itself.<sup>112</sup> The state of Ohio conceded that the exception applied to contributors, but argued it did not apply to recipients of campaign disbursements.<sup>113</sup> The Supreme Court rejected this “narrow” view of the *Buckley* minor-party exception.<sup>114</sup> It reasoned that the government’s interest was weaker in comparison with the threat facing minor parties’ First Amendment rights.<sup>115</sup> The individuals who make contributions and receive disbursements are those whose actions “lie at the very core of the First Amendment.”<sup>116</sup> Disclosure of these persons’ identities would subject them to “threats, harassment, and reprisals.”<sup>117</sup> Moreover, “[t]he fact that some or even many recipients of campaign expenditures may not be exposed to the risk of public hostility does not detract from the serious threat to the exercise of First Amendment rights of those who are so exposed.”<sup>118</sup>

The framework established by these cases contains ambiguities, which leaves open the possibility of expansion of the

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106. *Id.* at 88–89.

107. *Id.* at 91 n.6.

108. *Id.* at 90.

109. *Id.* at 88.

110. *Id.*

111. *Id.*

112. *Id.* at 91.

113. *Id.* at 94.

114. *Id.* at 95.

115. *Id.*

116. *Id.* at 97.

117. *Id.*

118. *Id.* at 97 n.14.

*Buckley* minor-party exception. The Court in *Patterson* and *Brown* expanded the robustness of the First Amendment, and in *McIntyre* “codified the anonymous speech doctrine.”<sup>119</sup> This framework allows for the recognition of a right of anonymous association for minor, issue-oriented advocates.

## II. CONNECTING SEEMINGLY DEVIATING JURISPRUDENCE

Part A of this section will argue which minority advocates ought to be exempt from disclosure. Part B will argue the degree of severity of threats, harassment, and reprisals necessary to overcome a state’s informational interest does not need to arise to that seen in *Patterson*. Part C will argue that the strength of associational speech is greater than that of speech expressed by monetary transfer. Finally, Part D will conclude that the right to associate expressed in *Patterson* falls within the framework created by *Citizens United*.

### A. *Establishing Which Minority-Advocates Ought to be Exempt from Disclosure*

The *Citizens United* Court reaffirmed the *Buckley* minor-party exception applicability in the context of electoral disclosure.<sup>120</sup> However, the Court has yet to define who or what constitutes a minor-party for the purposes of this exception. As a result, there are those, such as Charles and David Koch, who advocate widely-popular views, yet claim they are themselves dissenters who qualify for the *Buckley* minor-party exception because those views are in discord with the political party in office.<sup>121</sup> That argument is deceptive at best. A vast divergence exists between Margaret McIntyre,<sup>122</sup> the NAACP’s 1950s Alabama chapter<sup>123</sup> and the Koch brothers who have an estimated combined net worth of \$80 billion.<sup>124</sup> Indeed, the Kochs’ political network has

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119. Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J. L. & TECH. 92, 103.

120. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010).

121. See Edsall, *supra* note 11 (quoting Rob Tappan, a spokesman for Koch Industries).

122. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

123. See *Nat’l Ass’n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

124. Louis Jacobson, *Harry Reid Says Koch Brothers are Richest Family in the World*, POLITIFACT.COM, (Apr. 2, 2014, 2:32 PM), <http://www.politifact.com/truth-o-meter/statements/2014/apr/02/harry-reid/harry-reid-says-koch-brothers-are-richest>

been described as, in effect, a third major political party.<sup>125</sup> Accordingly, while the Kochs are only two individuals, their monetary worth coupled with their stated intent, gives them exceedingly greater influence in the political arena than the majority of other individuals. Though, conversely, as seen in *ProtectMarriage.com v. Bowen*,<sup>126</sup> the proponent of popular, though not necessarily majoritarian, viewpoints should also not be protected by the minor-party exception.<sup>127</sup> The result is that too much power or influence, whether by monetary means or number of supporters, disqualifies advocates from minority status.

Moreover, the *ProtectMarriage.com* lower court, relying on *Socialist Workers*, set a high bar for future minor-parties when applying the *Buckley* minor-party exception. It determined the same-sex marriage opponents were not a minor-party because they had neither a small constituency nor did they promote a historically unpopular idea.<sup>128</sup> As a result, that court viewed minor status as a “necessary element of a successful as-applied claim” but not sufficient without “seeking to further ideas historically and pervasively rejected and vilified by both this country’s government and its citizens.”<sup>129</sup> Thus, while the court was correct in determining the same-sex marriage opponents were not a minor-party, it created a difficult burden for minority groups with new and ostracized viewpoints from gaining protection under the *Buckley* exception.

Therefore, the Court should adopt a subjective spectrum, based upon certain factors, that affords true minority-advocacy groups protection under the *Buckley* exception to disclosure, whether their views are historically or newly despised. Relevant

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family-w/ [<http://perma.cc/2T9W-RK2C>]. See also *The World’s Billionaires*, FORBES, <http://www.forbes.com/billionaires/> (last visited Nov. 2, 2015) (ranking the wealthiest people on the planet with Charles and David Koch tied individually at six).

125. Confessore, *supra* note 8.

126. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009). See *infra* Part II.B.

127. Interestingly, the lack of clarity in Supreme Court compelled disclosure jurisprudence may be due, in part, to the Justices’ consciousness of the particular issue in each case. See McGeeveran, *supra* note 12 at 870 n.75.

It is possible that the Justices’ views were colored by the nature of the particular issue in [*Doe v. Reed*, 561 U.S. 186 (2010)], a referendum to repeal gay rights legislation. It may be coincidence, but Justices generally seen as more likely to support gay rights wrote the opinions most skeptical about the prospect of as-applied exemptions in *Doe* and vice versa.

*Id.*

128. *ProtectMarriage.com*, 599 F. Supp. 2d at 1216.

129. *Id.* at 1215.

factors should include: tenuousness of the group's finances, degree of unpopularity, and members' interests in the group's success. On the spectrum, as the members' interests increase, so too should the Court's willingness to allow *Buckley's* exception.

B. *Defining the Level of Harassment Necessary to Overcome the State's Informational Interest*

The Supreme Court held in *Buckley v. Valeo* that the First Amendment prohibits the government from compelling disclosure from minor political parties if the party can show “a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”<sup>130</sup>

Yet, the Court did not put forth a test to determine what type, degree, or level of threat, harassment, or reprisal is necessary to satisfy the disclosure exception. In creating the *Buckley* minor-party exception, the Court relied upon the strong evidence of threats and harassment put forward in *Patterson*.<sup>131</sup> That reliance, though, was on the amount and specificity of the evidence put forth, rather than the type, degree, or level of threats, harassment, or reprisals faced by members.<sup>132</sup> Subsequent cases used *Patterson* as the standard to judge threats, harassment, and reprisals.<sup>133</sup> This Note proposes that a subjective evaluation is the proper standard a court should use to assess as-applied challenges. Further, the standard should be proactive—to prevent actual instances of threats, harassment, and reprisals—rather than reactionary by requiring present or past instances of such.

This proposal can be illustrated using the facts of *ProtectMarriage.com v. Bowen*, where a class of major donors and other advocacy groups challenged a ballot initiative to California's Political Reform Act of 1974.<sup>134</sup> The proponents of the initiative sought to define “marriage” as only “between a man and a woman” and the plaintiffs alleged that contributors to the cause faced

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130. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam). This exception was adopted in *Citizens United* but will be referred to as the *Buckley* minor-party exception. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010).

131. *Buckley*, 424 U.S. at 71.

132. *Id.*

133. See *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

134. *ProtectMarriage.com*, 599 F. Supp. 2d at 1199.

threats, harassment, and reprisals.<sup>135</sup> There was evidence of numerous instances of threats, harassment, and reprisals against supporters of the ballot.<sup>136</sup> A threat made to the Mayor of Fresno, California stated:

If I had a gun I would have gunned you down along with each and every other supporter . . . . Anybody who has a YES ON PROP 8 sign or banner in fron [sic] of their house or bumper sticker on the car in Fresno is in danger of being shot or firebombed. Fresno is not safe for anyone who supports Prop 8 . . . . If you thought 9/11 was bad, you haven't seen anything yet.<sup>137</sup>

Economic reprisals included, “[the] manager of El Coyote restaurant took a voluntary leave of absence after reports of her \$100 donation to support Proposition 8 led to boycotts and protestors at the establishment owned by her mother.”<sup>138</sup> In another instance, California disclosure laws required an individual contributor to provide the name of his business when making a monetary contribution, such as the plaintiff donors made, to effectuate their advocacy. As a result, cars in the parking lot of his business were “papered” with flyers detailing his monetary support.<sup>139</sup> Additionally, a sponsored link appeared on Google when searching for that same individual, which referenced his monetary support of the plaintiff advocacy groups.<sup>140</sup>

The court in *ProtectMarriage.com* observed the threats, harassment, and reprisals in evidence were insufficient to satisfy the *Buckley* minor-party exception test.<sup>141</sup> The court’s holding, however, was based on the plaintiffs not being covered by the “minority party” requirement of the *Buckley* exception, as they were not a group with a “small constituenc[y] and [did not] promot[e] historically unpopular and almost universally-rejected ideas.”<sup>142</sup> The court further stated the facts at issue were distinguishable from prior cases because the threats, harassment, and reprisals took place “during the heat of an election battle

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135. *Id.* at 1199–1200.

136. *See id.*

137. *Id.* at 1200.

138. *Id.* at 1201.

139. *Id.*

140. *Id.*

141. *Id.* at 1216.

142. *Id.*

surrounding a hotly contested ballot initiative.”<sup>143</sup>

This viewpoint is in direct opposition to the Supreme Court’s 1995 decision in *McIntyre*. *McIntyre* emphasized that contentious, issue based political speech is “the essence of First Amendment expression.”<sup>144</sup> While *McIntyre* involved a local, school tax issue, which surely can be acrimonious, it does not invoke the same level of passion and emotion as does same-sex marriage, which has become one of the most hotly debated and pivotal civil rights issues of the past decade.<sup>145</sup> Nonetheless, “[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre’s.”<sup>146</sup> Therefore, while the plaintiffs in *ProtectMarriage.com* were unable to show threats, harassment, and reprisals of the same severity as the plaintiffs in *Patterson* and *Socialist Workers*, the threats and harassment shown by the *ProtectMarriage.com* plaintiffs should be sufficient for future similar challengers to invoke the *Buckley* minor-party exception.

Similarly, the same ballot initiative in *ProtectMarriage.com*, was the focal point in *Hollingsworth v. Perry*.<sup>147</sup> Defendants applied for a stay of an order allowing the trial of an action challenging the affirmed ballot to be broadcast by video and audio means, to other federal courthouses.<sup>148</sup> To grant the stay, the

143. *Id.* at 1217.

144. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

145. *Id.* at 337. *Cf.* *Brown v. Socialist Workers ‘74 Campaign Comm.* (Ohio), 459 U.S. 87, 98 n.14 (1982) (“The preservation of unorthodox political affiliations in public records substantially increases the potential for harassment above and beyond the risk that an individual faces simply as a result of having worked for an unpopular party at one time.”). Compare Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> [<http://perma.cc/2VLV-UZZ7>] (discussing the Supreme Court’s move to let appeals court rulings stand, thus in effect allowing same-sex marriage to expand to thirty states), and Nate Silver, *Explaining the Senate’s Surge in Support for Same-Sex Marriage*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Apr. 4, 2013 8:13 AM), [http://fivethirtyeight.blogs.nytimes.com/2013/04/04/explaining-the-senates-surge-in-support-for-same-sex-marriage/?\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/04/04/explaining-the-senates-surge-in-support-for-same-sex-marriage/?_r=0) [<https://perma.cc/U6EN-VPB3?type=source>] (analyzing the rapid increase of U.S. Senators in support of same-sex marriage), with David D. Kirkpatrick, *Backers of Gay Marriage Ban Find Tepid Response in Pews*, N.Y. TIMES (May 16, 2004), <http://www.nytimes.com/2004/05/16/us/backers-of-gay-marriage-ban-find-tepid-response-in-pews.html> (discussing attempts by conservative groups to impose bans on same-sex civil unions and marriage in light of Massachusetts becoming the first state to allow same-sex marriage).

146. *McIntyre*, 514 U.S. at 347. See also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (finding speech regarding an income tax referendum “is at the heart of the First Amendment’s protection”).

147. *Hollingsworth v. Perry*, 558 U.S. 183 (2010).

148. *Id.* at 184–85.

applicants were required to show that irreparable harm would result absent a denial of the stay.<sup>149</sup> The Court granted the stay as the defendants successfully showed prior instances of harassment surrounding the ballot initiative.<sup>150</sup> Consequently, witness testimony would be chilled as they had reason to believe they would face harassment by being exposed during a nation-wide broadcast.<sup>151</sup> Accordingly, if threats, harassment, and reprisals against witnesses are egregious enough to procure a restricted trial, the same threats, harassment, and reprisals should be sufficient to satisfy *Buckley's* minor party exception to disclosure. Crucially, this argument only applies to the rank-and-file-esque member who does nothing more than donate to or associate with an advocacy group. It would not apply in the example from *ProtectMarriage.com* above, regarding the Fresno Mayor, because he is a public figure who attended a public rally. It also does not apply to members who openly broadcast their support by bumper stickers, signs in front lawns, or similar modes.<sup>152</sup>

Additionally, although the Court in *Citizens United* held that the informational justification alone was sufficient to warrant disclosure, this argument is only persuasive if the disclosure actually results in a more informed electorate.<sup>153</sup> The *Buckley* minor-party exception should only be overcome in narrow circumstances. The fact that more information is available, i.e. donor names of minority groups, does not automatically create a more well informed voter. For example, *McIntyre* involved an individual who wrote and printed leaflets on her own accord.<sup>154</sup> No evidence suggested Ms. McIntyre was any more prominent a citizen than any other voter in her district.<sup>155</sup> Unless she were a public figure, or otherwise invested in the result for reasons her fellow voters would find repugnant, the electorate was no better off

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149. *Id.* at 190.

150. *Id.* at 195.

151. *Id.* at 195–96.

152. See also Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012) (discussing economic reprisals in the form of consumer boycotts resulting from a retailer's support of a Minnesota gubernatorial candidate opposed to same-sex marriage).

153. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369–70 (2010). *But cf.* *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part) (“The public right to know ought not be absolute when its exercise reveals private political convictions . . . . On the contrary, secrecy and privacy as to political preferences and convictions are fundamental in a free society.”).

154. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337 (1995).

155. See *id.*

reading her name at the bottom of the leaflets than if they were not signed. The content of the message would have remained exactly the same—just as true or false. As the Court noted, “a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message. Thus, Ohio’s informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.”<sup>156</sup>

Furthermore, not only may additional information be useless in actually informing voters, it may be acutely detrimental in conveying an accurate message. If the speaker’s identity is disclosed, the issue the message supports may suffer from prejudice merely upon the basis of who speaks in its favor.<sup>157</sup> Conversely, the message may be disregarded without having been read or heard solely due to the identity of the speaker.<sup>158</sup> In neither of these situations are the merits of the speech considered.

Therefore, the *Buckley* exception to disclosure for minor-party members who face threats, harassment, or reprisals due to disclosure of their identities, should be satisfied by showing a reasonable probability of the severity of harm as seen in *ProtectMarriage.com* and *Hollingsworth* rather than that seen in *Patterson*. Moreover, unless disclosure results in a more informed electorate, the state’s interest is not sufficient to overcome the *Buckley* minor-party exception.

### C. *Defining the Strength of Associational Speech in Relation to Other Methods of Speech*

The freedom of association is unquestionably a form of speech protected by the First Amendment.<sup>159</sup> However, it is unclear how strong this form of speech is, and therefore the level of protection it

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156. *Id.* at 348–49.

157. *Id.* at 342–43.

Anonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where “the identity of the speaker is an important component of many attempts to persuade,” the most effective advocates have sometimes opted for anonymity.

*Id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)).

158. See *McIntyre*, 514 U.S. at 342–43.

159. *Nat’l Ass’n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (explaining that the “freedom to engage in association” is “inseparable” from the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech).

deserves in comparison to other forms of speech is likewise unclear. This problem arises, in part, because one may associate with a group through membership or by monetary contribution. This Note posits association by membership deserves greater protection than association through monetary means. Further, that association by membership is as strong as, and therefore deserves the same degree of protection, as the express speech at issue in *McIntyre*.

There are at least two ways to examine the effects of First Amendment infringements: first, to focus on the actual individual speaker; second, to focus on public deliberation as a whole.<sup>160</sup> When individuals are deterred from associating with like-minded fellows, the views of the group as a whole are thereby suppressed.<sup>161</sup> Suppression of associational speech may serve as an absolute bar to minority or dissident views from entering the public discourse, both of which should be encouraged and embraced in a democracy.<sup>162</sup>

Associational speech for minority or dissident groups may be suppressed in numerous ways.<sup>163</sup> The court in *Brown* applied and enforced *Buckley's* minor-party exception largely because the “potential for impairing First Amendment interests is substantially greater”<sup>164</sup> regarding minor parties because

These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisals may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.<sup>165</sup>

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160. Ho, *supra* note 152, at 412–13 (defining the former as the “anti-chilling” interpretation while the latter as the “anti-suppression” interpretation).

161. See Ho, *supra* note 152, at 412–13.

162. See *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (“There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating there exists a “profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open . . .”).

163. By way of example, using threats, harassment, or reprisals to dissuade individuals from associating with, participating in, or donating to these minority or dissident groups.

164. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 92 (1982).

165. *Id.* at 93 (quoting *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (per curiam)).

*Brown* is supported by the Court's statement in *Patterson* that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."<sup>166</sup>

Conversely, the Court rejected a freedom of association defense when the petitioner in *Barenblatt v. United States* refused to answer certain questions asked by the Subcommittee of the House Committee on Un-American Activities.<sup>167</sup> The questions included, "Are you now a member of the Communist Party?" and "Have you ever been a member of the Communist Party?"<sup>168</sup> The Court observed, "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake . . . ."<sup>169</sup> Congress was deemed to have "wide power to legislate in the field of Communist activity . . . and to conduct appropriate investigations in aid thereof."<sup>170</sup> The Court made no secret that its decision rested on prejudice based upon associational ties when it stated,

To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II . . . .<sup>171</sup>

The Court concluded "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."<sup>172</sup>

Yet the dissent was critical of the Court's disregard of the Constitution based upon its stereotype that Communists did not constitute a political party, but rather a criminal gang.<sup>173</sup>

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166. Nat'l Ass'n for Advancement of Colored People v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

167. *Barenblatt v. U.S.*, 360 U.S. 109, 113 (1959). While *Barenblatt* is undoubtedly an outlier, it illustrates how contemporary politics may cause disregard of First Amendment rights.

168. *Id.* at 114.

169. *Id.* at 126.

170. *Id.* at 127.

171. *Id.* at 128–29.

172. *Id.* at 134 (Black, J., dissenting).

173. *Id.* at 146.

Furthermore, that because some members of the Communist Party pursued illegal aims, not all members did so.<sup>174</sup> Instead, Justice Black saw the potential slippery slope for First Amendment violations created by the majority.<sup>175</sup> “[O]nce we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men’s minds because some of its members are bad and some of its tenets are illegal, no group is safe.”<sup>176</sup>

These instances illustrate the necessity of including associational speech within the purview of the First Amendment. Great injustice will arise when that right is infringed.<sup>177</sup> Thus, to avoid grievous inequity, associational speech should be afforded the same level of protection as express speech.

The Court in *Buckley* stated that associational advocacy was less effective without the ability to pool funds obtained by contributions.<sup>178</sup> It further stated the “privacy of belief” may be invaded when the disclosed information concerns memberships as well as monetary contributions because “[f]inancial transactions can reveal much about a person’s activities, associations, and beliefs.”<sup>179</sup> Conversely, the Court in *McIntyre* emphasized “money may ‘talk,’ [but] its speech is less specific, less personal, and less provocative than a handbill.”<sup>180</sup>

These points of analysis are in accord with each other when viewing the independent nature of the respective form of expression. Group membership, like verbal speech or writing, is an independent act that allows one to directly associate. On the other hand, contributing money lacks the same degree of independence. It is a dissociative (albeit supportive) act. When an individual is a

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174. *Id.* at 147.

175. *Id.*

176. *Id.* at 150. Justice Black went further and illustrated prior instances of baseless prejudice throughout American history, including: Socialists in the 1920s, Masons in the 1830s, and Jacobins in the time of the alien sedition laws. *Id.* at 150–51. “[I]n times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out.” *Id.* at 151.

177. *See, e.g.,* *Korematsu v. U.S.*, 323 U.S. 214 (1944).

178. *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976) (per curiam) (“The right to join together ‘for the advancement of beliefs and ideas,’ is diluted if it does not include the right to pool money through contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’” (quoting *Nat’l Ass’n for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)) (internal citations omitted)).

179. *Buckley*, 424 U.S. at 66 (quoting *California Bankers Ass’n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)) (alteration in original).

180. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355 (1995).

group member, she then has a personal, unique interest in the views expressed by the group and the group itself—whereas a second individual who supports a group by monetary means has less skin in the game as that support may be quantified and matched by any other individual by an equal donation.<sup>181</sup>

Inverse to the degree of independence are the states' interests in having an informed electorate, avoiding the appearance of corruption, and actual corruption.<sup>182</sup> As the independence of speech increases, the state's interest in disclosure decreases, and vice versa. For example when a person contributes money to a candidate, the state has a strong interest in ensuring that candidate is not held indebted to her supporter. On the other hand, when another person expresses her opinion on an issue that candidates have taken opposing sides on, the state's interest in the speaker's identity dwindles. It is imperative that an individual who expresses her opinion be able to do so. That necessity ensures an individual's self-autonomy as well as a robust marketplace of ideas.<sup>183</sup> Therefore, associational speech based on membership should be afforded the same safeguards as other forms of speech.

#### D. *Patterson Was Impliedly Embraced by Citizens United*

*Citizens United* generally represents the Court's recent trend of favoring disclosure requirements.<sup>184</sup> While compelled disclosure is a restriction on speech, it is often justified.<sup>185</sup> Just as the right to speak is not absolute, nor are the justifications that restrict

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181. For example, for several years the Boy Scouts of America has been mired in controversy regarding its policy to not allow openly gay adults to serve in its organization. Erik Eckholm, *Boy Scouts' President Calls for End to Ban on Gay Leaders*, N.Y. TIMES (May 21, 2015), <http://www.nytimes.com/2015/05/22/us/boy-scouts-president-calls-for-end-to-ban-on-gay-leaders.html>. If an individual were to donate money in support of this policy (or in support of its revocation), he would have less of a personal, unique interest in his support for the Boy Scouts than if he joined the organization as a volunteer.

182. *Buckley*, 424 U.S. at 66.

183. See Ho, *supra* note 152, at 413–18 (discussing anti-chilling of self-autonomy and anti-suppression of the marketplace of ideas). See also McGeeveran, *supra* note 12 at 877–78 (“Many individuals whose opinions differ from those around them will put their heads down and disengage from political activity if that is the only way to avoid disclosure.”). Interestingly, Professor McGeeveran posits the social ostracism that may result for Democrats in vastly Republican locales and Republicans in deep blue territory may be sufficient to invoke exemption from disclosure. McGeeveran, *supra* note 12, at 878.

184. See, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). See also Ho, *supra* note 152, at 418 (“[C]ourts have typically favored disclosure in the campaign finance context.”).

185. See *Buckley*, 424 U.S. at 66.

speech.<sup>186</sup> One avenue in which disclosure may be circumnavigated involves minor group associations.<sup>187</sup>

Although *Citizens United* was decided with no mention of *Patterson*, it impliedly fits within the *Citizens United* framework. The Court in *Citizens United* reaffirmed the *Buckley* principle regarding disclosure by holding an informational interest was solely sufficient to affirm the disclosure provisions at issue.<sup>188</sup> Moreover, it applied the *Buckley* minor-party exception but found insufficient evidence to satisfy the standard for exception.<sup>189</sup> Nevertheless, *Citizens United* did not reference *Patterson* once, despite its relevance, while the Court in *Buckley* relied heavily upon *Patterson* when it created these standards.<sup>190</sup> “The strict test established by *Patterson* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.”<sup>191</sup>

In fact, the minor party exception was created as an exception to the three categories of government interests that were found sufficient to overcome *Patterson*’s freedom of association justification.<sup>192</sup> *Buckley* stated that the minor party exception would not apply when threats, harassment, or reprisals were “highly speculative” in infringing First Amendment rights.<sup>193</sup> Therefore, as *Citizens United* applied the exception test, it impliedly embraced *Patterson*. As a result, freedom of association arguments as used in *Patterson* and its progeny are alive and well to be utilized in challenges against compelled disclosure statutes.

### III. APPLYING CURRENT LAW TO CONNECTICUT AND MASSACHUSETTS

#### A. *Connecticut’s Response to Citizens United: P.A. 13-180*

In 2013, Connecticut Governor Dannel Malloy signed Public Act No. 13-180, *An Act Concerning Disclosure of Independent Expenditures and Changes to Other Campaign Finance Laws and Election Laws* (“Act”), into law, which significantly amended

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186. *Id.* at 69.

187. *See* Nat’l Ass’n for Advancement of Colored People v. Ala. *ex rel.* Patterson, 357 U.S. 449, 463 (1958).

188. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010).

189. *Id.* at 370.

190. *Buckley*, 424 U.S. at 66.

191. *Buckley*, 424 U.S. at 66.

192. *Id.* at 66, 69–70.

193. *Id.* at 70.

Connecticut's campaign finance disclosure provisions.<sup>194</sup> He stated *Citizens United* was “a tragic decision,” but is the reason he signed the bill.<sup>195</sup> The purpose of the Act was to make sure that people who are trying to hide their speech . . . have to disclose<sup>196</sup> and to allow “the electorate to make informed decisions and give proper weight to different speakers and messages . . . [and] help to shine light on that money so that we know who is behind it and where it is coming from.”<sup>197</sup>

The National Institute on Money in State Politics conducted a survey of all fifty states to research how stringent each state's laws were regarding disclosure requirements for independent spending, giving Connecticut an “A.”<sup>198</sup> Despite Connecticut's then-strong disclosure requirements, the Connecticut General Assembly still felt the need, in response to *Citizens United*, to enact sweeping legislation.<sup>199</sup>

Under current Connecticut law that incorporates PA 13-180, a person<sup>200</sup> may make an independent expenditure<sup>201</sup> of an unlimited amount, but must file specific disclosure statements electronically with the state when the aggregate amount exceeds one thousand

194. See 2013 Conn. Acts 718 (Reg. Sess.) (codified as amended in scattered sections of CONN. GEN. STAT. § 9).

195. Pazniokas, *supra* note 13.

196. 56 S. Proc., Pt. 25, 2013 Sess., p. 4734 (Conn. 2013), (remarks of Senator Anthony Musto)

197. 56 H.R. Proc., Pt. 25, 2013 Sess., p. 8404 (Conn. 2013), (remarks of Representative Ed Jutila).

198. *Scorecard: Essential Disclosure Requirements for Independent Spending, 2013*, FOLLOWTHEMONEY.ORG (May 16, 2013), <http://classic.followthemoney.org/press/ReportView.phtml?r=495> [<http://perma.cc/28VN-EBFZ>]. Massachusetts was also given an “A.” *Id.*

199. *Id.*; See generally 56 H.R. Proc., Pt. 25, 2013 Sess., p. 8404 (Conn. 2013); 56 S. Proc., Pt. 15, 2013 Sess., p. 4765 (Conn. 2013).

200. “‘Person’ means an individual, committee, firm, partnership, organization, association, syndicate, company trust, corporation, limited liability company or any other legal entity of any kind but does not mean the state or any political or administrative subdivision of the state.” CONN. GEN. STAT. § 9-601(10) (2015).

201. “[I]ndependent expenditure’ means an expenditure . . . that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee.” CONN. GEN. STAT. § 9-601c(a) (2015);

“[E]xpenditure” means . . . [a]ny purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made to promote the success or defeat of any candidate seeking the nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or the success or defeat of any political party.

*Id.* § 9-601b(a)(1) (2015).

dollars, provided it is within the time frame of a primary or general election campaign.<sup>202</sup> However, if the person makes or obligates to make an independent expenditure the disclosure statement is made on a “long-form” and “short-form” report.<sup>203</sup> The long-form requirements include the “name of the person making or *obligating to make*” the expenditure; the mailing address and business address if different than the mailing address of that same person; the name of the candidate(s) the expenditure is meant to support or oppose; and the name, phone number, and email address of the individual filing the report.<sup>204</sup> The short-form requirements include the “name of the person making or *obligating to make*” the expenditure; the amount of the expenditure; a description of the expenditure; and the name, phone number, and email address of the individual filing the report.<sup>205</sup> The long-form is used for a person’s initial independent expenditure, while the short-form is used for any subsequent independent expenditure.<sup>206</sup>

Additionally, the Act created a new category of monetary transfer called a “covered transfer.”<sup>207</sup> A covered transfer is “any donation, transfer or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another

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202. CONN. GEN. STAT. § 9-601d(a) (2015).

“General election campaign” means (A) in the case of a candidate nominated at a primary, the period beginning on the day following the primary and ending on the date the treasurer files the final statement for such campaign . . . or (B) in the case of a candidate nominated without a primary, the period beginning on the day following the day on which the candidate is nominated and ending on the date the treasurer files the final statement for such campaign . . . .

*Id.* § 9-700(7) (2015).

“Primary campaign” means the period beginning on the day following the close of (A) a convention held . . . for the purpose of endorsing a candidate for nomination to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, State Treasurer or Secretary of the State or the district office of state senator or state representative, or (B) a caucus, convention or town committee meeting held . . . for the purpose of endorsing a candidate for the municipal office of state senator or state representative, whichever is applicable, and ending on the day of a primary held for the purpose of nominating a candidate for such office.

CONN. GEN. STAT. § 9-700(11) (2015).

203. CONN. GEN. STAT. § 9-601d(b) (2015).

204. *Id.* § 9-601d(c) (emphasis added).

205. *Id.* § 9-601d(d) (emphasis added).

206. *Id.* § 9-601d(b) (2015). The purpose of having two forms is to reduce the amount of paperwork required by the filing person. See 56 S. Proc., Pt. 15, 2013 Sess., p. 4765 (Conn. 2013), (remarks of Senator Anthony Musto).

207. CONN. GEN. STAT. § 9-601(29)(A) (2015).

person who makes independent expenditures.”<sup>208</sup> A person must disclose the source of a covered transfer, the amount received when that person received the covered transfer during the preceding twelve month period before a primary or general election, and “is made or obligated to be made on or after the date that is one hundred eighty days prior to such primary or election.”<sup>209</sup>

#### B. *Massachusetts’ Response to Citizens United: H. 4366*

House Bill number 4366, *An Act relative to campaign finance disclosure and transparency* (hereinafter “H. 4366”),<sup>210</sup> was signed into law by Massachusetts Governor Deval Patrick on August 1, 2014.<sup>211</sup> Unlike Connecticut’s Act, Massachusetts’ was heralded as “an excellent first challenge to Citizens United,”<sup>212</sup> while Governor Patrick stated it was “exactly right” conceptually.<sup>213</sup> Under current Massachusetts law, all individuals, groups, and entities that make an independent expenditure<sup>214</sup> that is greater than two hundred

208. *Id.*

209. *Id.* § 9-601d(f)(1).

210. An Act relative to campaign finance disclosure and transparency, ch. 210, 2014 Mass. Legis. Serv. 683 (West) (codified as amended in scattered sections of MASS. GEN. LAWS ch. 55)

211. Shira Schoenberg, *Gov. Deval Patrick Signs Super PAC Disclosure Law*, MASS LIVE, (Aug. 4, 2014, 11:44 AM), [http://www.masslive.com/politics/index.ssf/2014/08/gov\\_deval\\_patrick\\_signs\\_super.html#incart\\_related\\_stories](http://www.masslive.com/politics/index.ssf/2014/08/gov_deval_patrick_signs_super.html#incart_related_stories) [http://perma.cc/4A43-3X2N].

212. Schoenberg, *supra* note 13 (quoting Rep. Linda Campbell Democratic vice chair of the Joint Committee on Election Laws).

213. Schoenberg, *supra* note 210.

214. Massachusetts defines an independent expenditure as:

[A]n expenditure made or liability incurred by an individual, group, association, corporation, labor union, political committee or other entity as payment for goods or services to expressly advocate the election or defeat of a clearly identified candidate; provided, however, that the expenditure is made or incurred without cooperation or consultation with any candidate or a nonelected political committee organized on behalf of the candidate or an agent of the candidate and is not made or incurred in concert with or at the request or suggestion of the candidate, a nonelected political committee organized on behalf of the candidate or agent of the candidate.

MASS. GEN. LAWS ANN. ch. 55, § 1 (Supp. 2015).

“Expenditure,” [is] any expenditure of money, or anything of value, by an individual, candidate, or political committee, or a person acting on behalf of said individual, candidate, or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or of presidential and vice presidential electors, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include: (1) any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value; and (2) any transfer of money or anything of

fifty dollars in the aggregate, during any calendar year, and the express purpose of such expenditure is for or against a candidate, must disclose: the name and address of the individual, group, or entity making the expenditure; the identification of the candidate the expenditure supports or opposes; “the name and address of any person to whom the expenditure was made”; the value of the expenditure; and its purpose and date.<sup>215</sup>

However, the bill also has its critics.<sup>216</sup> When addressing a portion of the new law that requires disclosure of donors to non-profit groups, that were exempt under the previous law, Paul Craney of the Massachusetts Fiscal Alliance stated, “[i]t’s just there to intimidate donors so that they don’t give to organizations, or if they do give to organizations, those organizations are reluctant to participate in the democratic process in educating the public on how lawmakers vote.”<sup>217</sup>

*C. P.A. 13-180 and Bill H. 4366 Inadvertently Invite As-Applied First Amendment Challenges*

Connecticut’s P.A. 13-180 and Massachusetts’ H. 4366 each are susceptible to as-applied challenges by minority advocates due to infringement of their freedom to associate. The *Citizens United* framework makes these challenges possible due to its use of the *Buckley* minor-party exception. Further, these challenges do not need to show a reasonable probability of threats, harassment, or reprisals amounting to that seen in *Patterson*, but instead to that seen in *ProtectMarriage.com* and *Hollingsworth*.

Connecticut’s new designation of a covered transfer has far-reaching implications. Under Connecticut law prior to P.A. 13-180, disclaimers<sup>218</sup> were only required to appear with independent expenditures when they promoted or discouraged an electoral candidate’s election or defeat, promoted or discouraged election or defeat of a political party, or solicited funds on behalf of a political

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value between political committees.

*Id.*

215. MASS. GEN. LAWS ANN. ch. 55, § 18A (Supp. 2015).

216. Shoenberg, *supra* note 12.

217. Shoenberg, *supra* note 12.

218. Disclaimer is used in the statute to reference disclosed information that appears with the independent expenditure, as opposed to a more general disclosure, which would appear in documents filed with the Secretary of the State for public record. See Conn. Acts 718 (2013) (Reg. Sess.) (codified as amended in scattered sections of CONN. GEN. STAT. § 9).

action committee (PAC) or political party.<sup>219</sup> Now, they must appear on every independent expenditure that references a political candidate.<sup>220</sup> If the independent expenditure was made within ninety days of a primary or general election the disclaimer required the names of the five individuals who made the largest covered transfer in the aggregate within the twelve months preceding the primary or general election.<sup>221</sup>

The disclosure requirements regarding independent expenditures and covered transfers are problematic because they are based upon the proximity between when the expenditure is made and the dates of a primary or general election.<sup>222</sup> In effect, a person who has received a covered transfer(s) of the specified aggregate amount must count backwards from the date of the primary or general election in order to determine the level of disclosure applicable to that person when the independent expenditure is made.<sup>223</sup> As a result, there is uncertainty as to when disclosure must be made.<sup>224</sup> Issues such as these adversely affect individuals' and small organizations' abilities to comply with the applicable statute, thus being subject to statutory penalty which may include fines or incarceration, merely as a result of engaging in political advocacy.

Similarly, there is another disparity that makes statutory compliance less burdensome for larger and well-funded organizations. Section 9-601b(b)(13) defines any "lawful communication" by a tax-exempt 501(c)(3) group as not amounting to an expenditure.<sup>225</sup> As a result, those communications do not require disclosure of any information about the 501(c)(3) group, its members, or contributors. Whereas a minor group or individual,

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219. See Conn. Acts 718 (2013) (Reg. Sess.) (codified as amended in scattered sections of CONN. GEN. STAT. § 9).

220. See *id.*

221. CONN. GEN. STAT. § 9-621 (2015).

222. See *id.* § 9-601d(b), (f)(1) (2015).

223. CONN. GEN. STAT. § 9-601d(b), (f)(1) (2015). See Administration of Independent Expenditure Disclosure Requirements Under Public Act 13-180, Declaratory Ruling 2013-01 (Conn. State Elections Enforcement Commission Nov. 20, 2013), [http://www.ct.gov/seec/lib/seec/laws\\_and\\_regulations/declaratory\\_ruling\\_2013-01\\_-\\_independent\\_expenditures\\_final.pdf](http://www.ct.gov/seec/lib/seec/laws_and_regulations/declaratory_ruling_2013-01_-_independent_expenditures_final.pdf) [<http://perma.cc/E6NF-WLSL>].

224. See Administration of Independent Expenditure Disclosure Requirements Under Public Act 13-180, Declaratory Ruling 2013-01 (Conn. State Elections Enforcement Commission Nov. 20, 2013), [http://www.ct.gov/seec/lib/seec/laws\\_and\\_regulations/declaratory\\_ruling\\_2013-01\\_-\\_independent\\_expenditures\\_final.pdf](http://www.ct.gov/seec/lib/seec/laws_and_regulations/declaratory_ruling_2013-01_-_independent_expenditures_final.pdf) [<http://perma.cc/E6NF-WLSL>].

225. CONN. GEN. STAT. § 9-601b(b)(13) (2015).

such as Margaret McIntyre, is unlikely to have the funds or knowledge to comply with the statutory requirements, a larger group will. Thus the statute in effect incentivizes anonymity for large groups and deters minor group participation.

Additionally, the new law creates a further disclosure burden in adding the phrase “or obligates to make” to “makes” regarding when a long and short form must be filed with the state. The phrase “or obligates to make” has been declared<sup>226</sup> to mean the disclosure report may be required at a point in time before a person actually spends her funds on an independent expenditure.<sup>227</sup> The effect is that persons and groups that advocate dissident viewpoints stand to face threats, harassment, and reprisals before they even make an independent expenditure. Consequently, these individuals and groups may be deterred from even fulfilling their obligation to make an independent expenditure.

Massachusetts’ H. 4366 is less stringent than Connecticut’s P.A. 13-180. While H. 4366 requires filing a report with the state by an individual or entity that makes an independent expenditure that exceeds two hundred fifty dollars in the aggregate, it has no statutory designation synonymous to Connecticut’s covered transfer.<sup>228</sup> Alternatively, § 18A categorizes a group an “independent expenditure PAC” when it receives contributions that are then used to make independent expenditures.<sup>229</sup>

When a group is deemed an independent expenditure PAC, it must disclose the name and address of the person who made the contribution, and is then also subject to the disclose provisions applicable to other political action committees.<sup>230</sup> The further disclosure then required includes: the name and address of every person who contributed fifty dollars or more during the reporting period; the name and address of every person who contributed, in the aggregate, fifty dollars or more during the reporting period; and the name and address of every person who contributed, in the

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226. There is no statutory definition for the term “obligate.”

227. See Administration Construction of the Phrase “Make or Obligate to Make” as Applied to Disclosure of Independent Expenditures, Declaratory Ruling 2014-01 (Conn. State Elections Enforcement Commission Mar. 19, 2014), [http://www.ct.gov/seec/lib/seec/laws\\_and\\_regulations/final\\_signed\\_declaratory\\_ruling\\_2014-01.pdf](http://www.ct.gov/seec/lib/seec/laws_and_regulations/final_signed_declaratory_ruling_2014-01.pdf) [<http://perma.cc/K7E4-K6R5>].

228. See An Act relative to campaign finance disclosure and transparency, ch. 210, 2014 Mass. Legis. Serv. 683 (West) (codified as amended in scattered sections of MASS. GEN. LAWS ch. 55).

229. MASS. GEN. LAWS ANN. ch. 55, § 18A(d) (Supp. 2015).

230. *Id.* § 18A(a)–(b), (d).

aggregate, fifty dollars or more during the calendar year.<sup>231</sup> The result is that an individual's identity must be disclosed when she contributes fifty total dollars within a calendar year and those funds are subsequently used by the donee to make an independent expenditure. To some, merely disclosing a residential or business address seems a minor inconvenience. To those expressing controversial viewpoints, though, this disclosure risks threats, harassment, and reprisals.<sup>232</sup>

The new acts stand to discourage individuals from contributing to advocacy organizations merely because their identity may be disclosed. The impact of the new law in effect requires the identifying information of individuals who reached an aggregate amount within a full year prior to a primary or general election.

### CONCLUSION

Both Connecticut and Massachusetts have recently enacted sweeping election law reform with the intention, in part, of keeping "dark money" out of electoral politics. While an important objective, both have done so in a fashion that undermines democracy by inadvertently suppressing associational speech of minorities and dissidents.

The Supreme Court recognized in *Patterson* the freedom to associate. The Court demanded that the freedom to associate allow those in the minority to express their dissident views without fear of threats, harassment, or reprisals. Accordingly, associational speech is a means of expression as well as a defense against suppression, and therefore must be granted the same constitutional protection as express speech.

The Court in *Buckley* created an exception to compelled disclosure for minor parties who face a reasonable probability of

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231. *Id.* § 18.

232. With today's technology, one may continually harass another from the convenience of one's own home by ordering "glitter bombs" sent to another. *See, e.g.,* RUINDAYS, <http://www.ruindays.com/> (last visited Oct. 31, 2015). That service proudly states,

We at RuinDays.com believe that anyone that has ever wronged you should pay. We discreetly and anonymously package the most annoying things possible to receive through mail, and ship them to your worst enemies, in an effort to ruin their day. Just give us their name and address. We'll take care of the rest.

*Id.* Undoubtedly, a crude prank service such as RuinDays—which will mail packages that include exploding glitter and fake smelling feces—ordinarily only arises to an inconvenience. However, it illustrates how easily one may harass another when knowing only that person's name and address.

threat, harassment, or reprisal if their identities were disclosed. However, the Court has not been clear what degree of threat, harassment, or reprisal is necessary to invoke this exception and consequently, has passively denied claims by minorities because they could not provide evidence that their harassment equaled that seen in *Patterson*.

The Supreme Court must create a clear standard to satisfy the *Buckley* exception for threats, harassment, or reprisals that conforms to contemporary instances of such. Until the Court does so, Connecticut and Massachusetts face the likelihood of as-applied challenges based upon unconstitutional associational infringement.